**ORAL ARGUMENT NOT YET SCHEDULED**

**Case No. 11-1037 (and Consolidated Cases)**

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

**UTILITY AIR REGULATORY GROUP, *ET AL.*,**

***Petitioners,***

**v.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**

***Respondent.***

**On Petitions for Review of Final Actions of the United States Environmental Protection Agency**

# OPENING BRIEF OF NON-STATE PETITIONERS AND INTERVENOR-PETITIONER


Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, NW
Washington, D.C. 20005
(202) 272-2900

*Counsel for Petitioners National Mining Association and Peabody Energy Company and Intervenor-Petitioner Wyoming Mining Association*

F. William Brownell
Norman W. Fichthorn
Henry V. Nickel
Allison D. Wood
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Washington, D.C. 20037
(202) 955-1500

*Counsel for Petitioner Utility Air Regulatory Group*

**Additional Counsel Listed on Inside Cover**


DATED: February 8, 2012

Charles H. Knauss
Shannon S. Broome
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW, North, Suite 200
Washington, D.C. 20007
(202) 625-3500
*Counsel for Petitioner*
*SIP/FIP Advocacy Group*

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
*Counsel for Petitioner*
*SIP/FIP Advocacy Group*

Roger R. Martella
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
*Counsel for Petitioner*
*SIP/FIP Advocacy Group*

Eric Groten
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746-7568
(512) 542-8709
*Counsel for Petitioners Coalition*
*for Responsible Regulation, Inc., et al.*

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Non-State Petitioners and Intervenor-Petitioner state as follows:

The Court's Order of December 1, 2011 (Doc. No. 1345134), requires joint briefing by parties representing a variety of interests subject to a combined word limit and does not provide for separate argument where interests may diverge. Any given argument presented or incorporated in this brief should not be construed as necessarily representing the views of each of these parties.

### A. Parties, Intervenors, and Amici

Because these consolidated cases involve direct review of final agency action, the requirement to furnish a list of parties, intervenors, and *amici* that appeared below is inapplicable. These cases involve the following parties:

**Petitioners:**

**Petitions for review of the rule at 75 Fed. Reg. 77,698 (Dec. 13, 2010):**

Case No. 11-1037: Utility Air Regulatory Group

Case No. 11-1038: State of Texas; Rick Perry, Governor of Texas; Gregory Wayne Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Railroad Commission; Texas General Land Office; Barry Smitherman, Texas Public Utility Commissioner; Donna Nelson, Texas Public Utility Commissioner; Kenneth Anderson, Texas Public Utility Commissioner

Case No. 11-1039: National Mining Association

Case No. 11-1040: Peabody Energy Company

Case No. 11-1041: SIP/FIP Advocacy Group

Case No. 11-1063: State of Texas; Rick Perry, Governor of Texas; Gregory Wayne Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Railroad Commission; Texas General Land Office; Barry Smitherman, Texas Public Utility Commissioner; Donna Nelson, Texas Public Utility Commissioner; Kenneth Anderson, Texas Public Utility Commissioner (transferred from the U.S. Court of Appeals for the Fifth Circuit)

Case No. 11-1075: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc. (transferred from the U.S. Court of Appeals for the Fifth Circuit)

Case No. 11-1076: Utility Air Regulatory Group (transferred from the U.S. Court of Appeals for the Fifth Circuit)

Case No. 11-1077: SIP/FIP Advocacy Group (transferred from the U.S. Court of Appeals for the Fifth Circuit)

Case No. 11-1078: National Mining Association (transferred from the U.S. Court of Appeals for the Fifth Circuit)

Case No. 11-1288: State of Wyoming (transferred from the U.S. Court of Appeals for the Tenth Circuit)

Case No. 11-1290: National Mining Association (transferred from the U.S. Court of Appeals for the Tenth Circuit)

Case No. 11-1291: Utility Air Regulatory Group (transferred from the U.S. Court of Appeals for the Tenth Circuit)

**Petitions for review of the rule at 75 Fed. Reg. 81,874 (Dec. 29, 2010):**

Case No. 11-1059: Utility Air Regulatory Group

Case No. 11-1287: State of Wyoming (transferred from the U.S. Court of Appeals for the Tenth Circuit)

Case No. 11-1292: Utility Air Regulatory Group (transferred from the U.S. Court of Appeals for the Tenth Circuit)

**Petitions for review of the rule at 75 Fed. Reg. 82,246 (Dec. 30, 2010):**

Case No. 11-1060: Utility Air Regulatory Group

Case No. 11-1289: State of Wyoming (transferred from the U.S. Court of Appeals for the Tenth Circuit)

Case No. 11-1293: Utility Air Regulatory Group (transferred from the U.S. Court of Appeals for the Tenth Circuit)

**Respondent**

The United States Environmental Protection Agency is the Respondent in all of these consolidated cases.

**Intervenors and *Amici***

The Wyoming Mining Association is an Intervenor-Petitioner in Case Nos. 11-1037, 11-1287, 11-1288, 11-1289, 11-1290, 11-1291, 11-1292, and 11-1293.

The State of Connecticut is an Intervenor-Respondent in Case Nos. 11-1037 and 11-1063.

Sierra Club, Natural Resources Defense Council, Environmental Defense, and Conservation Law Foundation are Intervenor-Respondents in Case No. 11-1059.

Sierra Club, Natural Resources Defense Council, Environmental Defense, and Conservation Law Foundation are Movant-Intervenor-Respondents in Case Nos. 11-1037, 11-1060, and 11-1063.

There are no *amici* in these consolidated cases.

**B. Rulings Under Review**

These consolidated cases involve three final agency actions: (1) the United States Environmental Protection Agency rule entitled "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," published on December 13, 2010, at 75 Fed. Reg. 77,698; (2) the United States Environmental Protection Agency rule entitled "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases," published on December 29, 2010, at

75 Fed. Reg. 81,874; and (3) the United States Environmental Protection Agency rule entitled "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," published on December 30, 2010, at 75 Fed. Reg. 82,246.

### C. Related Cases

These cases have not previously been before this Court or any other court, except to the extent certain cases (listed above) were originally filed in other U.S. Courts of Appeals and later transferred to this Court.

## DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the following Petitioners and Intervenor-Petitioners provide the following disclosures:

***Alpha Natural Resources, Inc.*** is a Delaware corporation engaged in the business of coal mining and gas production. Alpha Natural Resources, Inc. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Alpha Natural Resources, Inc.

***Coalition for Responsible Regulation, Inc.*** is a non-profit membership corporation organized under the laws of the State of Texas for the purpose of promoting social welfare, particularly to ensure that the Clean Air Act is properly applied with respect to greenhouse gases, and its members include businesses and trade associations of businesses engaged in activities that would likely be subject to regulation under the Clean Air Act for greenhouse gas emissions. Coalition for Responsible Regulation, Inc. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Coalition for Responsible Regulation, Inc.

***Great Northern Project Development, L.P.*** is a Delaware limited partnership engaged in the business of developing, constructing, and operating coal gasification projects. Great Northern Project Development, L.P. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Great Northern Project Development, L.P.

***Industrial Minerals Association – North America*** ("IMA-NA") is a trade association representing the interests of producer member companies that extract and process industrial minerals, and associate member companies that provide goods and services to the industrial minerals industry. IMA-NA has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in IMA-NA.

***National Cattlemen's Beef Association*** ("NCBA") is a trade association representing more than 230,000 cattle breeders, producers, and feeders in the United States. NCBA has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in NCBA.

***The National Mining Association*** ("NMA") is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

***Peabody Energy Company*** ("Peabody") is a publicly-traded company and, to its knowledge, has no shareholder owning ten percent or more of its common stock with the exception of BlackRock, Inc. and T. Rowe Price Group, Inc., which respectively own approximately 10.7% and 10.4% of Peabody's outstanding common stock. Peabody's principal business is the mining and sale of coal.

***Rosebud Mining Company*** is a Pennsylvania corporation engaged in the business of bituminous coal mining primarily in Ohio and Pennsylvania. Rosebud Mining Company has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Rosebud Mining Company.

***SIP/FIP Advocacy Group*** has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It is composed of a group of trade associations whose member companies represent a cross-section of American industry, such as the general manufacturing industry, the oil and natural gas industry, and the chemistry industry, interested in the implementation and consistent application of the SIP programs at issue in this case. These companies manufacture, produce, refine and transport an array of products, including in the states subject to the action at issue here. None of the members of the SIP/FIP Advocacy Group have issued shares or debt securities to the public. The members of the SIP/FIP Advocacy Group are "trade associations" within the meaning of Circuit Rule 26.1.

***Utility Air Regulatory Group*** ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

***The Wyoming Mining Association*** ("WMA") is a statewide trade organization representing 36 mining companies producing coal, bentonite, trona (processed into soda ash), and uranium. WMA's purpose is to serve as the unified voice of the Wyoming mining industry by communicating, influencing, and promoting issues on behalf of that industry. WMA also advocates on behalf of the use of coal for electric generation and industrial production. WMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although WMA's individual members have done so.

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## GLOSSARY OF TERMS

| | |
|---|---|
| Act | The Clean Air Act |
| Agency | United States Environmental Protection Agency |
| BACT | Best Available Control Technology |
| CAA | The Clean Air Act |
| $CO_2e$ | Carbon Dioxide Equivalent |
| EPA | United States Environmental Protection Agency |
| FIP | Federal Implementation Plan |
| GHG(s) | Greenhouse Gas(es) |
| JA | Joint Appendix |
| NAAQS | National Ambient Air Quality Standards |
| Part 51 | 40 C.F.R. Part 51 |
| PSD | Prevention of Significant Deterioration |
| SIP | State Implementation Plan |
| tpy | Tons Per Year |

## JURISDICTIONAL STATEMENT

Three final actions by the United States Environmental Protection Agency ("EPA" or "Agency") are under review in these consolidated cases:

1. *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77,698 (Dec. 13, 2010) ("SIP Call");[1]

2. *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed Reg. 81,874 (Dec. 29, 2010) ("Finding of Failure Rule" or "Finding of Failure"); and

3. *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82,246 (Dec. 30, 2010) ("FIP Rule" or "FIP").

Petitions for review of each of these final rules were filed within the applicable 60-day period prescribed by section 307(b)(1) of the Clean Air Act ("CAA" or "Act").[2] This Court has jurisdiction under that provision.

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[1] As discussed in this brief, a "SIP" is a "State Implementation Plan" under the federal Clean Air Act.

[2] Citations herein to the CAA are to sections of the Act. The Table of Authorities includes parallel citations to the U.S. Code.

## STATEMENT OF ISSUES

1. Whether EPA's action imposing a SIP Call and the corollary Finding of Failure and FIP rules on certain states, through the threat of a construction moratorium, was premised on an impermissible construction of the CAA Prevention of Significant Deterioration ("PSD") program provisions.

2. Whether the SIP Call and EPA's associated actions compelling immediate revision of certain states' PSD implementation plans, including the PSD SIPs of Texas and Wyoming, to regulate greenhouse gas ("GHG") emissions are contrary to (i) the CAA's provisions establishing an orderly process for state notice-and-comment rulemaking to incorporate, with prospective effect, new PSD requirements in SIPs; and (ii) an express provision in EPA's rules guaranteeing each state a full three years to conduct and complete such rulemaking.

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Statutory and Regulatory Addendum at the end of this brief.

## STATEMENT OF THE CASE AND FACTS

### I. Statutory and Regulatory Framework

The CAA's national ambient air quality standards ("NAAQS") provisions require EPA to establish ambient standards at a safe level of pollutants for the most ubiquitous air pollutants. EPA then determines which areas of the country have air quality at least as good as the NAAQS ("attainment areas") and which areas of the

country have air not meeting the NAAQS ("nonattainment areas").[3] *See* CAA §§ 107-109.

CAA § 110 requires states to develop SIPs, containing measures by which nonattainment areas in a state will achieve attainment, along with measures necessary to ensure that attainment areas stay in attainment. States submit SIPs to EPA for review, and EPA approves them if they meet EPA's minimum requirements for approvable SIPs set forth in 40 C.F.R. Part 51 ("Part 51"). States must submit SIPs within three years after EPA adopts a new or revised NAAQS, CAA § 110(a)(1), and the states must provide for notice and a public hearing in developing those SIPs, *id.* § 110(a)(2). If a state submits a deficient SIP or fails to submit a required SIP on time, EPA must promulgate, within two years after the state's default, a Federal Implementation Plan ("FIP"), under which EPA takes over those air quality responsibilities that EPA found the state failed to implement. *Id.* § 110(c).

SIP revisions under section 110(a), and FIP promulgation under section 110(c) following state default, are the sole means provided in the Act for revising any requirement in an implementation plan that applies to stationary facilities such as factories and power plants. *See id.* § 110(i) ("[e]xcept for … a plan promulgation under subsection (c) of this section [*i.e.*, a FIP], or a plan revision under subsection (a)(3) of this section [*i.e.*, a SIP revision], no … action modifying *any requirement* of an

[3] CAA § 107(d)(1)(A). Areas with insufficient data for determining attainment status are called "unclassifiable." *Id.*

applicable implementation plan may be taken with respect to *any stationary source* by the State or by the Administrator" (emphases added)). If, after EPA has approved a SIP, that SIP becomes "substantially inadequate" because it no longer meets the minimum SIP requirements, EPA may issue a "SIP Call" requiring the state to submit a SIP revision to cure the deficiency by a "reasonable deadline[]" (not to exceed 18 months). *Id.* § 110(k)(5).

One of the minimally required elements of a SIP with respect to regulation of stationary sources is a PSD preconstruction permitting program, which is governed by Part C of Title I of the CAA. *Id.* §§ 160-169. Part C addresses Congress's concern that air quality in attainment areas should not be allowed to deteriorate significantly, even if air quality remains better than the NAAQS. *Alabama Power Co. v. Costle*, 636 F.2d 323, 349-50 (D.C. Cir. 1979).

Following EPA's adoption of FIPs for each state defining PSD requirements, Congress enacted the PSD program as part of the 1977 amendments to the Act. *See Sierra Club v. Gorsuch*, 715 F.2d 653, 654 (D.C. Cir. 1983). Recognizing that PSD implementation plans were already in place in each state, Congress, *by statute* (in CAA § 168), revised each PSD FIP to incorporate some – but not all – of the new statutory PSD changes. Under CAA § 168(b):

> If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 162(a), section 163(b) or section 164(a) of this Act [as added by the 1977 CAA Amendments], then such regulations shall be deemed amended so as to conform with such requirements.

All other statutory changes to the PSD program had to await revisions to EPA's FIPs before they would become effective. CAA § 110(c); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 865-66 (D.C. Cir. 1979) (affirming CAA § 110(c) FIP revisions governing prospective implementation of the new statutory definition of "best available control technology" ("BACT"), an element of the PSD program).

Apart from the effects of this singular provision amending PSD implementation plans in limited and specific respects, SIPs remained in place unamended until states incorporated new statutory requirements through SIP revisions. Thus, section 406(c) of the 1977 CAA Amendments, Pub. L. No. 95-95, 91 Stat. 796 (1977), provided that nothing in those amendments shall "affect any requirement of an approved implementation plan" in effect under CAA § 110 "until [such requirement is] modified or rescinded in accordance with the [CAA] as amended." Similarly, CAA § 110(n)(1), a savings provision in the 1990 CAA Amendments, provided:

> Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before [the date of enactment of the 1990 CAA Amendments] shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this Act.

The program that Congress enacted in 1977 requires new and modified[4] stationary sources that are located in attainment areas and that emit or can emit air pollutants in amounts exceeding 100 or 250 tons per year ("tpy") (depending on the type of facility) to obtain PSD preconstruction permits containing conditions designed to prevent air quality from deteriorating in areas meeting the NAAQS and requiring compliance with BACT emission limitations. CAA § 165.

The CAA also provides very specific instructions with respect to how "other pollutants" may be added to the PSD permitting programs of each state. Pursuant to section 166, EPA must first promulgate regulations describing the SIP obligations with respect to PSD for the new pollutant, which do not even become effective for one year. *Id.* § 166(a)-(b). The states are given 21 months after promulgation to submit SIP revisions conforming to these new requirements. *Id.* § 166(b). Once submitted, the SIP revisions are then to be reviewed by EPA and approved in accordance with section 110. *Id.*

Like other aspects of CAA Title I, PSD requirements are implemented by states through SIPs, consistent with EPA's Part 51 regulations establishing minimum program requirements. *See id.* § 161 (SIPs "shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated

[4] "Modified" sources refer to sources that undertake renovation activity that would result in a "significant" increase in pollutants. *See* CAA §§ 169(2)(C), 111(a)(4); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 568 (2007).

under [Part C of Title I], to prevent significant deterioration of air quality in each region (or portion thereof) designated … as attainment or unclassifiable.").

Where PSD is part of an EPA-approved SIP, states run their approved PSD permit programs under both state and federal law.[5] *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1363 (D.C. Cir. 1995) (citing CAA §§ 113, 304). States first develop PSD SIP programs under state law. *See, e.g.,* WYO. STAT. ANN., Title 35, Ch. 11, Art. 2; TEX. HEALTH & SAFETY CODE, Title 5, Subtitle C, Ch. 382. A state then submits its program to EPA for approval as part of the state's SIP. CAA § 110(a)(1). EPA then has 12 months to approve or disapprove a SIP submittal after the submitted SIP is (or is deemed by operation of law to be) complete. *Id.* § 110(k)(2). When EPA approves a state PSD SIP or a PSD SIP revision, the state law also becomes enforceable as a matter of federal law.

From 1970 to date, the CAA has defined roles for both state and federal governments, making air pollution control an exercise in "cooperative federalism." *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982). While EPA sets ambient standards and other requirements in legislative rules that states must implement, the states have "primary responsibility" for the air quality within their borders and are given broad discretion to develop plans containing measures that will meet the EPA

[5] In the handful of states that have not received PSD SIP approval, EPA administers PSD permitting directly or states administer the federal regulations as EPA's delegatees. 40 C.F.R. § 52.21(a)(1). These federal program regulations (40 C.F.R. § 52.21) generally parallel those for state PSD programs (40 C.F.R. § 51.166).

rulemaking requirements. CAA §§ 107(a), 110(a); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64, 79 (1975). EPA may disapprove those state plans and impose a FIP (and, in some cases, other sanctions, *see* CAA §§ 110(m), 179(a)-(b)), but only if a state fails to submit an approvable SIP and EPA complies with CAA requirements governing promulgation of FIPs. The Act, in section 166, creates special protections respecting the primacy of state programs and state laws whenever EPA seeks to add new pollutants to the PSD program.

In 2002, EPA revised the Part 51 regulations governing the timing of submission and approval of SIPs where, as here, EPA changes its PSD requirements. *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186, 80,260 (Dec. 31, 2002) (promulgating 40 C.F.R. § 51.166(a)(6)(i)). Under 40 C.F.R. § 51.166(a)(6)(i), "[a]ny State required to revise its implementation plan by reason of an amendment to" EPA's PSD regulations in 40 C.F.R. § 51.166 "shall adopt and submit such plan revision to the Administrator for approval *no later than three years* after such amendment is published in the Federal Register." (Emphasis added). Under 40 C.F.R. § 51.166(a)(6)(iii), any such revised SIP is permitted to operate "prospectively."

## II. Rulemakings Initiating GHG Regulation

### A. Promulgation of GHG Motor Vehicle Standards

Until 2011, GHGs were not regulated under the CAA. Following a 2009 EPA finding under CAA § 202(a) that emissions of GHGs from new motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,"[6] CAA § 202(a)(1), EPA promulgated a rule under section 202 regulating GHG emissions from new motor vehicles beginning with model year 2012, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule").

### B. EPA's Interpretation that Stationary Facilities Are Subject to GHG Regulation

During its rulemakings on the Endangerment Finding and the Tailpipe Rule, EPA expressed the view that regulating motor vehicle GHG emissions would trigger new GHG permitting requirements under the PSD program. According to EPA, once GHGs emitted by motor vehicles were regulated under section 202(a), GHGs would become a pollutant that is "subject to regulation" for PSD purposes when "actual control" requirements for GHGs "take effect" under the Tailpipe Rule. This, EPA said, would occur on January 2, 2011. *Reconsideration of Interpretation of Regulations*

[6] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding").

*That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,006-07, 17,019 (Apr. 2, 2010).

### C. The Tailoring Rule's New Part 51 Requirements

EPA's interpretation of the PSD program to include GHG emissions created a fundamental problem. As EPA explained, extending Part 51's reach to GHGs would expand PSD to cover sources that Congress never intended to be regulated under the program. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,541 (June 3, 2010) ("Tailoring Rule"). Thus, EPA recognized that the PSD program historically has applied to a relatively limited group of large sources that emit (or potentially emit) 100 or 250 tpy or more of traditional pollutants. Because, for example, any medium-sized building, if it uses oil or natural gas for heating, will emit GHGs (specifically, carbon dioxide) in amounts that exceed the 100/250 tpy threshold, *see generally id.* at 31,533-43, EPA calculated that more than 80,000 smaller sources never before regulated under PSD would be required to obtain PSD permits annually, *id.* at 31,603. EPA found that subjecting this number of sources to the PSD program would create "absurd results" not intended by Congress. *See, e.g.*, *id.* at 31,541-51, 31,554-62.

Accordingly, EPA promulgated the Tailoring Rule, revising the minimum PSD requirements that states must include in PSD SIPs by amending 40 C.F.R. § 51.166 to cover GHG emissions. *Id.* at 31,514. Those amendments defined a new term – "subject to regulation" – which expanded the term "regulated NSR [new source

review] pollutant" to cover GHGs emitted at or above thresholds of 100,000 tpy (or in some cases 75,000 tpy), measured as "carbon dioxide equivalent" ("$CO_2e$").[7] GHGs, when emitted below these thresholds, are not regulated pollutants under the PSD program. *Id.* at 31,516. The Tailoring Rule defined "greenhouse gases" as including carbon dioxide and five other expressly identified gases. *See id.* at 31,606 (promulgating 40 C.F.R. § 51.166(b)(48)(i)). Finally, the preamble to the Tailoring Rule asked states to declare within 60 days whether their laws authorized them to issue PSD permits for GHGs and, if not, whether they intended to initiate action to change those laws. EPA stated that it would consider imposing a SIP Call on any state without GHG-permitting authority. *Id.* at 31,582-83.

During the public comment periods for EPA's proposed Tailpipe Rule and Tailoring Rule, numerous members of the public commented adversely on the proposed rules, explaining that regulation of GHGs under PSD was not authorized, much less required, under the CAA. Specifically, commenters explained that: (1) the Act was not permissibly interpreted to include GHGs as subject to regulation under PSD, Comments of the Utility Air Regulatory Group on the Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Docket EPA-HQ-OAR-2009-0517-5317, at 15, 19-40, Joint Appendix ("JA") at __, __-__; (2) the

[7] The Tailoring Rule's amendment to section 51.166 provides that "$CO_2e$" is determined by multiplying the mass amount of emissions of each of six GHGs by that gas's "global warming potential." 75 Fed. Reg. at 31,606 (promulgating 40 C.F.R. § 51.166(b)(48)(ii)).

plain language of the Act limited the pollutants that could trigger PSD to those that were subject to a NAAQS, Comments of the National Association of Manufacturers on Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Docket EPA-HQ-OAR-2009-0517-4862, at 4, JA at __; and (3) even if EPA could regulate GHGs under PSD, the Agency had not met the procedural requirements of CAA § 166 to regulate GHGs under PSD, Coalition for Responsible Regulation, et al. Comments on Proposed "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," Docket EPA-HQ-OAR-2009-0517-5715, at 27-35, JA at __-__. When EPA rejected those comments in its final rulemakings, petitions for review were filed.[8]

## III. The GHG SIP Call and GHG FIP

Based on states' responses to EPA's requests for information on state plans to implement the Tailoring Rule, EPA published its proposed SIP Call Rule on September 2, 2010, only four months before the Tailoring Rule's January 2, 2011 date for beginning GHG regulation. The proposed rule found that the laws of 13 states gave those states no authority to issue PSD permits for GHGs and therefore that

[8] The Endangerment Finding, the Tailpipe Rule, the interpretive memorandum reconsideration action, and the Tailoring Rule are on appeal in this Court. *See Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) (D.C. Cir.); *Coalition for Responsible Regulation v. EPA*, No. 10-1092 (and consolidated cases) (D.C. Cir.); *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (and consolidated cases) (D.C. Cir.). The Court is scheduled to hear argument in these cases on February 28-29, 2012.

those states' SIPs were "substantially inadequate" to meet the new GHG requirements for PSD permitting. EPA proposed to require those 13 states to amend their laws to authorize permitting of GHG-emitting facilities. *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Proposed Rule*, 75 Fed. Reg. 53,892, 53,902 (Sept. 2, 2010). Ignoring the requirements of CAA § 166 and the three-year period given states in 40 C.F.R. § 51.166(a)(6) to submit revised PSD SIPs that would apply "prospectively," EPA proposed to give states a maximum of one year (beginning on EPA's projected date for issuance of the final SIP Call, December 1, 2010) to revise their SIPs to authorize PSD permitting for GHGs. *Id.* at 53,896.

Although EPA gave states a maximum of one year to revise their SIPs, EPA warned that states would, in EPA's view, pay a heavy price for taking that year. According to EPA, if a state did not submit a revised SIP, and EPA did not approve it, before January 2, 2011, the statute and EPA's rules would preclude construction of facilities emitting GHGs at or above the Tailoring Rule thresholds in those states – *i.e.*, a construction moratorium would exist until PSD permits covering GHG emissions could be issued under the state's SIP. To allow states to avoid this threatened construction ban, EPA invited states to "accept" an early SIP submittal deadline of December 22, 2010, three weeks after EPA intended to promulgate the final SIP Call. *Id.* at 53,896, 53,901.

The consequences of a state declining EPA's invitation to accept the December 22, 2010 SIP submittal deadline were severe:

> It must be emphasized that for any State that receives a deadline after January 2, 2011, the affected GHG-emitting sources in that State – which are those larger GHG-emitters identified in the Tailoring Rule – will be unable to receive a federally approved permit authorizing construction or modification. *Therefore, after January 2, 2011, these sources may not lawfully be able to construct or modify* until the date that EPA either approves the SIP submittal or promulgates a FIP.

*Id.* at 53,901 (emphasis added). EPA put states on notice that "those States' affected sources confront the risk that they may have to put on hold their plans to construct or modify, a risk that may have adverse consequences for the economy." *Id.* at 53,905.

Simultaneously with its proposal of the SIP Call, EPA proposed that any state not meeting its SIP submittal date would become subject to a FIP for PSD permitting of GHG-emitting sources. *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan; Proposed Rule*, 75 Fed. Reg. 53,883 (Sept. 2, 2010). According to EPA, "[i]f any State is not able to submit a corrective SIP revision by its deadline, then EPA, by virtue of the authority of the FIP provisions under CAA section 110(c), will immediately make a finding that the State has failed to submit the required SIP revision and will immediately promulgate the FIP" for that state. *Id.* at 53,896. Thus, states that elected and then (as expected) missed the December 22, 2010 SIP-

submittal date would thereby be subject to EPA's imposition of a FIP as of January 2, 2011 – the price of avoiding EPA's threatened construction moratorium.

EPA published the final SIP Call on December 13, 2010, 75 Fed. Reg. at 77,698, finding that 13 states could not issue GHG permits under state law. Seven states, including Wyoming, "elected" a December 22, 2010 SIP submittal date to avoid EPA's threatened construction ban, and EPA established that date for those seven states. 75 Fed. Reg. at 77,705 Table IV-1. Five states selected various other dates extending through July 1, 2011, accepting EPA's imposition of the construction ban for a period of weeks or months. *Id.* Texas declined to select any date and elected to take the risk of the construction ban while advancing its legal arguments against EPA's rules in court.[9] 75 Fed. Reg. at 82,431.

As expected, all seven states "electing" the December 22, 2010 deadline, including Wyoming, missed that deadline. Accordingly, on December 29, 2010, EPA published its finding that these states had failed to submit their SIPs by December 22,

[9] *See* http://www.epa.gov/NSR/2010letters/tx.pdf. Texas's approach led to separate EPA rulemaking on the Texas PSD program. *See Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Proposed Rule*, 75 Fed. Reg. 82,365 (Dec. 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Interim Final Rule*, 75 Fed. Reg. 82,430 (Dec. 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program; Final Rule*, 76 Fed. Reg. 25,178 (May 3, 2011). These Texas specific rules are being challenged in separate consolidated cases in this Court. *State of Texas, et al. v. EPA*, No. 10-1425 (and consolidated cases) (D.C. Cir.).

2010, 75 Fed. Reg. at 81,874, and immediately followed that action by publishing its rule imposing a FIP on each such state, 75 Fed. Reg. at 82,246. The FIP Rule confirmed EPA would assert authority to conduct permitting of GHG emissions in those states, while generally leaving permitting of non-GHG emissions in state hands. EPA provided little detail as to how this dual permitting would work, other than to state that the Agency was "working expeditiously" on the problem. *Id.* at 82,251.

Contrary to EPA's announced expectation, most states decided they could not revise their PSD programs to include the Tailoring Rule through "interpretation," and many attempted to conduct highly expedited rulemakings to change those programs by year-end, often invoking emergency authority. Including the three rules under review here, EPA proposed and finalized seven GHG-related implementation rules at the end of 2010, including six signed just before Christmas and published on December 29 or December 30.[10] In this flurry of activity – all undertaken because EPA was determined to commence GHG regulation of stationary sources by the beginning of 2011 while ignoring statutory restrictions and its own regulation that gives states three years to change their SIPs – states were forced to acquiesce to immediate implementation of a federal GHG permitting program.

[10] *See* http://www.epa.gov/NSR/actions.html (first two entries for 2010).

## SUMMARY OF ARGUMENT

Under the CAA, states that have EPA-approved PSD programs, like Texas and Wyoming, may revise those programs to address any newly promulgated PSD program requirements only through public proceedings involving public notice and hearings, followed by EPA public notice-and-comment rulemaking to approve the SIP revisions. CAA § 110(a). Congress directed that PSD and other air quality requirements be imposed *through implementation plans*. *Id.* In 2002, EPA amended its regulations to ensure that states are provided with a full three-year period to accomplish SIP revisions related to new PSD requirements. For GHG regulation under the Tailoring Rule, EPA, in the Agency actions challenged here, elected to ignore not only the statutory provisions directing an orderly process for implementing CAA Title I requirements but also its own rules regarding amendments to EPA's Part 51 requirements for PSD SIPs. Consistent with fundamental principles of due process, the CAA, and administrative law, SIP revisions to effectuate PSD-program changes should apply prospectively only. 40 C.F.R. § 51.166(a)(6)(i), (iii).

By contrast, EPA's SIP Call and accompanying actions – its Finding of Failure and FIP[11] – sought, through unlawful intimidation, to coerce states' consent to GHG regulation under the PSD program immediately, in disregard of the CAA's required procedures and the Agency's own rules. EPA's position here is that its hands were

[11] These actions are sometimes referred to hereinafter collectively as "the SIP Call."

tied because the Tailoring Rule purportedly imposed, beginning January 2, 2011, a construction moratorium in states whose PSD implementation plans did not by that date provide for GHG regulation. As interpreted by EPA, the Agency's GHG regulatory actions, with the threatened ban on new-source construction, compelled acquiescence by states to EPA's scheme of commandeering the CAA implementation plan process to install a peremptory regime of GHG controls, without the procedures required by statute and EPA rules and in derogation of state authority. Petitioners are unaware of any other PSD program change for which EPA has claimed the authority, much less the obligation, to proceed in this way.

For these reasons and those that follow, the Court should vacate and remand the SIP Call, the Finding of Failure Rule, and the FIP, with instructions that: (i) pursuant to 40 C.F.R. § 51.166, states be given a three-year period, beginning no earlier than June 3, 2010, to revise their PSD SIP provisions to address GHG regulation and to submit the SIP revisions to EPA; (ii) EPA may not propose or promulgate a PSD FIP for GHG regulation unless that three-year deadline has passed without any submittal of a SIP revision by the states; and (iii) no GHG-emitting source in those states subject to the SIP Call shall be made subject to any PSD requirement for GHGs until their SIPs are validly amended, through SIP revisions or a lawfully promulgated FIP, to include GHGs in the PSD program and, until then,

those states may continue to issue, under their pre-existing approved programs, PSD permits that do not address GHG emissions.[12]

## STANDARD OF REVIEW

The Court must set aside final EPA action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." CAA § 307(d)(9); Administrative Procedure Act, 5 U.S.C. § 706(2).

## STANDING

Petitioners have Article III standing. Texas and Wyoming clearly have standing because the SIP Call, Finding of Failure Rule, and/or FIP impose on those states obligations with regard to their PSD programs. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (noting "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review"). Those rules also impose obligations on Non-State Petitioners (either directly or through their members[13]) to regulate their GHG emissions under the PSD program.

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[12] This request for relief assumes *arguendo* that the Court does not set aside the GHG-related requirements with respect to which the SIP Call was made. As noted, substantial challenges to those requirements are pending before this Court. *See* supra note 8. Any reversal of those rules would invalidate the rules at issue here.

[13] Non-State Petitioners that are associations have associational standing in this litigation because: (1) individual members of those Non-State Petitioners would have standing to sue in their own right; (2) the interests those Non-State Petitioners seek to protect here are germane to their purposes; and (3) neither the claims asserted by those Non-State Petitioners nor the relief requested require the participation of

In promulgating these rules, EPA refused to allow states the three-year period – provided by pre-existing, binding EPA regulations – to revise PSD SIPs to establish new requirements prospectively, following EPA's June 2010 publication of the new PSD requirement for GHGs in the Tailoring Rule. The rules at issue here are premised on EPA's view that new PSD requirements are established as self-executing commands of the CAA; that states with previously approved PSD SIPs therefore could not issue valid PSD preconstruction permits to certain sources of GHG emissions, including certain GHG-emitting facilities such as those owned and operated by Non-State Petitioners, beginning on January 2, 2011; and thus that a construction moratorium would apply beginning on that date, in the absence of either immediate adoption by states of SIP revisions to incorporate the new PSD requirements or immediate imposition of new federal permitting requirements on states and emission sources.

The rules therefore purport to impose emission limitation and permitting obligations applicable to stationary sources of GHG emissions such as those owned and operated or proposed to be built by Non-State Petitioners, and those obligations create significant costs and other burdens for affected facilities. Indeed, Non-State Petitioners own and operate and seek to build facilities in the States of Texas and

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individual members. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006). For those Non-State Petitioners that are associations, reference to "Non-State Petitioners" in this section should be deemed to include the members of those associations.

Wyoming. Because of EPA's position in these rules, they are being subjected to the PSD requirements of 40 C.F.R. Part 52 for GHGs. *See, e.g.*, 40 C.F.R. § 52.21(r)(6) (imposing recordkeeping and reporting requirements with respect to activities that do not necessarily trigger PSD permitting but have a reasonable possibility of doing so). Non-State Petitioners that own and operate facilities in these states must conduct administrative analyses regarding PSD permitting applicability to determine whether a PSD permit is required for GHGs and to obtain such a permit if the EPA-established permitting thresholds are exceeded. Absent the challenged rules, Non-State Petitioners would not be subject to PSD requirements for GHGs at this time and would be afforded the rights to participate in state legislative and administrative procedures in the states' development of any SIP revisions.

Non-State Petitioners therefore have standing as a result of concrete and particularized injury that is fairly traceable to EPA's rules and as to which there is a substantial probability of redress by a decision that holds those rules invalid with respect to GHG emissions from stationary sources. *See, e.g.*, *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 895-96 (rejecting argument that EPA regulation affected only states and noting that "[i]t is inconceivable that EPA's comprehensive reworking of an Act that specifically controls the requirements for industrial pollution would fail to affect the requirements of even a single [industrial association] member").

## ARGUMENT

The CAA defines precise roles for federal and state governments in the development of SIPs. In its proper role, EPA adopts legislative rules that give content to relevant CAA provisions and establish minimum requirements for SIPs. States then adopt SIPs, after public notice and full opportunity for public participation, to implement those rulemaking requirements prospectively for regulated sources.

In taking the actions at issue here, EPA ignored this careful congressional allocation of regulatory responsibility in a rush to regulate GHGs. EPA's new Part 51 PSD regulations, which include the Agency's Tailoring Rule, treat GHGs differently from every other air pollutant regulated under the PSD program. Unique new definitions and metrics determine whether and what GHG emissions will be regulated under the PSD program. EPA's actions at issue here circumvented the SIP revision process established by the CAA and ignored EPA regulations that provide states a full three-year period to revise SIPs to incorporate new PSD requirements prospectively. "EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). For the reasons discussed below, these EPA actions are contrary to law and must be set aside.

## I. The SIP Call and Threatened Construction Moratorium Are Unlawful Because They Rest on EPA's Incorrect Premise that the CAA's PSD Provisions Are "Self-Executing" and Because They Violate the SIP Procedures Required by the Act and EPA's Regulations.

The three EPA rules at issue in this case are in direct conflict with the statutory structure and EPA's regulations requiring an orderly process for SIP revision, including that states be given three years to amend their PSD SIPs to implement new EPA PSD requirements. *See* CAA §§ 110(a)(1), 166;[14] 40 C.F.R. § 51.166(a)(6)(i). Instead of giving states three years to revise their SIPs, which would then (as revised) operate "prospectively," *id.* § 51.166(a)(6)(iii), EPA threatened states with a construction ban if they did not change their SIPs within three *weeks*.

EPA attempts to justify the SIP Call and its threatened construction ban in a way that effectively renders statutory procedures and section 51.166(a)(6)(i) a nullity

[14] Section 166(a) requires rules specific to PSD review for any newly regulated pollutant to be developed within two years. Rules developed pursuant to section 166(a) become effective a year after their promulgation. This one-year delay is intended to allow Congress an opportunity to review the rules before the states must implement them. *Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)–Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC); Proposed Rule*, 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007) (citing H.R. Conf. Rep. 95-564, at 151 (1977), 1977 U.S.C.C.A.N. 1502, 1532). Each state then has 21 months to submit a revised SIP meeting those new requirements, and EPA must approve or disapprove the revised SIP four months later. CAA § 166. Under the statutorily prescribed process, then, the states have up to five years to accommodate new pollutants within their preconstruction permitting programs. The section 166 process – unlike the unprecedented piecemeal scrambling associated with EPA's rush to bring GHGs into the PSD program – expressly allows time for EPA to announce its expectations by rule, for Congress to have a chance to consider EPA's plans, for the states to amend their rules to conform, and for the SIP process to work as intended.

and violates EPA's obligation to comply with its legislative rules. In EPA's view, when EPA made GHGs a regulated air pollutant under the PSD program as of January 2, 2011, that action was "self-executing" as to GHG-emitting facilities subject to PSD programs under SIPs. According to EPA, new and modified facilities emitting or potentially emitting GHGs at or above the Tailoring Rule thresholds required a GHG permit as of that date regardless of whether or not the state had adopted a SIP revision incorporating GHG requirements. As a result, according to EPA, if states did not change their laws and incorporate EPA's new GHG requirements in their SIPs (and have those SIPs *approved* by January 2, 2011), the states would be unable to issue permits that, EPA claims, GHG-emitting facilities need before undertaking construction. *See, e.g.*, 75 Fed. Reg. at 77,700. This, according to EPA, would mean that construction could not occur in any such state. *Id.*

In interpreting the CAA's PSD provisions as being "self-executing," EPA construed the Act to override EPA-approved PSD preconstruction permitting SIP programs that do not cover GHG-emitting sources as of January 2, 2011. That interpretation, on which EPA relied as its stated rationale for the SIP Call and which EPA found would establish a construction moratorium until SIPs were revised, violates the CAA. In particular: (a) a requirement for GHG permitting was not "self-executing"; (b) EPA cannot construe the PSD provisions of the Act to impose a construction ban pending SIP revisions; and (c) the states' pre-existing, EPA-approved SIPs, *under which GHGs are not subject to regulation*, remain lawful, enforceable,

and sufficient until changed prospectively in accordance with the statutory and regulatory legislative rulemaking procedures.

### A. GHG Regulation Is Not "Self-Executing" on Approved SIPs, and Approved PSD Programs in SIPs Remain Lawful and Enforceable Until Changed in Accordance with Statutory Procedure.

EPA claims that it was forced *by the statute* to adopt the SIP Call because the targeted states could not issue PSD permits to sources emitting GHGs. Although EPA concedes "that the construction ban is [not] a sort of sanction that EPA may impose," *id.* at 77,707; *see also, e.g., id.* at 77,709 ("neither in the proposed SIP call nor anywhere else has EPA 'characterized the Tailoring Rule as creating a PSD permit moratorium'"), EPA assigns the blame to Congress for suspension of PSD permits in the SIP Call states.[15] According to EPA, the requirement for PSD permits covering GHGs beginning January 2, 2011, "was established by operation of the applicable CAA provisions, in conjunction with the [Tailpipe Rule]," not by the Tailoring Rule.[16] *Id.* at 77,707.

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[15] Indeed, EPA's approach had even more severe effects in light of the fact that PSD permits typically take at least a year to obtain. For all ongoing permit actions, unless the applicant had been able to foresee in late 2009 that EPA would sometime in the next year propose and then adopt new GHG-based permitting requirements, it had absolutely no chance of getting its permit issued on or after January 2, 2011, unless it then reinitiated its permit application with the GHG-based demonstrations now required by EPA.

[16] EPA's position that stationary-source GHG regulation under PSD is not a product of the Tailoring Rule does not withstand analysis. The Tailpipe Rule, for instance, did not define the specific GHGs that EPA intended to regulate under PSD. Those GHGs are defined in the Tailoring Rule, 40 C.F.R. § 51.166(b)(48)(i), and include two

As a matter of statutory interpretation, EPA's construction of the PSD provisions as being self-executing must be rejected. The statutory PSD provisions explicitly state that they are not self-executing; those provisions on their face specify that "regulations" must be promulgated to define the PSD SIP requirements that must be included in SIPs:

> [E]ach applicable implementation plan shall contain emission limitations and such other measures as may be necessary, *as determined under regulations promulgated under [Title I, Part C of the Act]*, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 107 of this Act as attainment or unclassifiable.

CAA § 161 (emphasis added). The Act contemplates an orderly and public process through which new requirements are adopted in SIPs and provides that approved SIPs can be changed only through legislative rulemaking using the procedure set forth in CAA § 110(a) for SIP revisions or in CAA § 110(c) for FIPs.

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GHGs that EPA conceded are not even emitted by motor vehicles, 75 Fed. Reg. at 25,399 (acknowledging that perfluorocarbons and sulfur hexafluoride "are not emitted by motor vehicles"), and the Tailoring Rule is the rule that mandates use of a specific "carbon-equivalent" way of measuring GHG emissions that counts certain GHG emissions more than others. 40 C.F.R. § 51.166(b)(48)(ii). Moreover, the fact that GHGs were to be regulated as of January 2, 2011, seven months after the Tailpipe Rule was published in the Federal Register, was first the product of EPA's interpretive memorandum reconsideration and then incorporated into 40 C.F.R. § 51.166 by the Tailoring Rule. 40 C.F.R. § 51.166(b)(48)(iv). Finally, the decision that only GHGs emitted or potentially emitted at or above the 75,000-tpy modification threshold for major sources already emitting at a 100,000-tpy level (in the first phase of the Tailoring Rule) would be subject to regulation was likewise made in the Tailoring Rule. 75 Fed. Reg. at 31,606 (promulgating 40 C.F.R. § 51.166(b)(48)(iv)).

For a new requirement to become part of a SIP, a state must develop a proposed SIP revision, provide "reasonable notice" to the public, hold a "public hearing" on the proposal, adopt a final proposal, and obtain EPA's approval following notice-and-comment rulemaking by EPA. CAA § 110(a)(1), (a)(2), (k), (l). If, by the applicable deadline, a state fails to submit a SIP revision that meets the new requirements, EPA may make a finding to that effect and then, after notice-and-comment rulemaking, adopt a FIP that will apply until the state corrects the deficiency. *See id.* §§ 110(c), 307(d)(1)(B), (d)(2)-(6) (establishing criteria and procedural requirements under the CAA for proposal and promulgation of FIPs).

These statutory requirements underscore Congress's intent that the public be afforded an adequate opportunity to participate in the adoption of SIP provisions. EPA's action here cannot be squared with these statutory requirements. Allowing states the time contemplated by the Act (and, in this case, by an EPA regulation) to adopt SIP revisions is even more important here, where the foundation of the "required" SIP revisions is the subject of litigation currently being addressed in this Court. In addition to challenges to EPA's Endangerment Finding, this Court is considering fundamental questions regarding EPA's ability to regulate GHGs as a PSD pollutant, including whether GHGs can be PSD pollutants, whether pollutants like GHGs for which no NAAQS has been established can trigger PSD, and whether EPA must comply with section 166 of the Act. *See* supra note 8. If the Court overturns EPA's action in the Tailoring Rule, the SIP revisions that states were forced

to implement will need to be reversed. The three-year period to adopt PSD SIP revisions provided in 40 C.F.R. § 51.166(a)(6) allows states to ensure EPA rules are valid before final adoption, submittal, and EPA approval of SIPs.

Moreover, when Congress intended to bypass required SIP revision procedures and impose new PSD requirements by statute, it did so explicitly and by direct amendment of implementation plans. Section 168(b), which Congress adopted in 1977, provided for immediate revision – by statute – of implementation plans. Absent explicit statutory direction (not present here), EPA cannot bypass the required procedures Congress established in section 110(a).

Thus, it makes sense that pending revision of a PSD SIP to incorporate new requirements, states may continue to issue valid PSD permits under the terms of their previously approved PSD SIPs. As recently stated by the Seventh Circuit in *United States v. Cinergy Corp.*, 623 F.3d 455, 457-59 (7th Cir. 2010), in an appeal of a CAA civil enforcement action, the Act "does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that the EPA has approved." Accordingly, *even a SIP provision that, in EPA's view, should not have been approved because it is inconsistent with the Act's requirements* nonetheless remains the law that is binding on sources in that state as long as it has not been repealed or superseded. *Id.*; *see also Gen. Motors Corp. v. United States*, 496 U.S. 530, 539-41 (1990) (holding that sources must comply with requirements contained in an applicable implementation plan, even if a

new provision has been adopted by the state and submitted to EPA for approval, and EPA has unreasonably delayed action on the proposed replacement).[17]

Thus, EPA's interpretation of the Tailoring Rule as overriding states' pre-existing, EPA-approved Part C PSD SIPs by requiring PSD permitting of GHG-emitting sources beginning January 2, 2011, is contrary to CAA § 110(a) and (c), which establish the only procedures available to revise an approved SIP. As CAA § 110(i) explains: "[e]xcept for … a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no … action modifying *any requirement* of an applicable implementation plan may be taken with respect to *any stationary source* by the State or by the Administrator." (Emphases added). *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 787 n.12 (3d Cir.

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[17] In the SIP Call, EPA took issue with *Cinergy*, calling the Seventh Circuit "mistaken[]" in applying that holding in the PSD context rather than limiting it to the nonattainment new source review context. 75 Fed. Reg. at 77,705-06 n.16. But, as EPA impliedly recognized, the court's opinion is written broadly, "conclud[ing] that sources could continue to abide by permitting requirements in an existing SIP until amended." *Id.* Indeed, the court relied on a CAA enforcement provision — CAA § 113(a)(1) — that does not on its face distinguish, for purposes of enforceability, between PSD provisions in a SIP and nonattainment new source review provisions in a SIP. *See Cinergy*, 623 F.3d at 458. Moreover, EPA's position on this issue conflicts with the principle animating the Supreme Court's *General Motors* decision, *i.e.*, that SIP requirements are enforceable until changed *by SIP revisions*.

In any event, EPA's position is foreclosed because the Seventh Circuit rejected EPA's invitation to limit its opinion on this issue to nonattainment permitting requirements. *See* Pet. for Reh'g, *United States v. Cinergy Corp.*, No. 09-3344 (7th Cir. Nov. 29, 2010), at 14-15 (asking the court to "clarif[y]" that the part of its opinion addressing SIPs' continuing force addressed only nonattainment, and not PSD, requirements); Order Denying Pet. for Reh'g, *United States v. Cinergy Corp.*, No. 09-3344 (7th Cir. Dec. 29, 2010).

1987) (CAA § 110(i) "appears to confirm what otherwise appears implicit in … the [CAA], namely that the Act attempts to enumerate an exhaustive list of the EPA's powers regarding SIPs" and that, "[l]acking another statutory source of authority, the EPA must utilize the [SIP] revision provisions to accomplish its purpose.").

Accordingly, the essential legal premise of the SIP Call and the corollary EPA actions – *i.e.*, that the statutory PSD provisions are self-executing on previously approved SIPs and, in the case of new GHG requirements, overrode those previously approved SIPs and imposed by operation of law a construction moratorium on states and sources as of January 2, 2011, relievable only through immediate PSD implementation-plan revisions – is without any lawful basis. Because EPA's fundamental premise is false, the SIP Call, Finding of Failure, and FIP are contrary to law and should be set aside. The states' pre-existing, EPA-approved SIPs, which do not make GHGs subject to regulation, therefore remain legally enforceable.

### B. EPA Did Not Have Statutory Authority To Impose a Construction Moratorium.

Although in denial on this point, EPA has clearly interpreted a state's failure to revise its existing PSD SIP to cover GHGs as creating a construction moratorium. Thus, according to EPA, failure to revise SIPs by January 2, 2011, would trigger a "period when sources may be unable to construct or modify due to the lack of regulatory authority to act on their permit applications," 75 Fed. Reg. at 77,710, which is the very definition of a moratorium. The "lack of [GHG] regulatory authority" as

of January 2, 2011 – the regulatory gap that is central to the SIP Call's rationale – of course exists *only under EPA's erroneous view that the new PSD requirements for GHGs are self-executing, take effect with respect to all approved SIPs as of January 2, 2011, and exist irrespective of the terms of those approved SIPs.*

Under the Act and EPA's own rules, EPA has no authority to impose any moratorium on preconstruction PSD permitting pending SIP revisions. Imposition of a moratorium as a result of a state not revising its SIP to include new permitting requirements would be a severe penalty that EPA could not impose without specific statutory authorization. That type of penalty was provided for by Congress under the Title I, Part D nonattainment new source review program enacted in the 1977 amendments to the CAA,[18] but never under the Title I, Part C PSD program.

In 1977, Congress gave states two years to develop the Title I, Part D nonattainment new source review preconstruction permit program or face the extraordinary sanction of a construction permit moratorium in their nonattainment areas. Pub. L. No. 95-95, § 129(a), 91 Stat. 745 (1977). Unlike the Part D program, the Part C PSD program imposed no sanction on states that failed to adopt required SIP revisions. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("'[w]here Congress includes particular language in one section of a statute but omits it in

[18] The Part D program of Title I of the CAA, CAA §§ 171-193, applies in nonattainment areas, whereas the Part C program, CAA §§ 160-169, applies in attainment areas.

another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Indeed, Congress, EPA, and the courts have recognized that the Part C PSD program must be implemented by legislative rules that amend PSD programs in implementation plans prospectively so as to avoid any interruption in PSD permitting. CAA § 168(b); *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676, 52,683 (Aug. 7, 1980); *Citizens To Save Spencer County*, 600 F.2d at 890. Therefore, EPA's interpretation of the January 2, 2011 date in the Tailoring Rule as imposing a construction permit moratorium must be rejected. *See City of Idaho Falls v. FERC*, 629 F.3d 222, 230 (D.C. Cir. 2011) (citing *Stinson v. United States*, 508 U.S. 36, 45 (1993)) (courts must reject an interpretation of a regulation if that interpretation contradicts the statute).

## II. The SIP Call, Finding of Failure, and FIP Are Contrary to the Act's Provisions for Revising Implementation Plans and EPA's Regulatory Provisions for Incorporating New PSD Requirements in Those Plans.

The SIP Call is contrary to the Act's provisions for SIP revisions and existing rules governing PSD SIP revisions, which establish a three-year schedule for those revisions. *See* CAA § 166; 40 C.F.R. § 51.166(a)(6). Only after expiration of that three-year period – which in this case extends through June 3, 2013, the third anniversary of the Tailoring Rule's publication – would EPA even *arguably* have

authority to find,[19] under CAA § 110(c), that SIPs are deficient because of their failure to include PSD provisions to address GHGs. Thus, there is no lawful basis for EPA's SIP Call. Contrary to the SIP Call, at all times before June 3, 2013, the states included in the SIP Call may: (i) continue to issue valid PSD preconstruction permits that do *not* address GHG emissions; and (ii) adopt SIP revisions that incorporate the Tailoring Rule into the states' PSD programs and that provide for regulation of GHG emissions prospectively.

### A. EPA Has No Authority Under CAA Section 110(k)(5) To Issue a SIP Call To Address New Minimum PSD SIP Requirements.

EPA issued the SIP Call under CAA § 110(k)(5), but that section does not authorize a SIP call to address new minimum PSD requirements. Section 110(k)(5) authorizes EPA to issue a SIP call requiring SIP revisions when a previously approved SIP becomes "substantially inadequate" to satisfy the requirements that applied when EPA approved the SIP. Here, however, the states' SIPs did not become substantially inadequate to meet a pre-existing requirement for SIPs. Instead, EPA *changed* requirements for PSD SIPs through a Part 51 rulemaking to require permitting of GHG-emitting sources.

EPA's only authority to require states to revise their SIPs because of promulgation of a rule establishing a new PSD requirement is section 110(a) of the

[19] This is assuming *arguendo* that GHGs can be regulated under the PSD program either at all or at this time. *See* supra Statement of the Case and Facts, II.C.

CAA, which requires states to change their SIPs if EPA establishes new SIP requirements. Once this SIP revision process is triggered, EPA has no authority to issue a SIP call under section 110(k)(5) because section 110(a) has already mandated SIP revisions. To conclude otherwise would require the Court to find that section 110(k)(5) authorizes EPA to mandate SIP revisions on terms that are both redundant to and inconsistent with those governing SIP revisions under sections 110(a) and 166.[20]

Contrary to EPA's position, EPA's adoption in the Tailoring Rule of new Part 51 minimum requirements for PSD SIPs placed states on a three-year schedule to adopt prospective revisions to their PSD SIPs under sections 110(a) and 166. During this period, states with previously approved PSD programs can continue to issue valid PSD permits under those programs while undertaking the SIP revision proceedings needed to address the new requirements. Thus, as discussed in Argument I *supra*, no valid construction moratorium was imposed as a result of the Tailoring Rule's amendment of 40 C.F.R. § 51.166. If a state does not revise its SIP to incorporate

[20] As for inconsistency, CAA § 110(k)(5) imposes a maximum 18-month deadline for state submission of SIP revisions in response to a SIP call (while providing that any deadline shorter than 18 months must still be long enough to be "reasonable"). In contrast, as noted above, CAA § 110(a) imposes a maximum three-year deadline for SIP revisions triggered by EPA's promulgation of new or revised NAAQS. In its 2002 amendment to 40 C.F.R. § 51.166, EPA applied the section 110(a) three-year schedule to PSD SIP revisions under CAA § 110(a), *except that in 40 C.F.R. § 51.166 EPA did not reserve authority to shorten that schedule* but instead gave states the full three years. 40 C.F.R. § 51.166(a)(6)(i).

PSD regulation of GHG emissions by the expiration of the three-year schedule provided in 40 C.F.R. § 51.166(a)(6), then, and only then, may EPA propose and promulgate a (prospectively applicable) FIP under section 110(c) of the Act. In no event was EPA authorized to issue a section 110(k)(5) SIP Call requiring state adoption of the newly promulgated minimum requirements for PSD SIPs.

### B. Under EPA's Rules, States Have a Full Three Years To Incorporate Regulation of GHGs into Their SIPs and, in the Interim, May Continue To Issue Valid PSD Permits that Do Not Address GHGs, and Any SIP Revisions To Address GHGs May Apply Prospectively Only.

The SIP Call established December 1, 2011 – 11 months after EPA's construction moratorium began – as an outer deadline for SIP revisions. EPA asserted that this deadline is "reasonable" within the meaning of CAA § 110(k)(5). In proposing the SIP Call, however, EPA did not mention 40 C.F.R. § 51.166(a)(6) – a binding legislative rule – which unambiguously affords states *three years* to develop and submit CAA section 110(a) PSD SIP revisions.[21] 40 C.F.R. § 51.166(a)(6)(i) provides:

> Any State required to revise its implementation plan by reason of an amendment to this section [*i.e.*, 40 C.F.R. § 51.166] … shall adopt and submit such plan revision to the [EPA] Administrator for approval no later than 3 years after such amendment is published in the Federal Register.

When EPA promulgated this legislative rule in 2002, it explained that CAA section 110(a) "*does not specify a date* for submission of SIPs when we *revise the PSD and NSR [new source review] rules*." 67 Fed. Reg. at 80,241 (emphases added). In light of

[21] EPA also failed to mention CAA § 166.

this, EPA concluded it was "appropriate to establish a date analogous to the date for submission of new SIPs when a NAAQS is promulgated or revised." *Id.* EPA recognized that, "[u]nder section 110(a)(1) of the Act …, that date is 3 years from promulgation or revision of the NAAQS." *Id.* It was for that reason that EPA "made conforming changes to the PSD regulations at § 51.166(a)(6)(i) to indicate that State and local agencies must adopt and submit plan revisions *within 3 years after new amendments are published* in the Federal Register." *Id.* (emphasis added).

EPA's SIP Call is a radical and unlawful truncation of the three-year schedule established by section 51.166(a)(6)(i). As noted above, EPA in 2002 found it "appropriate to establish," through a binding legislative rule, "a date analogous," *id.*, to the SIP submission date in CAA § 110(a)(1), which specifies that "[e]ach State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) … a plan which provides for implementation, maintenance, and enforcement." Thus, although EPA *may* provide for a period "shorter" than three years for submission of SIP revisions under CAA § 110(a)(1), in the case of SIP revisions necessitated by EPA's publication of new PSD requirements in 40 C.F.R. § 51.166, not only has EPA *not* provided for "such shorter period," it has codified a full three-year period in a legislative rule, 40 C.F.R. § 51.166(a)(6)(i). The SIP Call violates this binding legislative rule and therefore is unlawful.

The Tailoring Rule establishes January 2, 2011, as the initial effective date of PSD regulation of GHG emissions under that rule. Because 40 C.F.R. § 51.166(a)(6) gives states until June 3, 2013 – three years from the date the Tailoring Rule was published in the Federal Register – to submit prospectively applicable PSD SIP revisions that address GHG emissions, the SIP Call's requirement (and premise) that GHG regulation under the PSD program must begin before then (*i.e.*, as soon as January 2, 2011, and no later than December 1, 2011), is a violation of EPA's own PSD rules, which are binding on the Agency. *See United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as this regulation is extant it has the force of law.")

Moreover, because 40 C.F.R. § 51.166(a)(6)(iii) provides that "[a]ny revision to an implementation plan" that is required by "an amendment to this section [*i.e.*, 40 C.F.R. § 51.166] … shall take effect no later than the date of its approval and may *operate prospectively*" (emphasis added), EPA's GHG regulatory actions cannot be construed to impose *retroactively* requirements that would apply to permits issued *before* a SIP was revised and approved, or before a duly promulgated FIP were to become effective. A 40 C.F.R. § 51.166 amendment that triggers a requirement for *future adoption* of CAA section 110(a) SIP revisions cannot be interpreted to have any retrospective application. Because EPA-approved SIPs are themselves binding federal legislative rules, any SIP revision requiring "retroactive" application of the Tailoring Rule's regulation of GHGs to a previously issued PSD preconstruction permit would be unauthorized by the CAA, contrary to past EPA practice, and

otherwise unlawful. *See*, *e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," and "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").

Providing states with three years to submit their SIP revisions ensures that states have adequate time to meet public notice and hearing requirements. Both the CAA and EPA's PSD regulations require states to provide opportunity for public participation. *See* CAA § 110(a)(2); 40 C.F.R. § 51.166(a)(5). Here, EPA afforded states only weeks to submit a SIP revision – or face a construction moratorium. This period did not allow states to comply with their public notice requirements. Indeed, EPA encouraged states to violate these public notice and public hearing provisions. *Cf.* 75 Fed. Reg. at 53,903 ("encourag[ing]" states to adopt SIP revisions through "interpretation").

Accordingly, Non-State Petitioners and Intervenor-Petitioner respectfully submit that, in setting aside the SIP Call and its corollary actions, the Court should declare that any revision to the states' SIPs to establish GHG regulatory requirements under the PSD program in those states can have no effect with respect to permits issued before the effective date of that implementation plan revision. Likewise, the Court should declare that the states may, during the period before the effective date

of any proper implementation plan revision, continue to issue valid PSD permits without addressing GHG requirements.

## CONCLUSION

For the foregoing reasons, the Court should vacate and remand the SIP Call, the Finding of Failure, and the FIP, with instructions that: (i) pursuant to 40 C.F.R. § 51.166, the states be given three years, beginning no earlier than June 3, 2010, and expiring no earlier than June 3, 2013, to revise their PSD SIP provisions to address GHG regulation and to submit the SIP revisions to EPA; (ii) EPA may not propose or promulgate a PSD FIP for GHG regulation unless that three-year deadline has passed without submittal of a SIP revision by the states; and (iii) beginning on January 2, 2011, no GHG-emitting source in those states shall be made subject to any PSD requirement for GHGs until the SIPs in those states are validly amended, through SIP revisions or a lawfully promulgated FIP, to include GHGs in the PSD program, and, until then, the states may continue to issue, under their pre-existing approved programs, PSD permits that do not address GHG emissions.

Respectfully submitted,

/s/ Allison D. Wood

Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, NW
Washington, D.C. 20005
(202) 272-2900
*Counsel for Petitioners National Mining Association and Peabody Energy Company and Intervenor-Petitioner Wyoming Mining Association*

F. William Brownell
Norman W. Fichthorn
Henry V. Nickel
Allison D. Wood
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Washington, D.C. 20037
(202) 955-1500
*Counsel for Petitioner Utility Air Regulatory Group*

Charles H. Knauss
Shannon S. Broome
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW, North, Suite 200
Washington, D.C. 20007
(202) 625-3500
*Counsel for Petitioner SIP/FIP Advocacy Group*

Eric Groten
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746-7568
(512) 542-8709
*Counsel for Petitioners Coalition for Responsible Regulation, Inc., et al.*

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500
*Counsel for Petitioner SIP/FIP Advocacy Group*

Roger R. Martella
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
*Counsel for Petitioner SIP/FIP Advocacy Group*

Dated: February 8, 2012

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Opening Brief of Non-State Petitioners and Intervenor-Petitioner contains 10,166 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

/s/ Allison D. Wood

Dated: February 8, 2012

## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that I have this 8th day of February, 2012, served a copy of the foregoing Opening Brief of Non-State Petitioners and Intervenor-Petitioner electronically through the Court's CM/ECF system.

/s/ Allison D. Wood

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## I. Clean Air Act Section 107, 42 U.S.C. § 7407:

### § 7407. Air quality control regions

**(a) Responsibility of each State for air quality; submission of implementation plan**

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

**(c) Authority of Administrator to designate regions; notification of Governors of affected States**

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

**(d) Designations**

**(1)** Designations generally

**(A)** Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

**(i)** nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

**(ii)** attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

**(iii)** unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

**(B)** Promulgation by EPA of designations

**(i)** Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

**(ii)** In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

**(iii)** If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

**(iv)** A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

**(C)** Designations by operation of law

**(i)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

**(ii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

**(iii)** Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

**(2)** Publication of designations and redesignations

**(A)** The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

**(B)** Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

**(3)** Redesignation

**(A)** Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

**(B)** No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

**(C)** No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

**(D)** The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

**(E)** The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

**(i)** the Administrator determines that the area has attained the national ambient air quality standard;

**(ii)** the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

**(iii)** the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

**(iv)** the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

**(v)** the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

**(F)** The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

**(4)** Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

**(A)** Ozone and carbon monoxide

**(i)** Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

**(ii)** No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

**(iii)** No nonattainment area may be redesignated as an attainment area under this subparagraph.

**(iv)** Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause

(v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

**(v)** Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

**(B)** PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

**(i)** each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

**(ii)** any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

**(iii)** each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

**(5)** Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

**(6)** Designations

**(A)** Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM2.5 national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

**(B)** Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM2.5 national ambient air quality standards.

**(7)** Implementation plan for regional haze

**(A)** In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under

section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

**(B)** No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

* * *

**Clean Air Act Section 110(a), (c), (i), (k), (l), (m), (n), 42 U.S.C. § 7410(a), (c), (i), (k), (l), (m), (n):**

## § 7410. State implementation plans for national primary and secondary ambient air quality standards

### (a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

**(1)** Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

**(2)** Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall–

**(A)** include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

**(B)** provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to–

**(i)** monitor, compile, and analyze data on ambient air quality, and

**(ii)** upon request, make such data available to the Administrator;

**(C)** 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;

**(D)** contain adequate provisions–

**(i)** prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will–

**(I)** contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

**(II)** interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

**(ii)** insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

**(E)** provide

**(i)** necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof),

**(ii)** requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and

**(iii)** necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

**(F)** require, as may be prescribed by the Administrator–

**(i)** the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

**(ii)** periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

**(iii)** correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

**(G)** provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;
**(H)** provide for revision of such plan–

**(i)** from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

**(ii)** except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

**(I)** in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);
**(J)** meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);
**(K)** provide for–

**(i)** the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

**(ii)** the submission, upon request, of data related to such air quality modeling to the Administrator;

**(L)** require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover–

**(i)** the reasonable costs of reviewing and acting upon any application for such a permit, and

**(ii)** if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

**(M)** provide for consultation and participation by local political subdivisions affected by the plan.

**(3)**

**(A)** Repealed. Pub. L. 101–549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

**(B)** As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

**(C)** Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413 (d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413 (e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

**(4)** Repealed. Pub. L. 101–549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

**(5)**

**(A)**

**(i)** Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

**(ii)** Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

**(iii)** Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

**(B)** The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

**(C)** For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

**(D)** For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations–

**(i)** exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

**(ii)** preventing maintenance of any such standard after such date.

**(E)** For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

**(6)** No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413 (d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

* * *

**(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation**

**(1)** The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator–

**(A)** finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

**(B)** disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

**(2)**

**(A)** Repealed. Pub. L. 101–549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

**(B)** No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

**(C)** Repealed. Pub. L. 101–549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

**(D)** For purposes of this paragraph–

**(i)** The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

**(ii)** The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

**(iii)** The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

**(E)** No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

**(3)** Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

**(4)** Repealed. Pub. L. 101–549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

**(5)**

**(A)** Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

**(B)** In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

**(i)** establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

**(ii)** implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

**(C)** Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

* * *

**(i) Modification of requirements prohibited**

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413 (d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

* * *

**(k) Environmental Protection Agency action on plan submissions**

**(1) Completeness of plan submissions**

**(A) Completeness criteria**

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

**(B) Completeness finding**

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

**(C) Effect of finding of incompleteness**

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

**(2) Deadline for action**

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

**(3) Full and partial approval and disapproval**

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be

treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

**(4) Conditional approval**

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

**(5) Calls for plan revisions**

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

**(6) Corrections**

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

**(l) Plan revisions**

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. 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.

**(m) Sanctions**

The Administrator may apply any of the sanctions listed in section 7509 (b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509 (a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509 (a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509 (a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

**(n) Savings clauses**

**(1) Existing plan provisions**

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

**(2) Attainment dates**

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

**(A)** in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

**(B)** in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

**(3) Retention of construction moratorium in certain areas**

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary

sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502 (b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502 (c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

**Clean Air Act Section 111(a)(4), 42 U.S.C. § 7411(a)(4):**

**§ 7411. Standards of performance for new stationary sources**

**(a) Definitions**

**(4)** The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

**Clean Air Act Section 113(a)(1), 42 U.S.C. § 7413(a)(1):**

**§ 7413. Federal enforcement**

**(a) In general**

**(1) Order to comply with SIP**

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of title 28)—

**(A)** issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

**(B)** issue an administrative penalty order in accordance with subsection (d) of this section, or

**(C)** bring a civil action in accordance with subsection (b) of this section.

**Clean Air Act Section 161, 42 U.S.C. § 7471:**

**§ 7471. Plan requirements**

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

**Clean Air Act Section 165, 42 U.S.C. § 7475:**

## § 7475. Preconstruction requirements

### (a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

**(1)** a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

**(2)** the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

**(3)** the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

**(4)** the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

**(5)** the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

**(6)** there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

**(7)** the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

**(8)** in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

**(b) Exception**

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

**(c) Permit applications**

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

**(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations**

**(1)** Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

**(2)**

**(A)** The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

**(B)** The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

**(C)**

**(i)** In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

**(ii)** In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

**(iii)** In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

**(iv)** In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

Maximum allowable increase (in micrograms per cubic meter) Particulate matter: 19 Annual geometric mean 37 Twenty-four-hour maximum Sulfur dioxide: 20 Annual arithmetic mean 91 Twenty-four-hour maximum Three-hour maximum 325

**(D)**

**(i)** In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

**(ii)** In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

**(iii)** In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

| (In micrograms per cubic meter) | | |
|---|---|---|
| MAXIMUM ALLOWABLE INCREASE **Period of exposure** | **Low terrain areas** | **High terrain areas** |
| 24-hr maximum | 36 | 62 |
| 3-hr maximum | 130 | 221 |

**(iv)** For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

**(e) Analysis; continuous air quality monitoring data; regulations; model adjustments**

**(1)** The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

**(2)** Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

**(3)** The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations–

**(A)** shall not require the use of any automatic or uniform buffer zone or zones,

**(B)** shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous

emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region, **(C)** shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and **(D)** shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

**Clean Air Act Section 166(a) and (b), 42 U.S.C. § 7476(a) and (b):**

**§ 7476. Other pollutants**

**(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides**

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

**(b) Effective date of regulations**

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

**Clean Air Act Section 168(b), 42 U.S.C. § 7478(b):**

**§ 7478. Period before plan approval**

**(b) Regulations deemed amended; construction commenced after June 1, 1975**

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472 (a), section 7473(b) or section 7474 (a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479 (2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

**Clean Air Act Section 169(2)(C), 42 U.S.C. § 7479(2)(C):**

**§ 7479. Definitions**
For purposes of this part--

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**(2)(C)** The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

**Clean Air Act Section 179(a) and (b), 42 U.S.C. § 7509(a) and (b):**

**§ 7509. Sanctions and consequences of failure to attain**

**(a) State failure**

For any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 7410 (k)(5) of this title), if the Administrator—

**(1)** finds that a State has failed, for an area designated nonattainment under section 7407 (d) of this title, to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this chapter applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under section 7410 (k) of this title,

**(2)** disapproves a submission under section 7410 (k) of this title, for an area designated nonattainment under section 7407 of this title, based on the submission's failure to meet one or more of the elements required by the provisions of this chapter applicable to such an area,

**(3)**

**(A)** determines that a State has failed to make any submission as may be required under this chapter, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this chapter, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 7410 (k)(1)(A) of this title, or

**(B)** disapproves in whole or in part a submission described under subparagraph (A), or

**(4)** finds that any requirement of an approved plan (or approved part of a plan) is not being implemented,

unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination referred to in paragraphs (1), (2), (3), and (4), one of the sanctions referred to in subsection (b) of this section shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compliance, except that if the Administrator finds a lack of good faith, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this

section shall apply until the Administrator determines that the State has come into compliance. If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. In addition to any other sanction applicable as provided in this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7405 of this title.

**(b) Sanctions**

The sanctions available to the Administrator as provided in subsection (a) of this section are as follows:

**(1) Highway sanctions**

**(A)** The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under title 23 other than projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents. Such prohibition shall become effective upon the selection by the Administrator of this sanction.

**(B)** In addition to safety, projects or grants that may be approved by the Secretary, notwithstanding the prohibition in subparagraph (A), are the following—

**(i)** capital programs for public transit;

**(ii)** construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles;

**(iii)** planning for requirements for employers to reduce employee work-trip-related vehicle emissions;

**(iv)** highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;

**(v)** fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;

**(vi)** programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges,

or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;

**(vii)** programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and

**(viii)** such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.

In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

**(2) Offsets**

In applying the emissions offset requirements of section 7503 of this title to new or modified sources or emissions units for which a permit is required under this part, the ratio of emission reductions to increased emissions shall be at least 2 to 1.

**Clean Air Act Section 202(a)(1), 42 U.S.C. § 7521(a)(1):**

### § 7521. Emission standards for new motor vehicles or new motor vehicle engines

**(a) Authority of Administrator to prescribe by regulation**

Except as otherwise provided in subsection (b) of this section—

> **(1)** The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

**Clean Air Act Section 307(b) and (d), 42 U.S.C. § 7607(b) and (d):**

**§ 7607. Administrative proceedings and judicial review**

**(b) Judicial review**

**(1)** A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521 (b)(1) of this title), any determination under section 7521 (b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411 (d) of this title, any order under section 7411 (j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10 (c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414 (a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds

arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.
**(2)** Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

**(d) Rulemaking**

**(1)** This subsection applies to–

**(A)** the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

**(B)** the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

**(C)** the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

**(D)** the promulgation of any requirement for solid waste combustion under section 7429 of this title,

**(E)** the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

**(F)** the promulgation or revision of any aircraft emission standard under section 7571 of this title,

**(G)** the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

**(H)** promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

**(I)** promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

**(J)** promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),
**(K)** promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,
**(L)** promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,
**(M)** promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),
**(N)** action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),
**(O)** the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,
**(P)** the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,
**(Q)** the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,
**(R)** the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,
**(S)** the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,
**(T)** the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),
**(U)** the promulgation or revision of any regulation under section 7511b (f) of this title pertaining to marine vessels, and
**(V)** such other actions as the Administrator may determine.
The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

**(2)** Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second

(identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

**(3)** In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of–

**(A)** the factual data on which the proposed rule is based;

**(B)** the methodology used in obtaining the data and in analyzing the data; and

**(C)** the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

**(4)**

**(A)** The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

**(B)**

**(i)** Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

**(ii)** The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

**(5)** In promulgating a rule to which this subsection applies

**(i)** the Administrator shall allow any person to submit written comments, data, or documentary information;

**(ii)** the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions;

**(iii)** a transcript shall be kept of any oral presentation; and

**(iv)** the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

**(6)**

**(A)** The promulgated rule shall be accompanied by

**(i)** a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and

**(ii)** an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

**(B)** The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

**(C)** The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

**(7)**

**(A)** The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

**(B)** Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall 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. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

**(8)** The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)

of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the 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.

**(9)** In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be–

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

**(D)** without observance of procedure required by law, if

**(i)** such failure to observe such procedure is arbitrary or capricious,

**(ii)** the requirement of paragraph (7)(B) has been met, and

**(iii)** the condition of the last sentence of paragraph (8) is met.

**(10)** Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

**(11)** The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

**40 C.F.R. § 51.166(a)(5), (a)(6), (b)(48):**

**§ 51.166 Prevention of significant deterioration of air quality**

**(a)(5) Public Participation.**

Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in §51.102.

**(a)(6) Amendments.**

(i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

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**(b) Definitions.**

**(48)** *Subject to regulation* means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

**(i)** *Greenhouse gases (GHGs),* the air pollutant defined in §86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraphs (b)(48)(iv) through (v) of this section.

**(ii)** For purposes of paragraphs (b)(48)(iii) through (v) of this section, the term tpy *$CO_2$ equivalent emissions ($CO_2$ e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

***(a)*** Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph (b)(48)(ii)(a), prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

**(*b* )** Sum the resultant value from paragraph (b)(48)(ii)( *a* ) of this section for each gas to compute a tpy $CO_2$e.

**(iii)** The term *emissions increase* as used in paragraphs (b)(48)(iv) through (v) of this section shall mean that both a significant emissions increase (as calculated using the procedures in (a)(7)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy $CO_2$e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy $CO_2$e instead of applying the value in paragraph (b)(23)(ii) of this section.

**(iv)** Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

**(*a* )** The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy $CO_2$e or more; or

**(*b* )** The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy $CO_2$e or more; and,

**(v)** Beginning July 1, 2011, in addition to the provisions in paragraph (b)(48)(iv) of this section, the pollutant GHGs shall also be subject to regulation:

**(*a*)** At a new stationary source that will emit or have the potential to emit 100,000 tpy $CO_2e$; or

**(*b*)** At an existing stationary source that emits or has the potential to emit 100,000 tpy $CO_2e$, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy $CO_2e$ or more.

**40 C.F.R. § 52.21(a)(1), (r)(6):**

**§ 52.21(a)(4) Prevention of significant deterioration of air quality**

**(a)(1) Plan disapproval.**
The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

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**(r) Source obligation.**
**(6)** Except as otherwise provided in paragraph (r)(6)(vi)( *b* ) of this section, the provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)( *a* ) through ( *c* ) of this section for calculating projected actual emissions.