Case No. 08-72288

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT and the
SOUTHERN CALIFORNIA ASSOC. OF GOVERNMENTS,
Intervenors

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

BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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GLOSSARY

CARB	California Air Resources Board, a State agency
CAA	Clean Air Act, 42 U.S.C. §§ 7401, et seq.
EPA	United States Environmental Protection Agency
MPO	Metropolitan Planning Organization
MVEB	Motor Vehicle Emissions Budget, specifying the quantity of each NAAQS-regulated pollutant or precursor to such pollutants that on-road mobile sources can emit during specified years
NAAQS	National Ambient Air Quality Standard
$PM_{2.5}$	Airborne Particulate Matter 2.5 microns or less in diameter
RTIP	Regional Transportation Improvement Program
SCAG	Southern California Association of Governments, an MPO for the Los Angeles Air Basin
SIP	State Implementation Plan
TIP	Transportation Improvement Program

STATEMENT OF JURISDICTION

I. Agency. Pursuant to 40 C.F.R. § 93.118(e), Respondent U.S. Environmental Protection Agency ("EPA") has authority to make a preliminary administrative determination that a motor vehicle emissions budget ("MVEB") contained within a State Implementation Plan ("SIP") that has been submitted to EPA, but not yet approved or disapproved, is adequate for transportation conformity purposes. This is known as an "adequacy finding." In the instant case, EPA determined that baseline motor vehicle emissions budgets for the years 2009 and 2012 ("Baseline Budgets") contained in the pending fine particulate matter ("$PM_{2.5}$") SIP submittal for the South Coast Air Quality Management District of California ("SIP Submittal") are adequate for transportation conformity purposes. To date, EPA has neither approved nor disapproved any portion of the SIP Submittal.

II. Court. This Court has jurisdiction pursuant to Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1), to review EPA's preliminary administrative determination ("Adequacy Finding") that the Baseline Budgets satisfy the six adequacy criteria set forth at 40 C.F.R. § 93.118(e)(4) and therefore are adequate for transportation conformity purposes. To the extent the petition seeks review of the Adequacy Finding itself, the petition is both timely and properly venued.

However, as discussed, infra at Sections I and II hereof, to the extent it is challenging EPA's rules for making conformity determinations (codified at 40 C.F.R. § 93.118), EPA's rules regarding the siting of air monitors (codified at 40 C.F.R. Pt 58), or its rules regarding the manner and means by which an area may demonstrate its attainment of the national ambient air quality standard for $PM_{2.5}$ (codified at 40 C.F.R. Pt 50 and 51), this Court lacks jurisdiction. Clean Air Act section 307(b)(1) plainly required that such challenges to rules of nationwide effect be brought within 60 days of their promulgation and then only in the United States Court of Appeals for the District of Columbia.

III. Agency Decision Appealed From. Petitioners challenge the portion of EPA's May 6, 2008, Adequacy Finding in which the Agency determined that the $PM_{2.5}$ Baseline Budgets in the South Coast SIP Submittal are adequate for transportation conformity purposes. ER-1-20. Notice of the Adequacy Finding was published in the Federal Register on May 15, 2008. Adequacy Status of Motor Vehicle Budgets in Submitted South Coast 8-Hour Ozone and $PM_{2.5}$ Attainment and Reasonable Further Progress Plans for Transportation Conformity Purposes; California, 73 Fed. Reg. 28,110 (May 15, 2008) (corrected at 73 Fed. Reg. 34,837 (June 18, 2008)). Petitioners initiated this matter by filing a Petition for Review of the Adequacy Finding on May 30, 2008.

STATEMENT OF THE ISSUES

1. Whether Petitioners' argument that, before finding that the Baseline Budgets were adequate for transportation conformity purposes pursuant to 40 C.F.R. § 93.118(e)(4), EPA was required to determine that the State Implementation Plan of which it is a part will achieve attainment of the national ambient air quality standard for $PM_{2.5}$ within all portions of the South Coast, is barred as an untimely challenge to the 1997 and 2004 Conformity Rules and beyond this Court's jurisdiction under CAA section 307(b)(1), given that 40 C.F.R. § 93.118(e)(4) contains no such requirement.

2. Whether Petitioners' argument that EPA must conclude that an MVEB and the SIP submittal in which the MVEB is contained provide for monitoring and attainment in Middle Scale or Microscale areas within 300 meters of highways prior to finding the MVEB adequate for transportation conformity purposes is barred as untimely and in the wrong forum under CAA section 307(b)(1) because neither the 1997 NAAQS Rules nor the 1997 and 2006 Monitoring Rules require such monitoring or demonstrations.

3. Whether EPA acted reasonably when it determined that the $PM_{2.5}$ Baseline Budgets in the South Coast SIP Submittal satisfy the six criteria set forth in 40 C.F.R. § 93.118(e)(4) for determining such budgets to be adequate for transportation conformity purposes.

STATEMENT OF THE CASE

Under the Clean Air Act, 42 U.S.C. §§ 7401-7671q, each State must develop a plan or plans to bring all areas within the State into compliance, and ultimately maintain compliance, with federally-established national ambient air quality standards ("NAAQS") for identified pollutants such as, in this case, fine particulate matter ("$PM_{2.5}$"). These plans, known as "State Implementation Plans," or "SIPs," describe the steps the areas will take to attain and maintain a NAAQS, and they contain, among other things, a motor vehicle emissions budget ("MVEB") that represents the total allowable emissions from motor vehicles expected to be emitted during the plan years consistent with the goals of attaining and maintaining the NAAQS. SIPs must be submitted to and approved by EPA before they become effective as a matter of federal law, a process that can take a number of months or years.

The Clean Air Act also contains transportation conformity provisions that generally prohibit federal agencies from funding or approving transportation plans, programs or projects unless the government first finds that they "conform to"—i.e., are consistent with—the purposes of the SIP to eliminate or reduce the severity and number of NAAQS violations. Generally, a project conforms to a SIP if it is included in a transportation plan and program that is consistent with emissions levels that are included in that SIP's motor vehicle emissions budget. Because SIP

approval can take considerable time, and because conformity determinations based on a SIP's MVEB are generally prerequisite to essential federal funding of transportation activities, EPA in 1997 and again in 2004 promulgated rules to allow "adequacy findings." These findings essentially are preliminary determinations by EPA, based on a cursory review of the MVEB in a pending SIP submittal, that the MVEB is consistent with the SIP's ultimate purpose—whether that purpose is making reasonable further progress toward attainment, demonstrating attainment, or demonstrating maintenance of a NAAQS once attained—so that the MVEB may be used as the basis for transportation conformity determinations even before the SIP is finally approved by EPA.

Petitioners here challenge EPA's Adequacy Finding for one of two sets of MVEBs in the proposed State Implementation Plan for $PM_{2.5}$ and ozone in the South Coast non-attainment area.[1] ER-1-20. In making this determination, the Agency evaluated whether the MVEBs satisfied the six criteria for adequacy promulgated in EPA's 1997 Conformity Rule and codified at 40 C.F.R. § 93.118(e)(4).

As required by EPA's 2004 Conformity Rule, EPA's adequacy review

[1] The South Coast non-attainment area comprises the Los Angeles-South Coast Air Basin, which includes Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and Western Riverside County. 40 C.F.R. § 81.305.

comprised a cursory review of the two sets of MVEBs, the demonstration documents on which they were based, and other pertinent portions of the scientifically complex, 2,600-page SIP Submittal and related State materials. Based upon this review, EPA determined, inter alia, that the first set of MVEBs—based on the SIP Submittal's Modeled Demonstration of "reasonable further progress" toward attainment and already-adopted emission control measures—or "Baseline Budgets," did satisfy those six criteria. EPA also found, however, that the second set of MVEBs—based on the SIP Submittal's attainment demonstration and unadopted control measures—or "SIP-based Budgets," did not satisfy the adequacy criteria. The Agency therefore issued an adequacy finding that the reasonable-further-progress-based Baseline Budgets were adequate for transportation conformity purposes, but the SIP-based Budgets were not. ER-1-20.

In this matter, Petitioners Natural Resources Defense Council, Endangered Habitats League, East Yard Communities for Environmental Justice, and the Coalition for a Safe Environment (collectively "NRDC") challenge the portion of the Adequacy Finding in which EPA found that the Baseline Budgets are adequate for transportation conformity purposes,[2] arguing that EPA cannot make such

[2] NRDC challenges only the portion of the Adequacy Finding in which EPA determined that the $PM_{2.5}$ Baseline Budgets are adequate for transportation conformity purposes. NRDC is not challenging any ozone-related portions of the Adequacy Finding or the Agency's determination that the $PM_{2.5}$ SIP-based Budgets are not adequate for transportation conformity purposes.

adequacy findings without first finding that the SIP submittals in which MVEBs are contained themselves demonstrate attainment of the NAAQS within 300 meters of highways. There is, however, no requirement in EPA's regulations that attainment be demonstrated within 300 meters of highways.

Moreover, NRDC's argument that MVEBs must in all cases be consistent with attainment is based on repeated and highly misleading redacted quotations from EPA's regulatory text and preambles which erroneously suggest to the Court that MVEBs must in all cases be consistent with CAA attainment requirements, rather than the separate reasonable further progress requirements applicable here. NRDC's argument is further founded on collateral attacks of rules that have long been established, and that are not in any event within the jurisdiction of this Court to review. Moreover, NRDC's Petition fails to articulate a bona fide challenge to the portion of the Adequacy Finding at issue, and seeks relief—vacatur of the Adequacy Finding and an order requiring EPA to determine whether the SIP Submittal will achieve NAAQS attainment in all portions of the South Coast before reaching a new adequacy finding—that goes far beyond the scope of any relief this Court has jurisdiction to provide.

NRDC's opening brief is little more than a direct challenge to the Conformity Rules EPA promulgated in 1997 and 2004, in which EPA delineated, respectively, the six criteria MVEBs must satisfy in order to be deemed adequate for

transportation conformity purposes and the 90-day administrative process for reaching such determinations. However, the D.C. Circuit resolved challenges to those long-established rules in Environmental Defense Fund v. EPA, 167 F.3d 641 (D.C. Cir. 1999), and Environmental Defense v. EPA, 467 F.3d 1329 (D.C. Cir. 2006), and this Court lacks jurisdiction under 42 U.S.C. § 7607(b)(1) to entertain the challenges mounted here.

Based on NRDC's Statement of the Facts, one also might think this case involves a challenge to EPA's long-established 1997 and 2006 Monitoring Rules, which specify what $PM_{2.5}$ monitoring States must conduct and how data from such monitoring will be used to determine whether the NAAQS are met. Contrary to NRDC's allegations, these long-established rules do not require States to demonstrate attainment of the $PM_{2.5}$ NAAQS using data collected within 300 meters of dominating $PM_{2.5}$ emission sources such as highways, and this Court lacks jurisdiction to entertain challenges averring a contrary requirement.

At first blush, NRDC's arguments are puzzling in light of the clear and long-standing monitor siting and attainment demonstration requirements for the national $PM_{2.5}$ program. Upon closer examination, they reflect a fundamental disagreement with EPA regarding the manner in which $PM_{2.5}$ should be regulated in the United States. As a member of the public, NRDC is free to administratively petition EPA to adopt an entirely different $PM_{2.5}$ program that requires attainment demonstrations

for the annual NAAQS based on monitors placed in smaller, non-homogeneous Microscale or Middle Scale areas in the vicinity of highways. NRDC cannot, however, achieve that end by attempting to challenge the regulatory regime established years ago and over which this Court lacks jurisdiction pursuant to 42 U.S.C. § 7607(b)(1).

The only issue properly before this Court is whether EPA acted reasonably when it determined that the Baseline Budgets from the South Coast SIP Submittal satisfy the six adequacy criteria set forth in 40 C.F.R. § 93.118(e)(4) and therefore are adequate for transportation conformity purposes. The Adequacy Finding itself documents that EPA conducted the required review of the Baseline Budgets and pertinent portions of the SIP Submittal and related State materials in full compliance with its long-standing transportation conformity rules, and articulated a reasonable factual basis and rationale for concluding that each criterion was satisfied. The Court therefore should uphold the challenged portions of the Adequacy Finding.

STATEMENT OF THE FACTS

I. THE CLEAN AIR ACT AND AIRBORNE FINE PARTICULATE MATTER

The Clean Air Act establishes, inter alia, a comprehensive national program to protect public health and welfare from the harmful effects of exposure to a series of ubiquitous air pollutants. The relevant program elements for purposes of this case are: annual and 24-hour NAAQS, numeric national ambient air quality standards that specify the concentration of pollutants that cannot be exceeded in the ambient air; State implementation plans ("SIPs") that establish how States in which NAAQS are exceeded will come into attainment by statutory deadlines; the federal transportation conformity program that, inter alia, ensures that States do not approve and fund transportation activities that would delay or prevent attainment of an exceeded NAAQS, and MVEBs within the SIPs that specify what quantity of a NAAQS-regulated pollutant can be emitted by motor vehicles during specified years.

A. Clean Air Act National Ambient Air Quality Standards

Clean Air Act section 108 requires EPA to identify and list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and whose "presence . . . in the ambient air results from numerous or diverse mobile or stationary sources." EPA is then required to issue "air quality criteria" reflecting the latest scientific knowledge regarding "all identifiable effects on public health or

welfare" that may result from a given pollutant's presence in the ambient air. 42 U.S.C. § 7408. Section 109 directs EPA to propose and promulgate "primary" and "secondary" NAAQS based on those air quality criteria. Primary NAAQS are standards "the attainment and maintenance of which . . . allowing an adequate margin of safety, are requisite to protect the public health," while secondary NAAQS protect public welfare. Id. §§ 7409(b)(1-2), 7602(h).

EPA, with input from the States, determines what areas are not in attainment, and subsequently publishes a list in the Federal Register designating them as non-attainment areas. Id. § 7407(d)(1)(A), (B). PM2.5 non-attainment areas must come into attainment "as expeditiously as practicable," but no later than 10 years from the date they were designated. Id. § 7502(a)(2)(B).

1. The 1997 and 2006 $PM_{2.5}$ NAAQS

Fine particles in the atmosphere measuring less than 2.5 microns in diameter, and comprising a complex mixture of materials, including sulfate, nitrate, ammonium, elemental carbon, organic compounds, and inorganic material, are referred to as "$PM_{2.5}$". EPA established the first $PM_{2.5}$ NAAQS in 1997 based on analyses of numerous epidemiological studies[3] that examined the relationship between average, community-wide concentrations of $PM_{2.5}$ and adverse health

[3] An epidemiological study examines patterns of disease in human populations under real-world conditions.

events such as asthma attacks and premature deaths. National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,652, 38,654 (July 18, 1997) ("1997 NAAQS Rule"). EPA established the annual NAAQS at 15 $\mu g/m^3$, 40 C.F.R. § 50.7(a), a level slightly below the average, community-wide $PM_{2.5}$ concentrations reliably associated with adverse health effects in those studies, with the goal of "reduc[ing] aggregate population risk from both long- and short-term exposures by lowering the broad distribution of $PM_{2.5}$ concentrations across the community." 62 Fed. Reg. at 38,671/2; 40 C.F.R. pt 58, App. D, § 2.8.1.2.3 (1997). The much higher 24-hour NAAQS was set at 65 $\mu g/m^3$ to protect sensitive populations against short-term exposure to high levels of $PM_{2.5}$. 40 C.F.R. § 50.7(a); 62 Fed. Reg. at 38,668/2-3.

While both the annual and 24-hour NAAQS must be attained, the annual standard is generally said to be "controlling" because emission control measures that reduce $PM_{2.5}$ below that level should enable areas to attain the 24-hour NAAQS. See 40 C.F.R. Pt 58, App. D, § 2.8.1.2.3 (1997); 71 Fed. Reg. 61,144, 61,153/2 (Oct. 17, 2006) ("[T]he Agency set the annual standard to be the 'generally controlling' standard for lowering both short- and long-term $PM_{2.5}$ concentrations."), 61,265/1. EPA later designated $PM_{2.5}$ NAAQS non-attainment areas in 40 C.F.R. Pt 81, App. A, subch. C. See 40 C.F.R. § 81.305. The South Coast was designated as a non-attainment area for both the annual and the 24-hour

$PM_{2.5}$ NAAQS.

EPA promulgated a second $PM_{2.5}$ NAAQS Rule in 2006 that retained the existing annual standard, but reduced the 24-hour standard from 65 to 35$\mu g/m^3$. See 40 C.F.R. § 50.13; National Ambient Air Quality Standards for Particulate Matter; Final Rule, 71 Fed. Reg. 61,144, 61,224 (Oct. 17, 2006) ("2006 NAAQS Rule"). The South Coast SIP Submittal and related MVEBs discussed in this case were required in response to the 1997 $PM_{2.5}$ NAAQS, and not the 2006 $PM_{2.5}$ NAAQS. A notice designating non-attainment areas for the 2006 NAAQS was signed on December 22, 2008, but has not been published yet in the federal Register pursuant to 42 U.S.C. § 7407(d)(1)(A), (B). The 2006 NAAQS Rule was remanded to EPA for further consideration and explanation on February 24, 2009, in Am. Farm Bureau Fed. and Nat'l Park Prod. Council v. EPA, __ F.3d __, 2009 WL 437050 (Feb. 24, 2009 D.C. Cir.).

2. Determining Attainment of the 1997 $PM_{2.5}$ NAAQS

The 1997 NAAQS specifies that attainment is to be determined in accordance with 40 C.F.R. Pt 58, App. N. 40 C.F.R. § 90.7(b), (c). The provisions of Appendix N in turn refer to 40 C.F.R. Pt 58, App. D, which governs the placement of monitors to be used for comparison with the $PM_{2.5}$ NAAQS. Pt 50, App. N, §§ 1, 2.4(a) ("Section 58.14 . . . and section 2.8 of appendix D of 40 CFR part 58, specify which monitors are eligible for making comparisons with the PM

standards."), 4.1, 4.2 (2006) (emphasis added).

Appendix D was restructured and amended by the 1997 and 2006 Monitoring Rules, which together imposed $PM_{2.5}$-related requirements to ensure that States place monitors in a manner that meets the intended level of protection of public health of the NAAQS.[4] States are required to place and operate a minimum number of $PM_{2.5}$ monitors at "Neighborhood Scale" sites and use data collected there to determine attainment of the annual NAAQS. 40 C.F.R. Pt 50, App. N, § 2.4(a) (1997); id. Pt 58, App. D, § 2.8.1.2.2 (1997); id. Pt 50, App. N, § 2.0(a) (2006); id. § 58.30 (2006); id. Pt 58, App. D, § 4.7.1(b-c) (2006). Neighborhood Scale sites are located within half-kilometer to several-kilometer areas that have homogeneous $PM_{2.5}$ concentrations, and often represent living and working conditions comparable to those in the areas where data was collected for the epidemiology studies on which the NAAQS were based.[5] 40 C.F.R. Pt 58, App. D, §§ 1.2(b)(3), 4.7.1(c)(3) (2006) (definitions of Neighborhood Scale); see id. 40 C.F.R. Pt 58, App. D, §

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[4] Revised Requirements for Designation of Reference and Equivalent Methods for $PM_{2.5}$ and Ambient Air Quality Surveillance for Particulate Matter; Final Rule, 62 Fed. Reg. 38,764 (July 18, 1997) ("1997 Monitoring Rule"); Revisions to Ambient Air Monitoring Regulations; Final Rule, 71 Fed. Reg. 61,236 (Oct. 17, 2006) ("2006 Monitoring Rule").

[5] See 40 C.F.R. Pt 58, App. D, § 4.7.1(c)(3):
> Neighborhood Scale—Measurements in this category would represent conditions throughout some reasonably homogeneous urban sub-region with dimensions of a few kilometers . . . Homogeneity refers to the particulate matter concentrations. . . .

2.8.0.5 (1997) (same); 62 Fed. Reg. at 38,767/3-768/1.

Data collected from Microscale and Middle Scale sites[6]—smaller areas which may be located in the vicinity of traffic corridors—are eligible for use only to determine attainment of the 24-hour NAAQS. 40 C.F.R. § 58.30(a). Only in cases where an EPA Regional Administrator specifically determines that certain Microscale or Middle Scale monitoring sites collectively identify a larger region of localized high ambient $PM_{2.5}$ concentrations, may data from such sites be used to determine attainment of the annual $PM_{2.5}$ NAAQS. 40 C.F.R. § 58.30(a)(2); see id. Pt 50, App. N, § 2.0(a) (2006); id. Pt 58, App. D, §§ 4.7.1(c)(1), (2) (definitions of Middle Scale and Microscale), 4.7.5 (2006). See also id. App. D, §§ 2.8.1.2.2, 2.8.1.2.3, 2.8.1.3, 2.8.1.3.7 (1997); 62 Fed. Reg. at 38,780/1-2.

Under long-standing regulations, States are not required to place any national air network monitors in Microscale or Middle Scale areas. See 71 Fed. Reg. at

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[6] Microscale—This scale would typify areas such as . . . traffic corridors where the general public would be exposed to maximum concentrations from mobile sources. . . .
Middle Scale—Much of the measurement of short-term public exposure . . . for fine particulate, . . . is on the neighborhood scale. People . . . living near major roadways, encounter particles that would be adequately characterized by measurements of this spatial scale.

40 C.F.R. Pt 58, App. D, §§ 2.8.0.3 (emphasis added), 2.8.0.4 (emphasis added) (1997). See also 40 C.F.R. Pt 58, App. D, § 4.6(b)(2), (3) (2006) (same); see id. § 2.8.0.2. Microscale and Middle Scale areas range from 3 to 100 meters, and from 100 to 500 meters, respectively. 40 C.F.R. Pt 58, App. D, § 1.2(b)(1-2) (2006).

61,164. Indeed, because of this, the South Coast has no monitors located in Microscale or Middle Scale sites in the vicinity of highways. See Pet. Br. at 22-23.

3. State Implementation Plans

Non-attainment areas must develop State Implementation Plans that specify how they will come into NAAQS attainment by the statutory deadline. Plans for the 1997 $PM_{2.5}$ NAAQS include, inter alia: (1) an inventory of pollutant emissions during the 2002 baseline year; (2) a set of emissions limits and control measures that the state, in its discretion, has chosen to achieve necessary emission reductions; (3) an attainment demonstration that inter alia, establishes "target" emission levels for future years that will enable the region to reach attainment and uses the state-selected emission limits and control measures to establish that the region will attain the NAAQS by the statutory deadline; and (4) a reasonable further progress ("RFP") demonstration that establishes that emissions will be reduced throughout the non-attainment period such that the region shows "generally linear progress" from the 2002 baseline level to attainment in the deadline year. 42 U.S.C. §§ 7410, 7501(1), 7502(c); 23 U.S.C. § 134(f)(2); 40 C.F.R. §§ 51.1007 (attainment demonstration), 51.1008(c) (2002 baseline year), 51.1009(a), (c)(2), (d) (RFP demonstration). See also Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1137 (D.C. Cir. 1980); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 470-71 (2001); Union Elec. Co. v. EPA, 427 U.S. 246, 266 (1976).

For each SIP, the State allocates the allowable emissions for each year between mobile sources (e.g., motor vehicles) and non-mobile sources (e.g., factories and power plants). The numeric total of the allowable emissions from mobile sources that are then allocated to motor vehicles comprises the SIP's Motor Vehicle Emissions Budget ("MVEB"). 40 C.F.R. § 93.101 (*Motor vehicle emissions budget*). MVEBs therefore are primarily numeric limits that indicate the tons of pollutant motor vehicles may emit during relevant years, including the RFP milestone years, and are typically presented in chart form. The South Coast's $PM_{2.5}$ SIP therefore must include, inter alia: (1) an RFP plan demonstrating that $PM_{2.5}$ levels in the milestone years 2009 and 2012 reflect "generally linear progress" from the 2002 baseline to the $PM_{2.5}$ levels that will constitute attainment by the regulatory deadline; and (2) RFP MVEBs that specify the total $PM_{2.5}$ emissions allocated to motor vehicles in those milestone years. 40 C.F.R. § 51.1009(c)(2).

B. Transportation Conformity Program Requirements

The Clean Air Act's transportation conformity provisions prohibit the Federal Highway Administration and the Federal Transit Administration (with certain exceptions not relevant to this case) from funding or approving transportation activities in non-attainment areas unless the activities "conform" to the applicable SIP. See 42 U.S.C. § 7506(c)(1), (2); 69 Fed. Reg. 40,004, 40,043 (July 1, 2004). Proposed transportation plans, programs and projects "conform" to the applicable

SIP if: (1) they conform to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the NAAQS; (2) they will not cause or contribute to a new violation of the NAAQS or increase the frequency or severity of any existing NAAQS violation; and (3) they will not delay timely attainment of the NAAQS or any required milestone. See 40 C.F.R. § 93.118; 42 U.S.C. § 7506(c)(1).

The primary component of the conformity determination is a regional emissions analysis comparing whether the transportation system envisioned by the plan and program is consistent **with** the emissions levels in a motor vehicle emissions budget that has been found adequate or approved by EPA. Additionally, for transportation projects that will cause a significant increase in diesel emissions (e.g., highway expansion), a "hot spot analysis" is a required part of this conformity determination. 71 Fed. Reg. at 12,468/1, 12,469/2-3, 12,472/2-473/3 (Mar. 10, 2006); 40 C.F.R. § 93.123(b). During a hot spot analysis, the State agency estimates the increase in pollutant concentrations in the vicinity of the project, and compares those concentrations to the NAAQS to ensure that the project will not delay or jeopardize NAAQS attainment there. See 71 Fed. Reg. at 12,469/3.

Urban areas with a population over 50,000 seeking federal funding and assistance for regional and local highway projects must follow a comprehensive transportation planning process implemented by federal and State transportation

agencies and the local metropolitan planning organization ("MPO"). 23 U.S.C. § 134; 49 U.S.C. § 5303(c)(1). Two primary components of that process are: (1) a 20-year regional transportation plan ("RTP") that identifies regional transportation needs, develops an integrated transportation system to address them, and assesses the capital investments necessary to maintain, construct, and operate existing and future roadways and transit facilities; and (2) a transportation improvement program ("TIP") which identifies RTP projects that the MPO would like to implement during the next four years. 23 U.S.C. § 134(g),(h); 49 U.S.C. §§ 5303(f), 5304(b); 23 C.F.R. § 450.218. Because most States rely on federal funding for major transportation projects, the South Coast and most other heavily-populated non-attainment areas follow this process.

C. The MVEB Adequacy Process

The MVEB adequacy finding process was established to enable States to make conformity determinations for transportation projects while EPA is conducting its lengthy reviews of pending SIP submittals. Transportation Conformity Rule Amendments: Flexibility and Streamlining, 62 Fed. Reg. 43,780 (Aug. 15, 1997) ("1997 Conformity Rule"); Transportation Conformity Rule Amendments for the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule

Changes, 69 Fed. Reg. at 40,005, 40,038, 40,040-41 ("2004 Conformity Rule"); Sierra Club v. EPA, 315 F.3d 1295, 1300-01 (11th Cir. 2002).

Absent such a process, transportation projects would, in many instances, soon come to a standstill while the region's SIP submittal was being reviewed. Thus, EPA established the adequacy program as an informal, 90-day administrative process based on a "cursory review" of the MVEBs in pending SIP submittals to determine whether they satisfy six adequacy criteria set forth at 40 C.F.R. § 93.118(e)(4). See 62 Fed. Reg. at 43,780, 43,782; 69 Fed. Reg. at 40,003, 40,040-41, 40,046.

MVEBs that EPA determines satisfy all six criteria are deemed adequate for transportation conformity purposes, and State and federal agencies must base subsequent conformity determinations on them. 40 C.F.R. §§ 93.118(e)(3)-(4); 62 Fed. Reg. at 43,781-82; 69 Fed. Reg. at 40,040, 40,042. For the purposes of this case, the most critical of these six criteria is the fourth criterion, set forth at 40 C.F.R. § 93.118(e)(4)(iv), which requires EPA to determine whether "[t]he motor vehicle emissions budget(s), when considered together with all other emissions sources is consistent with applicable requirements for reasonable further progress, attainment, or maintenance(whichever is relevant to the given implementation plan submission)[.]" (emphasis added). With respect to reasonable further progress MVEBs, this criterion requires only a cursory review of whether the emissions

levels identified in the MVEBs, if achieved, would result in reasonable further progress towards emissions levels that would result in achievement of the NAAQS by the area's attainment date. See 62 Fed. Reg. at 43,782.

An adequacy finding is not EPA's final word on an MVEB. Even an MVEB deemed adequate may be disapproved later if EPA's final review of the SIP submittal in which the MVEB was submitted so requires. See 40 C.F.R. § 93.118(e)(3), (f)(1)(vi); 62 Fed. Reg. at 43,782 ("EPA's adequacy review should not be used to prejudge EPA's ultimate approval or disapproval of the SIP."); 69 Fed. Reg. at 40,040-41, 40,044-45. Prior adequacy findings also are mooted and have no legal effect once EPA approves a pending SIP submittal or disapproves it without a protective finding.[7] Sierra Club v. EPA, 315 F.3d at 1302; see 40 C.F.R. §§ 93.118(a), 93.120(a)(2).

D. Transportation Project Approval in the South Coast

A conformity determination is a necessary, but not a sufficient, prerequisite for approving a transportation project contained in the South Coast TIP. Before a transportation project is approved and implemented, Caltrans is required to perform an in-depth environmental impact assessment pursuant to both the National

[7] A protective finding is defined as a determination that a submitted SIP application contains control measures that satisfy the emissions reductions requirements relevant to the particular submission (e.g., RFP, maintenance or attainment). 40 C.F.R. § 93.101.

Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA"). 42 U.S.C. §§ 4321-4370f; Cal. Public Res. Code §§ 21000-21098. Both statutes require that all significant environmental impacts and means of ameliorating those impacts be fully investigated, and CEQA further requires that the project be modified to ameliorate them absent overriding concerns or other environmental benefits from the project that outweigh them. 40 C.F.R. §§ 1502.2, 1502.14; Cal. Public Res. Code, Ch. 2.6, §§ 21002, 21081; 14 Cal. Code Regs. §§ 15126.2, 15064; see Fairview Neighbors v. County of Ventura, 70 Cal. App. 4th 238, 243 (Ct. App. 1999); Nw Envtl Advocates, 460 F.3d at 1132-34. If CalTrans or the MPO cannot, or choose in their discretion not to, modify a project to ameliorate all significant environmental impacts, the project cannot be approved absent detailed agency findings regarding the overriding considerations outweighing the identified impacts. Fairview Neighbors, 70 Cal. App. 4th at 243-44.

II. THE SOUTH COAST'S PENDING $PM_{2.5}$ SUBMITTAL AND EPA'S RELATED MVEB ADEQUACY FINDING

A. The South Coast's $PM_{2.5}$ SIP Submittals

On November 28, 2007, the State of California submitted $PM_{2.5}$- and ozone-related revisions to the South Coast portion of the California SIP for other NAAQS-regulated pollutants ("2007 SIP Submittal"). ER-3, 379. The 2007 SIP Submittal contained, inter alia: (1) an emissions inventory for all $PM_{2.5}$ sources during the

2002 baseline year (ER-250); (2) an attainment demonstration that calculated annual target emissions levels for the South Coast and described state-selected control measures for attaining those targets (ER-191-205, 590, 564-88, 455-51); (3) an RFP Modeled Demonstration which established the $PM_{2.5}$ and $PM_{2.5}$ precursor emission levels for the 2009 and 2012 milestone years that would permit the South Coast to achieve generally linear progress towards $PM_{2.5}$ NAAQS attainment by the regulatory deadline (ER-589-91); and (4) a set of $PM_{2.5}$ MVEBs reflecting the allowable $PM_{2.5}$ emissions which the State chose to allocate to motor vehicles each year (ER-355). The Natural Resources Defense Council and a third party timely submitted public comments regarding the 2007 SIP Submittal. Id. 3, 11-18, 441-450.

After examining the MVEBs in the 2007 SIP Submittal, EPA informed the State that those MVEBs likely could not be found adequate because they were based on emission reductions attributable to control measures that the State had not yet adopted. ER-379, 396-98, 405. In response, CARB prepared two alternative sets of MVEBs that it proposed to substitute for the original set. Id. at 3. The first set, referred to as the SIP-based Budgets, are attainment budgets that reflect emissions reductions from general commitments to adopt control measures in the future. Id. at 3-4, 382-84. The second set, referred to as the Baseline Budgets, are reasonable

further progress budgets based on the SIP Submittals' RFP Modeled Demonstration and control measures the State had adopted by December 2006. Id. 3-4, 385-87.

The State submitted a set of amendments to the 2007 SIP Submittal on March 30, 2008, that included both the SIP-based Budgets and the Baseline Budgets.[8] ER-3. While the amendments substituted both new sets of budgets for the original MVEBs, the State requested that EPA first consider the adequacy of the lower SIP-based Budgets, and only consider the higher Baseline Budgets if it found the SIP-based Budgets unacceptable. Id. at 3. The amended version ("SIP Submittal") is still being reviewed by EPA.

B. EPA's Adequacy Review of the MVEBs in the SIP Submittal

On March 27, 2008, EPA announced that it would conduct an adequacy review of the Baseline Budgets and the SIP-based Budgets and requested public comments. Three public interest groups, including the Natural Resources Defense Council, submitted comments by the April 28, 2008, deadline. Id. 3, 19-20.

In accordance with its regulations, EPA performed a cursory review of the Baseline Budgets, the SIP-based Budgets, and pertinent portions of the scientifically complex, 2,600-page SIP Submittal and other State materials. See ER-3-20. Per 40 C.F.R. § 93.118(e)(4)(iv), EPA first reviewed the SIP-based

[8] The March 2008 amendments also included ozone-related changes to the 2007 SIP Submittal which are not addressed in this brief, as NRDC is not challenging the ozone-related portions of the Adequacy Finding. See Pet. Br. at 40.

Budgets in conjunction with the attainment demonstration to determine whether the SIP-based Budgets were consistent with the CAA's requirements for attainment. ER-16 (Response 7). EPA determined that the unadopted control measures the State proposed for achieving the $PM_{2.5}$ precursor emission targets were unacceptable on their face. However, EPA also concluded that the $PM_{2.5}$ precursor emissions attainment targets identified reasonable levels of emissions to achieve attainment. Id. at 6, 8, 16 (Response 7), 20.

Again per section 93.118(e)(e)(iv), EPA next performed a cursory review of the Baseline Budgets in conjunction with the SIP Submittal's RFP Modeled Demonstration to determine whether the Baseline Budgets were consistent with the CAA's requirements for reasonable further progress. ER-8-20. In addition, EPA reviewed the public comments submitted in response to its March 27, 2008, notice announcing its adequacy review of the Baseline and SIP-based Budgets, as well as its ongoing SIP review of the SIP Submittal (i.e., the original 2007 SIP Submittal as amended on March 30, 2008). ER-11-20. Finally, EPA also reviewed compilations of adequacy-related public comments submitted to the state, the State's responses thereto, and other State materials describing the 2007 SIP Submittal and amendments. ER-8; see 40 C.F.R. § 93.118(f).

EPA determined that the RFP Modeled Demonstration was valid, based on the fact that the $PM_{2.5}$ precursor emission targets for the 2009 and 2012 milestone

years showed generally linear progress towards attainment by the regulatory deadline. ER-6, 8, 20; see 40 C.F.R. § 51.1009(d) (an RFP Modeled Demonstration must show generally linear progress towards attainment). EPA also concluded that the Baseline Budgets were consistent with the RFP Modeled Demonstration, and therefore with the CAA's reasonable further progress requirements. ER-8, 19-20.

EPA ultimately determined that the Baseline Budgets satisfied all six of the adequacy criteria in 40 C.F.R. § 93.118(e)(4), but that the SIP-based Budgets did not, due solely to their reliance on unadopted control measures. ER-1, 3-20. EPA therefore issued a letter to the State of California on May 6, 2008, in which EPA found, inter alia, the Baseline Budgets adequate for transportation conformity purposes. EPA published notice of that determination and the Baseline Budgets in the Federal Register on May 15, 2008.[9] ER-1-24. State and federal agencies therefore must base future South Coast transportation conformity determinations on the Baseline Budgets until the SIP Submittal is approved or disapproved without a protective finding. See 40 C.F.R. § 93.118(e)(1); ER-1, 3.

[9] Adequacy Status of Motor Vehicle Budgets in Submitted South Coast 8-Hour Ozone and $PM_{2.5}$ Attainment and Reasonable Further Progress Plans for Transportation Conformity Purposes; California, 73 Fed. Reg. 28,110-112 (May 15, 2008) (corrected at 73 Fed. Reg. 34,837 (June 18, 2008)).

STANDARD OF REVIEW

The standard of review for this case is provided by the Administrative Procedure Act, which provides that a final agency action may not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Vigil v. Leavitt, 381 F.3d 826, 833 (9th Cir. 2004) (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-97 (2004), and Arizona v. Thomas, 824 F.2d 745, 748 (9th Cir. 1987)). This narrow, deferential standard presumes the validity of agency actions so long as "the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." Nw Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003), and Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983)).

Deference is strongly warranted where EPA's decision involves the evaluation of complex scientific issues and data within its technical expertise. Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. at 103; Nw Envtl Advocates v. Nat'l Marine Fisheries Serv. 460 F.3d 1125, 1133 (9th Cir. 2006) ("[W]e must 'be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency.'") (quoting Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004), and citing Anderson v.

Evans, 371 F.3d 475, 489 (9th Cir. 2004)); Appalachian Power Co. v. EPA, 135 F.3d 791, 801-02 (D.C. Cir. 1998) (Deference to EPA expertise is particularly warranted "when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act."). The courts also "[may not consider] matters outside of the administrative record, Love v. Thomas, 858 F.2d 1347, 1356 (9th Cir. 1988), and may not 'substitute [their] judgment for that of the agency.'" Nw Ecosystem Alliance, 475 F.3d at 1140 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)); see Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA, 499 F.3d 1108, 1117 (9th Cir. 2007) ("Considering evidence outside [the] record is inappropriate . . . because it 'inevitably leads the reviewing court to substitute its judgment for that of the agency.'") (citations omitted).

An agency's interpretation of its own regulations also "[is entitled to] substantial deference," and may not be overruled "unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [Agency's] intent at the time of the regulation's promulgation.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)); Fed. Express Corp. v. Holowecki, __ U.S. __, 128 S. Ct. 1147, 1155 (2008); Centr. Arizona Water Constr. Dist. v. EPA, 990 F.2d 1531, 1539 (9th Cir. 1993) (citations omitted). Such deference is particularly appropriate

when regulations "concern[] 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" Thomas Jefferson Univ., 512 U.S. at 512 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)); Central Arizona, 990 F.2d at 1539 (citations omitted).

SUMMARY OF THE ARGUMENT

While NRDC purports to challenge the portion of the Adequacy Finding in which EPA determined that the $PM_{2.5}$ Baseline Budgets in the South Coast's pending SIP Submittal are adequate for transportation conformity purposes pursuant to 40 C.F.R. § 93.118(e)(4), NRDC's opening brief primarily constitutes an untimely and improperly venued attack on the 1997 and 2004 Conformity Rules in which EPA promulgated the six criteria MVEBs must satisfy in order to be found adequate and the administrative process by which the Agency reaches adequacy findings. NRDC's arguments that EPA must determine in all cases whether the MVEBs at issue and the underlying SIP submittal are consistent with CAA attainment requirements (as opposed to reasonable further progress or maintenance requirements) directly contradict the 1997 and 2004 Conformity Rule provisions that promulgated the fourth adequacy criterion and structured the administrative adequacy process as a 90-day, cursory review of the MVEBs at issue and pertinent portions of the pending SIP submittal. Further, they are based upon misleadingly redacted regulatory and statutory quotations, including the fourth adequacy criterion itself. These arguments therefore are untimely and improperly venued in this Court, and should be dismissed pursuant to 42 U.S.C. § 9607(b)(1).

NRDC's additional argument that MVEBs cannot be found adequate unless they and the underlying SIP submittal will ensure attainment of the NAAQS within

300 meters of highways also is not properly before the Court pursuant to 42 U.S.C. § 9607(b)(1). EPA's long-established 1997 and 2006 Monitoring Rules do not require $PM_{2.5}$ monitoring in those areas, and only allow data collected there to be used to determine attainment of the annual $PM_{2.5}$ NAAQS under special circumstances not present in the South Coast. This argument also was waived as it is based largely on non-record materials in the Statement of Facts that are not properly before the Court, and was mentioned only in passing on one page of the Argument in NRDC's opening brief.

Finally, and most importantly, NRDC failed to demonstrate that EPA acted arbitrarily or capriciously when it determined that the $PM_{2.5}$ Baseline Budgets satisfied all six of the adequacy criteria at 40 C.F.R. § 93.118(e)(4) and therefore are adequate for transportation conformity purposes. NRDC does not even mention the first three or the fifth and sixth adequacy criteria in its opening brief, and offers no credible basis for disputing EPA's regulatory interpretation that the fourth adequacy criterion requires the $PM_{2.5}$ Baseline Budgets to be consistent with the CAA's reasonable further progress requirements. The challenged portion of the Adequacy Finding also establishes that EPA performed the cursory review of the Baseline Budgets and pertinent portions of the SIP Submittal required by the Conformity Rules, timely and fully responded to NRDC's adequacy-related public comments, and reached a reasoned conclusion that the Baseline Budgets were

facially consistent with the CAA's requirements for reasonable further progress. The timely and properly-venued arguments in NRDC's opening brief therefore should be denied on the merits.

ARGUMENT

I. NRDC ASSERTS AN UNTIMELY CHALLENGE TO THE 1997 AND 2004 CONFORMITY RULES IN THE WRONG FORUM

NRDC's primary challenge to the Adequacy Finding—that the CAA and EPA's implementing regulations require EPA to determine that SIP submittals demonstrate attainment of the $PM_{2.5}$ NAAQS before finding the MVEBs in them adequate for transportation conformity purposes, a requirement found nowhere in the statute or EPA's long-standing regulations—should be denied because it is effectively an untimely challenge brought in the wrong forum to EPA's 1997 and 2004 Conformity Rules.[10] Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1), expressly requires that challenges to EPA rules that are "nationally applicable" be filed in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days after their promulgation. See e.g., Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 581 (2007) (admonishing that a Fourth Circuit decision which implicitly invalidated EPA's 1980 CAA regulations governing prevention-of-significant-deterioration implicated CAA section 307(b), which limits such challenges when review could have been obtained in the D.C. Circuit within 60 days of the rulemaking).

[10] NRDC's substantive arguments regarding the sufficiency of the $PM_{2.5}$ attainment demonstration in the SIP Submittal also are not properly before this Court for the reasons discussed infra in Section II hereof.

EPA established the MVEB adequacy finding program in 1997 to facilitate the approval and funding of transportation projects during EPA's review of pending SIP submittals—so long as the projects are consistent with adequate MVEBs in the SIP Submittals. 62 Fed. Reg. at 43,781-82; 69 Fed. Reg. at 40,038-43; see Sierra Club v. EPA, 315 F.3d at 1300, 1301 ("[A] finding that an MVEB . . . is adequate . . . is a temporary determination designed to enable transportation planning to proceed while the submitted SIP is fully reviewed by EPA."). In order to minimize delay, EPA structured the MVEB adequacy finding process as an informal and "cursory" 90-day administrative review of MVEBs and pertinent portions of the region's pending SIP submittal and related State materials to ensure that they satisfy six criteria unique to that process.[11] See 62 Fed. Reg. at 43,783 ("[A]dequacy determinations are merely administrative applications of established criteria [in 40 C.F.R. § 93.118(e)(4)] to emissions budgets."); 69 Fed. Reg. at 40,046/1 ("EPA's adequacy review is a cursory review . . . to ensure that the minimum adequacy criteria are met"); 40 C.F.R. § 93.118(e)(4).

The six adequacy criteria in EPA's regulations were promulgated in the 1997 Conformity Rule, and are "minimum criteria" different from, and less stringent than,

[11] 69 Fed. Reg. at 40,004, 40,041 ("Adequacy reviews are carried out on an informal, case-by-case basis and apply existing criteria in the conformity rule (40 CFR 93.118(e)(4).") (citing the proposed original conformity rule at 61 Fed. Reg. 36,112 (July 9, 1995) and 1997 Conformity Rule, 62 Fed. Reg. at 43,780).

the criteria for approving SIP submittals. As explained in the preamble to the 1997 Conformity Rule, MVEBs are evaluated again during EPA's review of a pending SIP submittal, and may be disapproved at that time despite having been found adequate for transportation conformity purposes:

> EPA's 45-day adequacy review should not be used to prejudge EPA's ultimate approval or disapproval of the SIP. . . . EPA cannot ensure that a submitted SIP is consistent with RFP, attainment, or maintenance until EPA has completed its formal review process and the SIP has been approved or disapproved through notice-and-comment rulemaking. Although the minimum criteria for adequacy allow EPA to make a cursory review of the submitted motor vehicle emissions budget for conformity purposes, EPA recognizes that other elements must also be in the SIP for it to ultimately be approved. Therefore, a budget that is found adequate in the 45-day review period could later be disapproved when reviewed with the entire SIP submission.
>
> EPA will find a submitted motor vehicle emissions budget inadequate if the submitted budget does not meet the minimum criteria. However, the criteria included in the conformity rule are not intended to be a comprehensive definition of an adequate SIP for SIP approval purposes.

62 Fed. Reg. at 43,782; Sierra Club v. EPA, 315 F.3d at 1297-98, 1300 & n.5; see also 69 Fed. Reg. at 40,046 ("EPA's adequacy review is a cursory review of the SIP and motor vehicle emissions budgets to ensure that the minimum adequacy criteria are met before a submitted SIP is used in a conformity determination."); 40 C.F.R. § 93.118(e)(3), (f)(1)(vii); see also 61 Fed. Reg. 36,112, 36,116/1 (July 9, 1996) (Proposed 1997 Conformity Rule); 69 Fed. Reg. at 40,044-45. Moreover, once a SIP is approved, all subsequent transportation conformity determinations must be

based upon the approved SIP, and the adequacy finding has no further legal effect. 40 C.F.R. § 93.118(e); see Sierra Club v. EPA, 315 F.3d at 1302.

In the 2004 Conformity Rule, EPA promulgated regulations governing the adequacy finding process as well as other amendments to the adequacy regulation. EPA did not, however, reopen the adequacy criteria promulgated in 1997. See 69 Fed. Reg. at 40,038, 40,041, 40,046/3. Indeed, the D.C. Circuit has previously rejected as improper an attempt by others (represented there by Mr. Robert Yuhnke, also counsel for Petitioners in this case) to mount a belated challenge to the 1997 Conformity Rule. Envtl Def. 467 F.3d at 1333 ("The 2004 Rule made only minor changes to the 1997 regulation, which petitioners do not challenge. Instead, they seek review of the 1997 regulation itself, which they cannot now do."). Nowhere in the 1997 or 2004 Conformity Rules is EPA required to base an adequacy finding on an in-depth examination of the SIP submittal containing the MVEB at issue to determine whether the SIP submittal or the MVEBs actually would achieve attainment by the regulatory deadline.[12]

[12] Environmental Defense Fund v. EPA, 167 F.3d 641, discussed at pages 57-59 of NRDC's opening brief, does not support a contrary argument. There, the D.C. Circuit found unacceptable a 1997 Conformity Rule provision that automatically deemed MVEBs adequate for transportation conformity purposes if EPA did not act to reach an adequacy finding within 45 days after the SIP submittal containing those budgets was submitted. Id. at 650. Because EPA would not have made any adequacy finding at all for such MVEBs under the invalidated provision, either positive or negative, the D.C. Circuit held that States could not be sure whether projects that conformed to them would frustrate or delay NAAQS attainment. Id. at

Instead, as noted previously, NRDC's argument that such a requirement exists is based entirely on repeated and highly misleading redacted quotations from the pertinent regulation and preamble text. On page 43 of its brief, for instance, NRDC "quotes" from the preamble to the 1997 Conformity Rule: " '[I]f a SIP does not identify enough emissions reductions and the motor vehicle emissions budget does not provide for [] attainment, then there is no basis to claim that a transportation activity conforms within the meaning of [§ 7506(c)],' " NRDC Br. at 43 (quoting from 62 Fed. Reg. 43,796-97) (redacted as in NRDC's brief). The actual preamble text, however, contains tellingly omitted language: "[I]f a SIP does not identify enough emissions reductions and the motor vehicle emissions budget does not provide for RFP or attainment, then there is no basis to claim that a transportation activity conforms within the meaning of [§ 7506(c)]." 62 Fed. Reg. 43,796-97 (text redacted by NRDC emphasized). NRDC's redaction thus wrongly suggests to the reader a regulatory requirement that an MVEB must be found to be

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650-51. Contrary to NRDC's arguments, the D.C. Circuit did not hold that EPA must find that a SIP submittal will achieve attainment or reasonable further progress before finding an MVEB in that application adequate for transportation conformity purposes pursuant to 40 C.F.R. § 93.118(e)(4).

Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001), cited by NRDC at Pet. Br. 28 and 56-57 is inapposite. Hall addressed EPA's approval of a SIP submittal and the general requirements SIPs must fulfill for final approval. It did not involve an adequacy finding or the requirements MVEBs must satisfy in order to be found adequate for transportation conformity purposes while a related SIP submittal is being reviewed.

consistent with attainment before any adequacy finding may be made, when in fact the text only requires consistency with reasonable further progress *or* attainment, as appropriate for the type of plan under consideration.

To similar effect, on page 45 of its opening brief NRDC selectively quotes from the regulatory definition of the term "motor vehicle emissions budget" to leave a similar impression: " 'Motor Vehicle Emissions Budget is that portion of the total allowable emissions defined in the [SIP] . . . for the purpose of . . . demonstrating attainment . . . of the NAAQS . . . allocated to highway and transit vehicle use.' " Pet. Br. at 45 (quoting 40 C.F.R. § 93.101). With the pertinent redacted text restored, the regulation takes a very different meaning: "Motor Vehicle Emissions Budget is that portion of the total allowable emissions defined in the [SIP] . . . for the purpose of **meeting reasonable further progress milestones or** demonstrating attainment **or maintenance** of the NAAQS . . . allocated to highway and transit vehicle use." 40 C.F.R. § 93.101 (text redacted by NRDC emphasized).

Even in the few instances where NRDC acknowledges the existence of the regulatory language allowing a demonstration of MVEB consistency with reasonable further progress, it is misleading. Thus, for instance, on both pages 41 and 50 of its brief, NRDC avers that 40 C.F.R. § 93.118(e)(4)(iv) requires "a determination that the MVEBs, taken together with the other emission control measures in the SIP, will provide for reasonable further progress and attainment,"

NRDC Br. at 41 (emphasis added); NRDC Br. at 50 ("conformity rule requires that all the MVEBs in a submitted control strategy implementation plan revision must be 'consistent with applicable requirements for reasonable further progress [and] attainment") (bracketed text as it appears in NRDC's brief). In fact, however, the regulation uses the disjunctive "or," not the conjunctive "and" in relating RFP, attainment, and maintenance: an MVEB must be "consistent with applicable requirements for reasonable further progress, attainment, **or** maintenance (whichever is relevant to the given implementation plan submission) . . . ." 40 C.F.R. § 93.118(e)(4)(iv) (emphasis added).[13]

To the extent that NRDC is arguing that the CAA requires a demonstration that an MVEB is consistent with attainment before an adequacy finding can be made, and that EPA's regulations should have been so written, that is a regulatory challenge that could only have been brought in the D.C. Circuit within 60 days of the Conformity Rules' promulgation, pursuant to 42 U.S.C. § 7607(b)(1). The 60-day period within which the 1997 and 2004 Conformity Rules could be challenged expired long before NRDC initiated this matter. These arguments therefore should be dismissed or denied, leaving the Court to conduct the only inquiry properly

[13] NRDC takes this one step further on page 52, omitting even the brackets indicating that it has redacted text. Pet. Br. at 52 (misquoting 40 C.F.R. § 93.118(e)(4)(iv) as requiring that the interim MVEB be "'consistent with applicable requirements for attainment.' §93.118(e)(4)(iv).").

before it—whether the Adequacy Finding articulates a reasoned factual basis for EPA's determination that the Baseline Budgets satisfy each of the six adequacy criteria at 40 C.F.R. § 93.118(e)(4) based on a cursory review of those budgets and pertinent portions of the scientifically-complex, 2,600-page SIP Submittal and related State materials.

II. NRDC'S ATTAINMENT-RELATED ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT

NRDC's argument that EPA must first determine that the emissions allowed by MVEBs will provide for attainment within 300 meters of highways and implying that this may be done only by placing monitors at those locations—that is, at a Microscale or Middle Scale level—before the Agency can find them adequate for conformity purposes also is not properly before the Court, and therefore should be denied as well. Pet. Br. at 60. Like its challenges to the Conformity Rules, NRDC's argument that monitors must be placed and attainment must be shown at Microscale or Middle Scale level constitutes an untimely challenge, in the wrong forum, to EPA's long-established regulations governing monitoring and determinations of attainment with the $PM_{2.5}$ NAAQS.

The long-established 1997 and 2006 Monitoring Rules do not require States to conduct monitoring in Middle Scale or Microscale areas (e.g., within 300 meters

of highways) or in the vicinity of dominating local $PM_{2.5}$ sources (e.g., highways).[14] The Rules also do not allow States to use data collected there to determine attainment of the annual $PM_{2.5}$ NAAQS, except in certain limited circumstances not present in the South Coast. Consequently, arguments alleging that monitors must be sited within 300 meters of highways and the resulting data used to determine attainment of the annual NAAQS could only have been asserted in the D.C. Circuit within 60 days after those rules were promulgated, and so are not properly before this Court pursuant to 42 U.S.C. § 7607(b)(1).

A. NRDC'S Arguments Seeking Mandatory Monitoring and Determinations of Attainment of the Annual NAAQS within 300 Meters of Highways Contradict the Express Provisions of the 1997 and 2006 Monitoring Rules

The 1997 and 2006 Monitoring Rules impose minimum monitoring requirements and specify which monitors' data are to be compared to the annual and the 24-hour $PM_{2.5}$ NAAQS to determine whether those NAAQS have been

[14] Areas within 300 meters of highways fall squarely within the definitions of Microscale or Middle Scale, and squarely outside the definition of "Neighborhood Scale," which is the scale at which monitoring must be conducted and attainment demonstrated. Such areas are markedly smaller than the required several kilometers for Neighborhood Scale sites, and as NRDC points out, their $PM_{2.5}$ levels are dominated by highway-related emissions that vary significantly over short distances. See Pet. Br. at 14-21. These characteristics are hallmarks of Middle Scale or Microscale areas, which the 1997 and 2006 Monitoring Rules defined as smaller areas in the vicinity of traffic corridors where people live near roadways or where the public is exposed to maximum $PM_{2.5}$ concentrations from mobile sources, respectively. See supra, at __-__ [Fact section with definitions of these areas].

attained. To the extent NRDC seeks relief that is contradicted by those provisions, the Court may not entertain NRDC's claims pursuant to 42 U.S.C. § 7607(b)(1). This Court therefore may not entertain NRDC's arguments that EPA must find that SIP submittals demonstrate attainment of the $PM_{2.5}$ NAAQS within 300 meters of highways before finding MVEBs in those applications adequate for transportation conformity purposes.

1. The 1997 and 2006 Monitoring Rules Do Not Require Network Monitors to Collect $PM_{2.5}$ Attainment Data in Areas Within 300 Meters of Highways

The $PM_{2.5}$ NAAQS were promulgated in 1997 to protect the public on an average, community-wide basis,[15] and both the $PM_{2.5}$ levels to which the public could be exposed and the types of monitoring sites at which States could determine attainment were codified in the NAAQS and Monitoring Rules themselves. The annual and 24-hour NAAQS were set at 15 and 65 μg/m3, respectively, and States were instructed to determine attainment "in accordance with appendix N" of 40 C.F.R. Pt 50. See 40 C.F.R. § 50.7(b, c). Appendix N, in turn, requires States to

[15] Unlike some other NAAQS, the $PM_{2.5}$ NAAQS were "intended to reduce aggregate population risk from both annual and 24-hour exposures by lowering the broad distribution of $PM_{2.5}$ concentrations across the community" to a level slightly below that associated with adverse health effects in epidemiological studies of the relationship between adverse health effects and average, community-wide levels of particulate matter. 61 Fed. Reg. at 65,641/2; see 62 Fed. Reg. at 38,655-56, 38,665/2-3, 38,671/2, 38,672/2, 38,764; 40 C.F.R. § 50.7 (1997); id. Pt 58, App. D, § 2.8.1.2.3 (1997).

compare ambient $PM_{2.5}$ levels at those air network monitors the Monitoring Rules deem eligible for making comparisons with the NAAQS in order to determine whether they have been attained. 40 C.F.R. Pt 50, App. N, § 2.4(a) (1997).

Appendix D, which was significantly amended by the 1997 and 2006 Monitoring Rules, imposes detailed requirements for siting network monitors, including $PM_{2.5}$ monitors. To ensure that States collect $PM_{2.5}$ exposure data comparable to that used in the studies on which the NAAQS were based, the 1997 Monitoring Rule stated that monitors collecting data for comparison to the annual $PM_{2.5}$ NAAQS should be located in "neighborhood-scale community-oriented locations." 40 C.F.R. Pt 58, App. D, § 2.8.1.2.2.

> The most important spatial scales to effectively characterize the emissions of particulate matter from both mobile and stationary sources are the middle scales for PM_{10} and neighborhood scales for both PM_{10} and $PM_{2.5}$. . . . Most $PM_{2.5}$ monitoring in urban areas should be representative of a neighborhood scale.

Id. §§ 2.8.0.2 (emphasis added), 2.8.0.4 ("[M]uch of the measurement of short-term public exposure . . . for fine particulate, is on the neighborhood scale."). An exception was created for those cases where the EPA Regional Administrator specifically determines that Microscale or Middle Scale monitoring sites collectively represent "a larger region of localized high ambient $PM_{2.5}$ concentrations[.]" For the 24-hour $PM_{2.5}$ NAAQS, monitors are not required to be sited in Microscale or Middle Scale locations, although their data may be used to

determine attainment if such monitors do exist. 40 C.F.R. Pt 58, App. D, § 2.8.1.2.3; 62 Fed. Reg. at 38,767/3-68/1.

In the 2006 $PM_{2.5}$ Monitoring Rule, EPA retained the 1997 requirements for locating monitors and using their data for determining attainment of the annual $PM_{2.5}$ NAAQS. EPA also responded to public comments seeking mandatory monitoring in "microenvironment or hot spot locations," by expressly declining to require such monitoring for either the annual or the 24-hour $PM_{2.5}$ NAAQS.[16] Consequently, neither the 1997 nor the 2006 Monitoring Rule contains any requirement that States place $PM_{2.5}$ monitors in Middle Scale or Microscale areas (including those in the vicinity of

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[16] See 71 Fed. Reg. at 61,264 (2006):

> In the [proposed 2006 Monitoring Rule] EPA said it believed that the 1997 rule's design criteria remained appropriate for implementation of the proposed [annual] $PM_{2.5}$ NAAQS, . . . because these requirements effectively ensured that monitors are placed in locations that appropriately reflect the community-oriented area wide concentration levels used in the epidemiological studies that support the proposed lowering of the 24-hour $PM_{2.5}$ NAAQS. 71 FR 2742. The EPA continues to believe this . . . .
>
> . . . While an implication of the final monitoring rule provisions regarding siting of $PM_{2.5}$ monitors is that States may choose not to monitor microenvironment or middle scale locations where some people are exposed to 24-hour concentrations above the . . . 24-hour NAAQS, such a result remains consistent with the community-oriented area-wide level of protection on which the 24-hour $PM_{2.5}$ NAAQS is premised. Thus . . . it is not appropriate to specifically require any number of monitors to be placed in microenvironment or hot spot locations as one commenter suggested.

highways or other dominating local sources of $PM_{2.5}$), and both expressly limit the circumstances in which data from such monitors may be used to demonstrate attainment of the annual NAAQS.

The $PM_{2.5}$ Implementation Rule, which NRDC mentions in passing on page 53 of the opening brief, also does not support such an argument. 72 Fed. Reg. 20,586 (Apr. 25, 2007). While the Implementation Rule requires that states prepare attainment demonstrations through modeling that is "consistent with EPA's modeling guidance," the modeling guidance explains that future air quality should be estimated at current monitoring sites. Id.; see "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze," prepared by EPA's Office of Air Quality Planning and Standards, at 15 (April 2007). The guidance also recommends that States consider supplemental analyses for unmonitored areas which would support the modeled attainment test primarily by identifying large-scale NAAQS violations in areas with inadequate monitoring networks, and does not specifically require unmonitored area analyses for small-scale areas, such as areas within 300 meters of highways. Id., at 17.

2. NRDC's Arguments for Mandatory Monitoring and Attainment Demonstrations within 300 meters of Highways Are Untimely and Raised in the Wrong Forum

This Court lacks jurisdiction over NRDC's arguments regarding mandatory monitoring and attainment demonstrations within 300 meters of highways. Because the

1997 and 2006 Monitoring Rules affirmatively declined to impose any such requirement, NRDC was required to bring any such challenges within the statutory 60-day period for challenging those rules, and then only in the D.C. Circuit. See 42 U.S.C. § 7607(b)(1).

Indeed, a number of public interest groups, including several represented by NRDC counsel, Mr. Yuhnke, did submit timely petitions in the D.C. Circuit seeking to invalidate the 1997 and 2006 Monitoring Rules. Numerous challenges to the 1997 NAAQS Rule were consolidated and pursued as far as the U.S. Supreme Court in Whitman v. Am. Trucking Ass'ns, 531 U.S. at 464, 475–76.[17] Numerous timely petitions also were filed in the D.C. Circuit challenging the 2006 NAAQS Rule and Monitoring Rule, though petitioners ultimately chose not to press their challenges to the 2006 Monitoring Rule in their merits briefs. See Am. Farm Bureau Fed. and Nat'l Park Prod. Council v. EPA, __ F.3d __, 2009 WL 437050 (Feb. 24, 2009 D.C. Cir.) (Consolidated Case No. 06-1410). By not pursuing timely petitions for review of these rules resolving the monitor siting and attainment demonstration issues, NRDC waived its only permissible opportunity to argue that monitoring must be conducted and attainment demonstrations made within 300 meters of highways.

[17] Mr. Yuhnke argued on behalf of the environmental group and citizen petitioners in Case No. 97-1440, one of the many consolidated petitions challenging the 1997 NAAQS Rule. See Am. Trucking Assns v. EPA, 175 F.3d 1027, 1032 (D.C. Cir. 1999); Am. Trucking Assns v. EPA, 283 F.3d 355, 357 (D.C. Cir. 2002).

B. NRDC's Arguments for Mandatory Monitoring and Attainment within 300 Meters of Highways Also Are Based Primarily on Non-Record Evidence and Materials Outside the Scope of EPA Adequacy Reviews

Even if NRDC's claims were not affirmatively barred by 42 U.S.C. § 7607(b)(1), they should be stricken or denied because they are based primarily upon non-record materials this Court has long recognized it cannot consider when reviewing agency decisions, and scientific materials that do not fall within the scope of EPA adequacy reviews performed pursuant to the Conformity Rules. NRDC bases its arguments for monitoring and attainment demonstrations within 300 meters of highways in substantial measure on non-record summaries of scientific studies (Pet. Br. at 9-10), information posted to web sites at the time its opening brief was submitted (id. at 2, 4, 5, 23-24, n.1-2, n.4-5, n.10), the results of NRDC's own perusal of various Internet mapping sites and scientific materials (id. at 23-24, Table 3 & n.4-5), and scientific studies and other technical materials attached to the public comments NRDC submitted shortly before EPA reached the Adequacy Determination (id. At 9-10, 13-22, 25-27).

It is black letter law that an agency decision stands or falls on the decision itself and the administrative record before the agency at the time it was reached. With several narrow exceptions that are not applicable in this case, this Court may not consider materials outside of the administrative record, either in support of or in opposition to an agency decision. Love v. Thomas, 858 F.2d 1347, 1356 (9th Cir.

1988); see Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA, 499 F.3d 1108, 1117 (9th Cir. 2007) ("Considering evidence outside [the] record is inappropriate . . . because it 'inevitably leads the reviewing court to substitute its judgment for that of the agency.'") (quoting Asarco, Inc., 616 F.2d at 1160-61). NRDC's non-record materials and related arguments, as well as the 30-page amicus brief in this matter which contains no legal discussion whatsoever and merely summarizes the scientific results of epidemiological studies (Docket No. 25), were not before EPA at the time it reached the Adequacy Finding and therefore are not properly before the Court for purposes of reviewing the Adequacy Finding.

For the reasons explained supra at Section I, the epidemiological study results discussed at pages 9-10, 13-22, and 25-27 of the opening brief also were not properly before EPA as part of its adequacy review of the Baseline Budgets, and therefore do not constitute grounds for challenging the Adequacy Finding. An in-depth review of the technical results of epidemiology studies—particularly ones proffered to argue that EPA should require the South Coast to submit an annual NAAQS attainment demonstrations that is not required by the Monitoring Rules—simply does not fall within the ambit of the cursory, 90-day review of the Baseline Budgets and pertinent portions of the SIP Submittal required by the Conformity Rules. See supra at 34-37 hereof. As EPA indicated in its responses to NRDC's public comments, it did not consider those studies before it for adequacy

determination purposes and is considering them in the administrative proceeding to which they properly pertain—EPA's review of the SIP Submittal. See infra Section III.B hereof; ER-11-20.

Very little if anything is left of NRDC's argument for monitoring and attainment demonstrations within 300 meters of highways once the non-record and epidemiologic study materials and related discussion are removed from the Statement of the Facts, and it is mentioned again only in passing on page 60 of NRDC's opening brief. That argument therefore should be stricken or denied even if it were not outside the Court's jurisdiction pursuant to CAA section 307(b)(1).

III. EPA DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHEN DETERMINING THAT THE BASELINE BUDGETS ARE ADEQUATE FOR TRANSPORTATION CONFORMITY PURPOSES

Ultimately, NRDC's petition should be denied because NRDC has failed to show that EPA acted arbitrarily or capriciously in making the Adequacy Finding. NRDC only objects to EPA's determination that the Baseline Budgets satisfied the fourth adequacy criterion set forth at 40 C.F.R. § 93.118(e)(4)(iv),[18] and alleges that EPA failed to respond to NRDC's comments. This Court has long held that agency actions are presumed valid where "the agency considered the relevant factors and

[18] NRDC does not even mention the first three or the fifth and sixth adequacy criteria in its opening brief. NRDC therefore has waived the right to challenge the Adequacy Finding on those grounds, and the United States accordingly does not detail EPA's analysis of them in this brief.

articulated a rational connection between the facts found and the choices made." Nw Ecosystem Alliance, 475 F.3d at 1140 (citations omitted). EPA clearly did so with respect to compliance with the fourth adequacy criterion, and the second half of the Adequacy Finding comprises EPA's single-spaced, detailed responses to NRDC's adequacy-related public comments. The Adequacy Finding therefore should be upheld and NRDC's petition denied on the merits.

A. The Portion of the Adequacy Finding at Issue Is Presumptively Correct and Entitled to Substantial Deference

Even the most cursory review of the Adequacy Finding reveals that EPA did not act arbitrarily or capriciously when it determined that the Baseline Budgets satisfy the fourth adequacy criterion at 40 C.F.R. § 93.118(e)(4)(iv). It is black letter law that EPA has not reached a decision arbitrarily and capriciously so long as it "considered the relevant factors and articulated a rational connection between the facts found and the choices made." Nw Ecosystem Alliance, 475 F.3d at 1140 (citing Nat'l Ass'n of Home Builders, 340 F.3d at 841 and Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. at 105); see Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43-44 (1983); Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116, 131 (1985).

It is equally well established that EPA's decisions are presumptively correct, particularly those involving the evaluation of complex scientific issues and data within its technical expertise, and to reach them "the Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." NRDC v. Thomas, 805 F.2d at 432 n.37; Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. at 103; see Appalachian Power Co. v. EPA, 135 F.3d 791, 801-02 (D.C. Cir. 1998) ("[D]eference [is] traditionally given to agency expertise, particularly . . . with a statutory scheme as unwieldy and science-driven as the Clean Air Act.").

As expressly required by the 1997 and 2004 Conformity Rules, EPA determined that the Baseline Budgets satisfy the six adequacy criteria at 40 C.F.R. § 93.118(e)(4) by performing a cursory review of the Baseline Budgets, the RFP Modeled Demonstration and other selected portions of the 2,600-page, scientifically complex SIP Submittal and related State materials. See supra Section I. NRDC does not dispute that EPA conducted that "cursory review" or that EPA explained in the Adequacy Finding the administrative record documents the Agency considered, the review it conducted, and the grounds on which it concluded that the Baseline Budgets satisfy each of the six adequacy criteria. The Adequacy Finding therefore

is presumptively correct, entitled to substantial deference, and should be upheld even if NRDC or this Court might have reached a different conclusion with respect to the Baseline Budgets based on the same administrative record.

B. The Adequacy Finding Documents EPA's Reasoned Conclusion That the 2009 and 2012 Baseline Budgets Satisfy the Fourth Adequacy Criterion

NRDC cannot prevail on its argument that EPA erroneously determined that the Baseline MVEBs satisfy the fourth adequacy criterion. That criterion requires EPA to determine whether:

> The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment or maintenance (whichever is relevant to the given implementation plan submission).

40 C.F.R. § 93.118(e)(4)(iv). EPA performed the cursory review required by the 1997 and 2004 Conformity Rules, and reached a reasoned conclusion, clearly explained in the Adequacy Finding, that the fourth adequacy criterion was satisfied.

1. The Baseline Budgets, When Considered With All Other Emissions Sources, Are Consistent With the CAA's Requirements for Reasonable Further Progress

Contrary to NRDC's assertions, the CAA's attainment requirements are not the "applicable requirements" here because the Baseline Budgets are reasonable further progress ("RFP") budgets based on the SIP Submittal's RFP Modeled

Demonstration.[19] Instead, the CAA's reasonable further progress requirements are the "applicable requirements" for purposes of the fourth adequacy criterion in this case, and EPA accordingly reviewed the Baseline Budgets in conjunction with the SIP Submittal's RFP Modeled Demonstration (rather than in conjunction with the attainment demonstration) to determine whether they were consistent with the CAA's reasonable further progress requirements.[20]

Petitioners' argument that the "applicable requirements" for purposes of the fourth adequacy criterion are the CAA's attainment requirements, and not its RFP requirements, also fails to recognize the appropriate relationship between RFP and attainment. For purposes of the $PM_{2.5}$ NAAQS, RFP is defined as a level of emissions consistent with generally linear progress (i.e., reduction in emission levels) between the baseline year and the attainment year. 40 C.F.R. § 51.1009(d). Therefore, attainment is relevant to the CAA RFP requirements only to the extent that the Agency needs to identify the appropriate emission level to "target" in the attainment year. For adequacy determination purposes, EPA need only conclude that the SIP Submittal contains a "target" emissions level for the attainment year

[19] The Baseline Budgets are not attainment budgets, and are not based on the SIP Submittal's separate attainment demonstration. See ER-394 ("The . . . baseline budgets [do] not reflect the $PM_{2.5}$ . . . attainment demonstrations"), 432 (same).

[20] See ER-6, 8 ("this finding is based on [a] review of the State's RFP modeled demonstration"), 11 (Response 1), 18 (Response 12), 19-20 ("This finding is based [on] EPA's cursory review of the State's RFP modeled demonstration").

that would result in $PM_{2.5}$ NAAQS attainment, and then confirm that the emissions levels identified for the RFP milestone years do, in fact, represent a generally linear decrease in emissions level between that target level and the emissions level in the 2002 baseline year.

EPA conducted this very analysis to determine that the Baseline Budgets were consistent with the RFP Modeled Demonstration, which established the required "generally linear progress towards" achieving $PM_{2.5}$ attainment by 2015, and therefore satisfy the fourth adequacy criterion.[21] ER-8, 6 ("These 'baseline' budgets are consistent with the State's reasonable further progress demonstrations"), 19-20 (same). EPA first found that the RFP Modeled Demonstration "reasonably identifies $PM_{2.5}$ precursor attainment targets and thus establishes approximate levels of emissions reductions necessary to achieve generally linear progress for the 2009 and 2012 $PM_{2.5}$ RFP milestones, as required by EPA's $PM_{2.5}$ Implementation Rule." ER-8; id. at 20. EPA then determined that the figures in the Baseline Budgets were consistent with those target levels. See ER-6, 8, 19-20; see id. at 598-602, 589-91, 607-12. Finally, EPA determined that the Baseline Budgets were based on

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[21] The CAA's RFP requirement consists of "annual incremental reductions in emissions . . . for the purpose of ensuring attainment . . . by the applicable date," 42 U.S.C. § 7501(1), demonstrated by "generally linear progress" towards the attainment level as measured between specified milestone dates. 40 C.F.R. § 51.1009(a), (c), (d); see ER-20.

emissions reductions attributed to already-adopted control measures—and thus did not share the defect EPA identified in the 2007 SIP Submittal's MVEBs and in the SIP Submittal's attainment demonstration. ER-4, 6, 8,18; see id. at 379, 394, 398, 430, 432. Consequently, EPA's reasoned basis for concluding that the Baseline Budgets are "consistent with applicable requirements for reasonable further progress," and therefore satisfy the fourth adequacy criterion, was clearly explained in the Adequacy Finding and fully supported by the administrative record.

2. EPA's Interpretation of the Fourth Adequacy Criterion is Entitled to the Highest Deference

NRDC also cannot enlarge the scope of this Court's review by disputing EPA's interpretation of the fourth adequacy criterion—and therefore its application to the Baseline Budgets and RFP Modeled Demonstration. Federal agencies are entitled to the highest level of deference when they interpret regulations they have promulgated, and those interpretations must be upheld unless they are "plainly erroneous or inconsistent with the regulation." Fed. Express Corp., __ U.S. __, 128 S.Ct. at 1155 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997), and Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); Thomas Jefferson Univ., 512 U.S. at 512 (citations omitted); Central Arizona, 990 F.2d at 1539 (citing Citizens for Clean Air v. EPA, 959 F.2d 839, 844 (9th Cir. 1992), and Hawaiian Elec. Co. v. EPA, 723 F.2d 1440, 1447 (9th Cir. 1984)). Such heightened deference is particularly warranted when, as with the adequacy finding process, the disputed

regulations concern "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." Thomas Jefferson Univ., 512 U.S. at 512 (citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991)); Central Arizona, 990 F.2d at 1539 (citing Baltimore Gas & Elec. Co. v. NRDC, Inc., 462 U.S. at 103).

EPA's construction of 40 C.F.R. § 93.118(e)(4)(iv) to require that the RFP Baseline Budgets be consistent with the CAA's RFP requirements (and thus that the Baseline Budgets be reviewed in light of the RFP modeled demonstration rather than the attainment demonstration) was not plainly erroneous and is entirely consistent with the regulation's plain language: "The motor vehicle emissions budget(s) . . . [are] consistent with applicable requirements for reasonable further progress, attainment or maintenance (whichever is applicable to the given implementation plan submission)." (emphasis added). That construction therefore is entitled to the highest deference from this Court, which should disregard NRDC's attainment-related arguments as it addresses the only issue properly before it—whether the Adequacy Finding articulates a reasoned basis for EPA's determination that the Baseline Budgets satisfy the fourth adequacy criterion at 40 C.F.R. § 93.118(e)(4)(iv) based on a cursory review of those budgets, the RFP Modeled Demonstration, and pertinent portions of the SIP Submittal and other related State

materials.

C. EPA Timely and Properly Responded to NRDC's Public Comments

NRDC's argument that EPA failed to respond to its public comments also lacks merit. The Adequacy Finding clearly establishes that EPA received and responded to two separate sets of public comments: the first regarding the 2007 SIP Submittal that EPA received in response to its notice that the 2007 SIP Submittal would be reviewed as the South Coast's proposed $PM_{2.5}$ and ozone SIP, and the second regarding the Baseline and SIP-based Budgets that EPA received in response to its notice that it would be performing an adequacy finding for each while separately reviewing the SIP Submittal. ER 3-4. The second half of the Adequacy Finding comprises EPA's detailed responses to those comments, in which the Agency: carefully considered each comment before determining that the majority raised SIP review issues rather than adequacy finding issues; responded substantively to each adequacy finding issue; and stated in its response to each comment that raised SIP-related issues that the SIP-related issues would be considered during EPA's ongoing SIP review of the SIP Submittal. ER-11-20.

NRDC simply disagrees with EPA's responses, however disagreement with EPA's responses is not grounds for revoking the Adequacy Finding. See Pet. Br. At 4-5, 9-11, 13-22, 25, 41, 60 & n.13. NRDC also cannot credibly argue that EPA erred when it decided to respond to the SIP review issues raised in NRDC's comments during the Agency's separate review of the SIP Submittal. SIP review issues simply are not part of the adequacy finding process, and the in-depth analysis of the 2,600-page SIP Submittal and thousands of pages of detailed technical documents and epidemiology reports that would be required to respond to them falls far outside the 90-day "cursory review" required for adequacy findings. For this very reason, the 2006 Conformity Rule expressly stated that EPA does not review state-level public comments and responses that address SIP review issues as part of the adequacy finding process, even on rare occasions when EPA conducts its adequacy findings as part of its SIP review.[1/] The Adequacy Finding therefore does not suffer from any procedural defect related to EPA's responses to public comments, and therefore should be upheld.

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[22] See 69 Fed. Reg. at 40,040 ("EPA . . . will only review and consider any comments submitted through the state SIP process that are relevant to our adequacy finding. . . . EPA and the States have separate established processes for taking action on a SIP and responding to all comments, including comments that relate to other aspects of a submitted SIP, that are received through those individual processes."), 40,042 ("when we conduct adequacy reviews through the SIP approval process, we will review and consider only those comments . . . that are relevant to our adequacy finding[s]").

* * *

Since EPA clearly has "considered the relevant factors and articulated a rational connection between the facts found and the choices made" in the course of determining that the Baseline Budgets satisfy the fourth adequacy criterion,[23] Nw Ecosystem Alliance, 475 F.3d at 1140, and NRDC has failed to identify any comment-related procedural error in EPA's adequacy review, the portion of the Adequacy Finding at issue should be upheld and NRDC's petition denied on the merits.

CONCLUSION

For all of the foregoing reasons, NRDC's untimely regulatory challenges should be dismissed or denied, its non-record submissions and related arguments stricken or disregarded, and its remaining arguments denied on the merits.

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[23] To the extent any of NRDC's arguments could be construed as a challenge to EPA's determination that the Baseline Budgets satisfied the fifth adequacy criterion at 40 C.F.R. § 93.118(e)(v), the Agency's reasoned basis for that determination is set out in the Adequacy Finding as well. As required by 40 C.F.R. § 51.1008(b) and 51.1009(c)(2), the Baseline Budgets were calculated using the state-wide $PM_{2.5}$ emissions inventoried during 2002, the PM2.5 baseline year, and the target emission levels needed to assure attainment by 2015. ER-8, 20; see id. ER-561 (Ch. 3, emissions inventory for 2002). The Baseline Budgets therefore are consistent with, and clearly related to, the emissions inventory contained in Chapter 3 of the final AQMP. ER-8. Moreover, the Baseline Budgets were developed in 2007 using control measures adopted by the State as early as December 2006. ER-4, 6, 8, 18; see id. at 379, 394, 398, 430, 432. EPA's determination that the Baseline Budgets satisfied the fifth adequacy criterion therefore was clearly explained in the Adequacy Finding and strongly supported by the administrative record.

Respectfully submitted,

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March 2, 2009

STATEMENT OF RELATED CASES

The United States is not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I certify that pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced has a typeface of 14 points, and contains 13,856 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii). I have relied on Microsoft Word's calculation feature.

March 2, 2009 /s/ Heather E. Gange

CERTIFICATE OF SERVICE

On March 2, 2008, I served the Respondent's Brief, Respondents Excerpts of Record, and Respondent's Statutory Appendix on counsel listed below via Federal Express, prepaid, at the following addresses:

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