

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

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

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**SUPPLEMENTAL BRIEF FOR RESPONDENT  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

GLOSSARY ..... iii

ISSUE PRESENTED ..... 1

ARGUMENT .....2

CONCLUSION ..... 6

STATEMENT OF RELATED CASES ..... 7

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION ..... 7

CERTIFICATE OF SERVICE ..... 8

**TABLE OF AUTHORITIES**

**CASES**

*Ass'n of Irrigated Residents v. EPA*,  
Nos. 09-71383, 09-71404, 2011 WL 310357 (9th Cir. Feb. 2, 2011) ..... 1, 2, 3,4

*Hall v. EPA*,  
273 F.3d 1146 (9th Cir. 2001) .....4, 5

*Sierra Club v. EPA*,  
315 F.3d 1295 (11th Cir. 2002) .....4, 5

**STATUTES**

42 U.S.C. §§ 7401 et seq..... iii

42 U.S.C. §§ 7607(b)(1) .....3

**CODE OF FEDERAL REGULATIONS**

40 C.F.R. § 93.118(a) .....4

40 C.F.R. § 93.118(e)(1) .....4

40 C.F.R. § 93.118(e)(3) .....4

40 C.F.R. § 93.118(e)(4) ..... 1, 2, 5

40 C.F.R. § 93.118(f)(2) .....4

40 C.F.R. § 93.120(a)(2) .....4

62 Fed. Reg. 43,780 (Aug. 15, 1997) .....4, 5

69 Fed. Reg. 40,004 (July 1, 2004) .....4, 5

75 Fed. Reg. 71,294 (Nov. 22, 2010) .....3

## GLOSSARY

CAA	Clean Air Act, 42 U.S.C. §§ 7401, <u>et seq.</u>
EPA	United States Environmental Protection Agency
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 <sub>2.5</sub>	Airborne Particulate Matter 2.5 microns or less in diameter
RFP	Reasonable Further Progress, linear decrease in pollutant emissions to attainment levels between a specified baseline year and the attainment deadline year
SIP	State Implementation Plan
South Coast	South Coast air basin, comprising Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and western Riverside County

**ISSUE PRESENTED**

Pursuant to the Court's Order of February 7, 2011 (Docket No. 59), this supplemental brief addresses the question whether the Court's recent decision in *Assoc. of Irrigated Residents v. EPA*, 2011 WL 310357 (9<sup>th</sup> Cir. February 2, 2011) (hereafter "*Irrigated Residents*"), an unrelated case challenging the process and criteria by which the Environmental Protection Agency ("EPA") reviewed and approved proposed revisions to an ozone-related State Implementation Plan ("SIP") submittal for the South Coast Air Quality Management District, has any bearing on this case in which Petitioners challenge EPA's preliminary finding that two motor vehicle emissions budgets ("MVEBs") contained in a different, PM<sub>2.5</sub>-related SIP submittal were adequate for transportation conformity purposes pursuant to the adequacy criteria set forth in 40 C.F.R. § 93.118(e)(4) ("Adequacy Finding").

## **ARGUMENT**

The Court's recent decision in *Association of Irrigated Residents v. EPA*, 2011 WL 310357 (February 2, 2011 9<sup>th</sup> Cir.), is inapposite to this case, as it does not address the sole question properly presented in this case — whether EPA acted reasonably when it made a preliminary Adequacy Finding, based on a cursory review of the RFP Baseline Budgets and the RFP Modeled Demonstration, that the RFP Baseline Budgets satisfy the six adequacy criteria set forth in 40 C.F.R. § 93.118(e)(4) and that they therefore are adequate for transportation conformity purposes. In contrast, the petitioners in *Irrigated Residents* challenged EPA's decision not to issue an ozone SIP call for the South Coast, EPA's approval of an ozone-related SIP submittal and pesticide element, and the scope of the review EPA must conduct for SIP submittals in order to approve, disapprove, or approve them in part and disapprove in part.

The *Irrigated Residents* decision does not address or even mention adequacy findings for MVEBs, except in a brief background statement that supports EPA's arguments by recognizing that adequacy findings are preliminary actions, distinct from SIP approvals or disapprovals, that are reassessed during EPA's SIP submittal reviews and may well be reversed:

Because SIPs sometimes take years to review, EPA may make preliminary adequacy determinations regarding the MVEBs found in the SIPs. [40 C.F.R.] § 93.118. After further review,

EPA may declare the MVEB to be inadequate. *Id.* § 93.118(e)(3).

*Id.* at \*1; *see* Respondent's Brief, at 32-34. The *Irritated Residents* decision also does not mention PM<sub>2.5</sub> monitoring or attainment demonstration issues that, while raised in Petitioners' briefs, are not properly before the Court in the present case. Moreover, Petitioners here are not challenging ozone-related portions of the Adequacy Finding; they cannot raise issues regarding the proper scope of EPA's SIP submittal reviews in this case because EPA has taken no action on the SIP Submittal here<sup>1</sup>; and no pesticide elements or SIP calls are involved in this case. Therefore, aside from summarizing the effect of two conformity regulations — that adequacy findings are separate from, and may be reversed by, SIP approvals or disapprovals, consistent with EPA's position in this case — *Irritated Residents* simply does not speak to the substantive and procedural issues presented in this case.

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<sup>1</sup> EPA has not completed its review of the South Coast's PM<sub>2.5</sub> SIP Submittal and taken final action approving it, disapproving it, or approving it in part and disapproving it in part. On November 8, 2010, EPA issued a notice in the Federal Register seeking public comment regarding a proposed rule to approve the South Coast's PM<sub>2.5</sub> SIP Submittal in part and disapprove it in part. *See* "Approval and Promulgation of Implementation Plans; State of California; 2007 South Coast State Implementation Plan for 1997 Fine Particulate Matter Standards; 2007 State Strategy; PM<sub>2.5</sub>," 75 Fed. Reg. 71,294 (November 8, 2010). Public comments were accepted through January 21, 2011, and EPA is now considering them. *Id.* at 71,294/2. When EPA publishes a final decision, which may differ from the proposed rule, procedural or substantive challenges must be raised within 60 days in a separate petition to this Court pursuant to Clean Air Act section 307(b)(1), 42 U.S.C. § 7607(b)(1).

To the extent Petitioners look to *Irritated Residents* and *Hall v. EPA*, 273 F.3d 1146 (9<sup>th</sup> Cir. 2001), to bolster their argument that SIP approval criteria should apply to adequacy findings,<sup>2</sup> they misapprehend the distinction between adequacy findings for MVEBs and approvals or disapprovals of SIP submittals. As the Court of Appeals for the Eleventh Circuit expressly held, and as this Court implicitly recognized in the quotation above, the administrative process and criteria for making MVEB adequacy findings are separate and distinct from the process and criteria for approving or disapproving SIP Submittals.<sup>3</sup>

Adequacy findings also are preliminary determinations based on cursory reviews of MVEBs in light of a SIP submittal's RFP demonstration or its attainment demonstration (whichever is appropriate for each MVEB) to assess whether the MVEBs satisfy the six adequacy criteria set forth in 40 C.F.R. §

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<sup>2</sup> See Docket No. 58, Fed. R. App. Pro. 28(j) Letter from Messrs. Adriano Martinez and Bob Yuhnke, Counsel for Petitioners, to Ms. Molly Dwyer, Clerk of the Court, dated February 3, 2011; Respondent's Brief, at n.12.

<sup>3</sup> *Sierra Club v. EPA*, 315 F.3d 1295, 1300, 1301 (11<sup>th</sup> Cir. 2002); 62 Fed. Reg. 43,780, 43,781-82 (Aug. 15, 1997); 69 Fed. Reg. 40,004, 40,038-43 (July 1, 2004); See Respondent's Brief, at 32-34. Adequacy findings also are mooted (and may even be reversed) by final SIP approvals or disapprovals. 40 C.F.R. §§ 93.118(a), (e)(1), (e)(3); 40 C.F.R. § 93.120(a)(2); 62 Fed. Reg. at 43,782; *Sierra Club*, 315 F.3d at 1302. EPA also does not solicit or consider SIP submittal review-related public comments during the adequacy finding process. 69 Fed. Reg. at 40,040, 40,042. Moreover, 40 C.F.R. § 93.118(f)(2) establishes a separate administrative process for those rare occasions where SIP submittals are reviewed so expeditiously that they can be approved or disapproved within the same time frame adequacy findings are reached.



93.118(e)(4).<sup>4</sup> In contrast, SIP approvals or disapprovals are final agency actions based on lengthy, in-depth reviews of entire, voluminous and scientifically complex SIP submittals to determine whether the submittals satisfy the numerous SIP requirements imposed by the Clean Air Act. Therefore, the *Irritated Residents* and *Hall* decisions that address the scope of review, the process, and the criteria for approving or disapproving entire SIP submittals are wholly inapposite to cases such as this one in which Petitioners challenge the scope of review, the process, and the criteria for making preliminary adequacy findings for MVEBs.

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<sup>4</sup> See 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. . . . 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 . . . . Although the minimum criteria for adequacy allow EPA to make a cursory review of the submitted motor vehicle emissions budget for conformity purposes, . . . other elements must also be in the SIP for it to ultimately be approved. Therefore, a budget that is found adequate . . . could later be disapproved when reviewed with the entire SIP submission.

See Respondent's Brief, at 32-34 & n.11-12; 69 Fed. Reg. 40,004, 40,041, 40,044-46; *Sierra Club*, 315 F.3d at 1297-98.

**CONCLUSION**

For the foregoing reasons, and the reasons stated in the United States' Response Brief, 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.

Respectfully submitted,

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February 22, 2011

**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 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-3, the attached brief is proportionately spaced has a typeface of 14 points, and contains 1,301 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.

February 22, 2011

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**CERTIFICATE OF SERVICE**

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