IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF IRRITATED RESIDENTS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Nos. 09-71383 and 09-71404
(Consolidated)

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

PETITION FOR PANEL REHEARING

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TABLE OF CONTENTS

BACKGROUND 2

I. STATUTORY BACKGROUND 2

A. Select State Implementation Plan Requirements in "Extreme" Nonattainment Areas 2

B. Federal Implementation Plans and Sanctions 3

C. The 2003 State Strategy and 2003 South Coast Air Quality Management Plan 4

II. PETITIONERS' ARGUMENTS AND THE COURT'S DECISION 5

ARGUMENT 7

I. THE COURT ERRONEOUSLY CONCLUDED THAT EPA'S DISAPPROVAL OF THE 2003 ATTAINMENT DEMONSTRATION TRIGGERED SANCTIONS UNDER SECTION 7509 OF THE ACT 7

II. THE COURT ERRED IN FAILING TO DEFER TO EPA'S REASONABLE INTERPRETATION OF THE AMBIGUOUS STATUTORY REFERENCE TO "GROWTH IN EMISSIONS" 11

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Association of Irritated Residents, et al. v. EPA,
632 F.3d 584 (9th Cir. 2011) .... passim

BedRoc Ltd. v. United States,
541 U.S. 176 (2004) 17

California Wilderness Coalition v. U.S. Department of Energy,
631 F.3d 1072 (9th Cir. 2011) 11

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 11

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989) 15

Field v. Mans,
516 U.S. 59 (1995) 10

United States v. Daas,
198 F.3d 1167 (9th Cir. 1999) 15

STATUTES

42 U.S.C. § 7410(c)(1)(A)-(B) 4

42 U.S.C. § 7410(k)(5) 8

42 U.S.C. § 7502(c)(3) 3, 8, 9, 10

42 U.S.C. § 7506(c)(1) 3, 8, 9, 10

42 U.S.C. § 7506(c)(1)(B) 7

42 U.S.C. § 7509(a) 4, 8

42 U.S.C. § 7509(a)(1)-(4) 4

42 U.S.C. § 7509(b)(1)-(2) 4

42 U.S.C. § 7511a(c)(2) 9

42 U.S.C. § 7511a(c)(2)(A) 2

42 U.S.C. § 7511a(d)(1)(A) 3, 5, 6, 12, 17

42 U.S.C. § 7511a(e)...2

FEDERAL RULES OF APPELLATE PROCEDURE

Fed. R. App. P. 40(a)(2)..1

FEDERAL REGISTER

56 Fed. Reg. 56,694 (Nov. 6, 1991)..2

74 Fed. Reg. 10,176 (March 10, 2009) 5

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and the associated rules of this Court, Respondent United States Environmental Protection Agency ("EPA") respectfully requests panel rehearing of certain aspects of the Court's decision in *Association of Irritated Residents, et al. v. EPA*, 632 F.3d 584 (9th Cir. 2011) (slip opinion attached hereto).

EPA believes the Court "overlooked or misapprehended" two important points of law, *see* Fed. R. App. P. 40(a)(2), resulting in erroneous holdings regarding the imposition of sanctions under section 7509(a)(2) of the Clean Air Act ("the Act")[1] and the circumstances under which an area must adopt transportation control measures pursuant to section 7511a(d)(1)(A) to offset increases in vehicle emissions. First, in holding that EPA had a duty to impose sanctions under section 7509(a)(2) when EPA disapproved California's *voluntarily*-revised attainment demonstration, the Court overlooked the fact that section 7509(a)(2) on its face applies only to "required" state implementation plan ("SIP") submissions and not to voluntary submissions. Second, in holding that the Los Angeles-South Coast Air Basin Area ("South Coast") was unambiguously required under section 7511a(d)(1)(A) to implement transportation control measures even though aggregate vehicle emissions were *decreasing*, the Court failed to recognize, or defer to EPA's reasonable interpretation of, the ambiguity

[1] Except as otherwise noted, statutory references are to Title 42 of the United States Code.

inherent in the section's reference to a "growth in emissions." The Court's erroneous holdings on these issues have profoundly costly and disruptive implications for EPA, States, and localities across the nation, and likely will discourage States and localities from updating their Clean Air Act implementation plans except when absolutely required to do so by the Act.

BACKGROUND

I. STATUTORY BACKGROUND

A. Select State Implementation Plan Requirements in "Extreme" Nonattainment Areas

As noted in earlier briefing in this case, the South Coast is designated "nonattainment" for the national ambient air quality standard ("NAAQS") for 1-hour ozone, and EPA has classified the South Coast ozone nonattainment area as "extreme" for 1-hour ozone, with an attainment deadline of November 15, 2010. *See* 56 Fed. Reg. 56,694, 56,726 (Nov. 6, 1991).

"Extreme" ozone nonattainment areas such as the South Coast are subject to stringent requirements under the Act. Such areas were required to submit, within four years of enactment of the November 1990 CAA Amendments, a demonstration that the area's SIP provides for attainment of the ozone NAAQS by the applicable deadline. 42 U.S.C. § 7511a(c)(2)(A); *id.* § 7511a(e). This so-called "attainment demonstration" includes both a control strategy and air quality modeling showing that the control strategy is sufficient to reduce emissions to

levels where violations of the NAAQS would not occur by the attainment date. Extreme nonattainment areas must also adopt transportation control measures and strategies "to offset any growth in emissions from growth in vehicle miles traveled," and "to attain reduction in motor vehicle emissions as necessary, . . . to comply with the requirements of . . . this section (pertaining to periodic emissions reduction requirements)." *Id.* § 7511a(d)(1)(A).

Section 7506(c) of the Act provides that before any transportation program or project located in a nonattainment area can receive federal approval or funding, that transportation activity must be found to "conform" with the applicable SIP. An activity "conforms" to an approved SIP if, based on the most recent estimates available, the anticipated emissions will not (1) frustrate the general purpose of the SIP; (2) cause or contribute to a new violation of the NAAQS; (3) worsen an existing violation; or (4) delay timely attainment of a NAAQS or other milestone. *Id.* § 7506(c)(1).

B. Federal Implementation Plans and Sanctions

If a State fails to submit a SIP or EPA disapproves a SIP, in many instances EPA is required to promulgate a federal implementation plan ("FIP") and to impose mandatory sanctions. The Act requires EPA to promulgate a FIP within two years after the Administrator either "finds that a State has failed to make a required submission or finds that the plan or plan revision" is incomplete, or

"disapproves a [SIP] in whole or in part." *Id.* § 7410(c)(1)(A)–(B). EPA is no longer required to promulgate a FIP if "the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such federal implementation plan." *Id.*

Certain mandatory sanctions set forth in section 7509(b) apply[2] when EPA makes any one of four findings regarding "any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 7410(k)(5) of this title)." *Id.* § 7509(a). The four findings are: a failure to submit the plan; a determination that a submitted plan is incomplete; a disapproval of a submitted plan; or a determination that a state is not implementing an approved plan. *Id.* § 7509(a)(1)–(4).

C. The 2003 State Strategy and 2003 South Coast Air Quality Management Plan

On January 9, 2004, the California Air Resources Board ("CARB") submitted to EPA two SIP revisions related to the 1-hour ozone standard: a plan identifying CARB's regulatory agenda to reduce ozone in all areas of California by 2010 ("2003 State Strategy"), and the 2003 South Coast Air Quality Management Plan ("AQMP"). The 2003 South Coast AQMP was submitted by the State in light of new photochemical modeling performed by the South Coast Air Quality

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[2] These sanctions include prohibitions on new highway projects or grants, and limitations on new construction or modification of major stationary sources of air pollution. *Id.* § 7509(b)(1)–(2).

Management District purporting to show the need for additional emissions reductions, and to establish new motor vehicle emissions budgets and thereby avoid a transportation conformity lapse and associated federal funding losses.

On March 10, 2009, EPA disapproved the revised attainment demonstration because of its reliance on various state commitments originally included in the 2003 State Strategy, but withdrawn by CARB before EPA acted on the submission. 74 Fed. Reg. 10,176 (Mar. 10, 2009). EPA concluded that its disapproval of the revised attainment demonstration did not trigger mandatory sanctions under section 7509, because the State already had in place a plan that EPA had fully approved as meeting the attainment demonstration obligation under section 7511a(c) and (e), and the *revised* attainment demonstration was not an implementation plan "required" under the Act. *Id.* at 10,177. EPA approved the State's demonstration that aggregate vehicle emissions would decline each year from the base year of the plan through the attainment year of 2010. Absent a "growth in [aggregate] emissions" from motor vehicles, EPA concluded that no transportation control measures were required under section 7511a(d)(1)(A). *Id.* at 10,179.

II. PETITIONERS' ARGUMENTS AND THE COURT'S DECISION

Petitioners challenged several aspects of EPA's March 10, 2009 final rule. Relevant to this petition for rehearing, Petitioners argued that upon disapproving the State's revised attainment demonstration for the 1-hour ozone standard, EPA

should have required California to submit a *new* plan demonstrating attainment, notwithstanding that a previously-approved attainment demonstration remained on the books. Petitioners also claimed that EPA acted contrary to section 7511a(d)(1)(A) of the Act by not requiring the State to adopt transportation control measures where vehicle emissions were higher than they would have been had vehicle miles traveled not increased, but, in fact, total vehicle emissions were declining.[3]

On the first issue, the Court held that in light of EPA's disapproval of the revised attainment demonstration, it must either "promulgat[e] a FIP, issu[e] sanctions, or evaluat[e] the necessity of a SIP call." 632 F.3d at 594. On the second issue, the Court held that EPA should have required California to adopt transportation control measures and strategies pursuant to section 7511a(d)(1)(A) because the State projected that vehicle miles traveled would increase in the region through 2010, and the Court read the statute as unambiguously providing that a "growth in emissions" caused by an increase in vehicle miles traveled results

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[3] That *aggregate* vehicle emissions could decrease even though vehicle miles traveled *increase* is not as strange as it might sound; indeed, it could well be expected. It could, for instance, occur where there are more cars on the road than there were before due to an increase in population, but those cars on average are cleaner-burning, due to the natural replacement of older more polluting models with newer models (including hybrid or electric vehicles). In such a case, emission levels would be higher than they would have been had vehicle miles traveled not increased, but those emission levels could still be lower than previous levels based on prior vehicle miles traveled, offset by the overall emission reductions resulting from the introduction of the less-polluting new cars or use of cleaner fuels.

whenever vehicle emissions levels are greater than they would have been had vehicle miles not increased at all, even if overall vehicle emissions are decreasing. *Id.* at 595.

ARGUMENT

I. THE COURT ERRONEOUSLY CONCLUDED THAT EPA'S DISAPPROVAL OF THE 2003 ATTAINMENT DEMONSTRATION TRIGGERED SANCTIONS UNDER SECTION 7509 OF THE ACT

EPA's disapproval of the State's revised attainment demonstration did not trigger sanctions under section 7509(a), because the States' attainment demonstration was not "required" under the Act. Respectfully, the Court's statements to the contrary are in error.

The Court held that EPA's disapproval of the State's revised attainment demonstration triggered the requirement of section 7410(c)(1)(B), for EPA to promulgate a FIP unless the State corrected the deficiency within two years, although the Court left open the possibility that "EPA can find that the state has 'corrected the deficiency'" if EPA evaluates the existing SIP and finds that it continues to meet the Act's requirements. 632 F.3d at 592. The Court determined that the FIP provision of section 7410(c)(1)(B) is not on its face limited to situations in which EPA disapproves a "required" submission, and, in any event, held that the revised attainment demonstration submitted by the State was "required." *Id.* The Court further determined, without analysis, that the *sanctions*

requirement at section 7509 was similarly triggered by EPA's disapproval of the revised attainment demonstration. *Id.* The sanctions provision, however, unlike the FIP provision, is expressly limited to "required" submissions. 42 U.S.C. § 7509(a) ("[f]or any implementation plan or plan revision *required* under this part . . . .") (emphasis added). Thus, whether sanctions were triggered by EPA's disapproval hinges on whether the revised attainment demonstration was indeed a "required" submission. As explained below, the revision was not "required."

The Court stated that "large portions of the 2003 Attainment Plan were not discretionary." 632 F.3d at 592. In support, the Court pointed to the updated emissions inventory required by sections 7502(c)(3) and 7511a(a)(3)(A), and the fact that the State chose to submit updated motor vehicle emissions budgets to avoid a lapse in federal transportation funding, *see* 42 U.S.C. § 7506(c)(1). Neither of those provisions, however, establishes that the attainment demonstration was "required" under the Act. The Act does not require or provide for revisions to attainment demonstrations absent certain findings that EPA has not made with respect to the 1-hour ozone standard in the South Coast.[4] While States are *always* free to submit SIP updates and revisions to EPA, this does not render such

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[4] For example, a new attainment demonstration is required where EPA has made a finding under section 7410(k)(5) that the SIP is "substantially inadequate to attain or maintain the relevant [NAAQS]," or has made a finding under section 7509(c) that an area failed to attain the relevant NAAQS by the applicable attainment date. EPA has made no such findings here.

submissions "required" under the Act.

The Court fundamentally erred in relying on the provisions of the Act that require nonattainment areas to periodically revise their emissions inventories (sections 7502(c)(3) and 7511a(a)(3)(A)) as support for its conclusion that the revised attainment demonstration was "required" by the Act. *See* 632 F.3d at 592. The provisions specific to attainment demonstrations, sections 7502(c)(1) and 7511a(c)(2)(A), contain no such requirement for periodic revisions. Rather, the attainment demonstration provisions clearly contemplate only a one-time submission by the State to meet the statutory obligation. Under section 7502(b), an attainment demonstration pursuant to section 7502(c)(1) must be submitted by a date established by the Administrator, which can be no later than three years following a designation of "nonattainment."

Similarly, section 7511a(c)(2) requires submission of an attainment demonstration within "4 years after November 15, 1990." Significantly, section 7511a makes no reference whatsoever to any later attainment demonstrations, and the lack of any such reference should have resolved the issue in EPA's favor. Indeed, in determining elsewhere in its opinion that the FIP obligation in section 7410(c)(1)(B) is not limited to instances in which the State fails to submit, or EPA disapproves, a "required" submission, the Court relied heavily on the canon of statutory construction that, "when Congress includes particular language in one

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 632 F.3d at 591 (internal quotations and citations omitted). That same canon should have led the Court to conclude that no obligation to submit additional attainment demonstrations existed here, because Congress expressly included no such obligation in the statute, when other sections show that it could have done so if it had so intended. In short, the absence of a requirement in section 7511a to periodically revise the attainment demonstration should be read as a purposeful omission by Congress, such that revisions to attainment demonstrations are not "required" by the Act. *See Field v. Mans*, 516 U.S. 59, 66 (1995).

Similarly, the Panel erred in relying on the conformity provisions of section 7506(c), which requires that conformity determinations be based on the most recent estimates of emissions, as support for its conclusion that portions of the 2003 attainment plan submission were not discretionary. First, this statutory requirement applies *only* to conformity determinations, which are made by federal agencies prior to funding or approving transportation plans and projects, and does not apply to SIPs (including attainment demonstration SIPs). Nothing in section 7506(c) requires States to make any adjustments or revisions to SIPs, whether in relation to updated emissions estimates or otherwise. As a practical matter, many States do elect to revise their SIPs to reflect more recent emissions estimates, as

California did in this case, but this practice is voluntary and is not compelled by section 7506(c) or by any other provision of the Act.

EPA's disapproval of the State's voluntarily revised 1-hour ozone attainment demonstration did not trigger sanctions under section 7509, because on its face that provision applies only to "required" submissions. Even if the interplay of the relevant statutory provisions were ambiguous, however, the Court should have deferred to EPA's reading of how to harmonize them with one another under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984). The Court erred in holding otherwise.

II. THE COURT ERRED IN FAILING TO DEFER TO EPA'S REASONABLE INTERPRETATION OF THE AMBIGUOUS STATUTORY REFERENCE TO "GROWTH IN EMISSIONS"

A bedrock principle of administrative law is that a court must not substitute its own judgment as to the meaning of an ambiguous statutory provision for an agency's reasonable interpretation. *See Chevron*, 467 U.S. at 842–44; *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011). The statutory provision at issue in this case, section 7511a(d)(1)(A), does not specify how to calculate a "growth in emissions" from growth in vehicle miles traveled or numbers of vehicle trips, because it does not specify whether the term "emissions" refers to emissions from motor vehicles in the aggregate or just to levels of emissions (whether increasing or decreasing) affected by the increase in

vehicle miles traveled or numbers of vehicle trips. The Court impermissibly resolved this statutory ambiguity by weighing EPA's interpretation of this language against Petitioners' interpretation, and then adopting Petitioners'. The Court's failure to acknowledge this statutory ambiguity and defer to EPA's reasonable interpretation under *Chevron* was in error.

The Court concluded that the following language *unambiguously* requires States to adopt transportation control measures and strategies *whenever* vehicle emissions are projected to be higher than they would have been had vehicle miles traveled not increased, even when *aggregate* vehicle emissions are actually decreasing:

> [States must submit a SIP revision] that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any *growth in emissions* from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements).

42 U.S.C. § 7511a(d)(1)(A) (emphasis added); *see* 632 F.3d at 596. The statute, however, does not define what constitutes a "growth in emissions" – how EPA is to determine whether, and to what extent, there will be a "growth in emissions" caused by a growth in vehicle miles traveled is left utterly unexplained. *Chevron* requires the Court to have deferred to EPA's reasonable interpretation that there is

no “growth in emissions” to offset (and transportation control measures are thus not required) where a State demonstrates that aggregate vehicle emissions are in fact not increasing from prior levels, notwithstanding any growth in vehicle miles traveled or numbers of vehicle trips taken.

The interpretation adopted by the Court, which looks only to whether vehicle emissions (even if actually decreasing over time) are higher than they would have been had the number of vehicle miles traveled remained constant, is not dictated by the plain terms of the statute. Although the Court held that the baseline by which to identify a “growth in emissions” “*must* be viewed as any increase in emissions due solely to VMT,” *see* 632 F.3d at 596 (emphasis added), the statute does not on its face mandate that baseline or otherwise compel reading “growth” to refer to vehicle emissions that are actually decreasing in the aggregate notwithstanding any growth in vehicle miles traveled. Rather, the statute does not answer whether there can be a “growth in emissions” where vehicle emissions are higher than they would have been if the number of vehicle miles traveled had remained constant, but are actually lower than they were before as a result of cleaner vehicles entering the fleet and other factors that reduce vehicle emissions.

The Court recognized that there must be “growth” of two distinct elements to trigger the transportation control measure requirement – growth in vehicle miles traveled and growth in resulting emissions – and that growth in the former does not

necessarily represent growth in the latter. *See id.* at 595. The statute is thus readily susceptible to EPA's longstanding interpretation that there is no "growth in emissions" to be offset where aggregate vehicle emissions have actually decreased and are projected to continue to decrease. Although the Court purported to adhere to *Chevron*'s "familiar two-step procedure," *id.* at 596, it appears to have impermissibly resolved statutory ambiguity in favor of what it determined to be *its* preferred interpretation.

The Court's criticisms of EPA's interpretation are not accurate. First, the Court incorrectly stated that "EPA's interpretation only gives effect to the second clause of the relevant sentence, and not to the first." 632 F.3d at 596. The Court stated that EPA's interpretation addressed the requirement to impose transportation control measures as needed "to attain reduction in motor vehicle emissions [to comply with periodic emissions reduction requirements]," but not the requirement to offset "growth in emissions from growth in vehicle miles traveled." *Id.* 596–97. To the contrary, EPA has consistently read these two elements as separate, and would require adoption of transportation control measures if an increase in vehicle miles traveled caused an increase in *aggregate* vehicle emissions, *even if* adoption of transportation control measures would not be required (under the second clause of the provision) because no reduction in motor vehicle emissions would be necessary to meet periodic emissions reduction requirements, and vice versa.

Indeed, the separate clauses may require different numbers and kinds of offsetting transportation control measures, on different implementation schedules. EPA's interpretation is not, as the Court inaccurately stated, redundant.

Second, the Court erred in concluding that legislative history "clearly refutes" EPA's interpretation. 632 F.3d at 597. The proper question is not whether legislative history "refutes" EPA's interpretation, but whether legislative history clarifies an otherwise ambiguous statute.[5] In any event, here the legislative history does neither. While a House Committee Report states that the phrase "growth in emissions" should be measured according to "the level of emissions that would occur if VMT held constant in the area," such a baseline conflicts with both the plain text of the statute and the Court's conclusion that there must be growth in each of the separate elements (vehicle emissions *and* vehicle miles traveled) to trigger the control requirement. *See id.* Such an approach essentially reads the phrase "growth in emissions" out of the statute, rendering it mere surplusage, as if all the Act requires is a simplistic analysis of whether vehicle miles traveled are increasing.

Under the interpretation adopted by the Court, *any* level of vehicle

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[5] "[L]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) ("If the statute is ambiguous – and only then – courts may look to its legislative history for evidence of congressional intent.").

emissions, *even if reduced to near zero*, would trigger the control measure requirement if vehicle miles traveled increased, for emissions would always be higher than if the number of vehicle miles traveled had remained constant. This reading leads to the absurd result that transportation control measures or strategies will *always* be required if vehicle miles traveled increase, unless a vehicle fleet is *100%* electric and causes no tail-pipe emissions at all, no matter what the level of vehicle miles traveled. The Court recognized that growth in vehicle miles traveled alone should not be viewed as automatically showing a "corresponding" growth in emissions, *see* 632 F.3d at 596, yet its interpretation does exactly that. The Court mentioned the "possibility" that "advances in clean car technology" would one day allow for increases in vehicle miles traveled without a "corresponding" increase in vehicle emissions, *id.*, yet under the Court's reading nothing short of a 100% electric fleet with zero tailpipe emissions would have that effect.

EPA's interpretation ensures that transportation control measures and strategies are adopted to offset any increase in vehicle miles traveled that causes an increase in actual aggregate vehicle emissions in the area. Such an increase would reflect an emissions "growth" in comparison to the actual levels of emissions in a previous year (a growth which might need to be remedied for an area to achieve its air quality goals), rather than simply a lesser rate of decrease of such emissions (which may not impair an area's ability to meet air quality goals). The Court's

ruling, instead, will force States and localities to offset any growth in vehicle miles traveled simply for its own sake, and devote scarce resources to address already declining motor vehicle emissions at the possible expense of other emissions sources whose pollution contribution may be in fact growing.

Other legislative history cited by the Court, *id.* at 597, speaks only to offsetting growth in vehicle miles traveled, without reference to growth in emissions. That legislative history is thus unhelpful in interpreting the meaning of "growth in emissions," and directly disregards the statute's direction that transportation control measures are needed to offset any "*growth in emissions* from growth in vehicle miles traveled." 42 U.S.C. § 7511a(d)(1)(A) (emphasis added). Indeed, reliance on that legislative history conflicts with the Court's own recognition that growth in emissions and growth in vehicle miles traveled are to be analyzed as separate questions. *See* 632 F.3d at 596. It was error for the Court to rely on legislative history to "bolster" its reading of what it declared to be an unambiguous statute, *see id.* at 2093, particularly because the legislative history fails to elucidate an interpretation that is both consistent with the language of the statute and workable as a practical matter. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004) (courts "resort to legislative history only when necessary to interpret ambiguous statutory text").

The statutory provision is ambiguous on its face because it fails to specify

how EPA is to determine whether a "growth in emissions" will occur. It *could* be read the way the Court reads it – to require adoption of transportation control measures *whenever* vehicle emissions are higher than they would have been had vehicle miles traveled not increased – but it may equally be read (as EPA reads it) to require adoption of transportation control measures only when *aggregate* vehicle emissions increase as a result of an increase in vehicle miles traveled. Under *Chevron*, the Court erred by failing to defer to EPA's reasonable interpretation of the provision.

CONCLUSION

For the reasons stated above, the Court should grant rehearing on the two issues raised herein.

Respectfully submitted,

DATED: May 5, 2011

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 40-1

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionally spaced, has a 14-point typeface, and contains 4,185 words, as counted by Microsoft Word, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: May 5, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITION FOR PANEL REHEARING** with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 5, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASSOCIATION OF IRRITATED RESIDENTS, an unincorporated association; EL COMITÉ PARA EL BIENESTAR DE EARLIMART, an unincorporated association; COMMUNITY OF CHILDREN'S ADVOCATES AGAINST PESTICIDE POISONING, an unincorporated association,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA JACKSON, in her official capacity as Administrator of the US EPA; LAURA YOSHII, in her official capacity as Regional Administrator of Region IX of the U.S. EPA,
Respondents.

No. 09-71383

EPA No. EPA-R09-OAR-2008-0677

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 09-71404

EPA No. EPA-R09-OAR-2008-0677

OPINION

On Petition for Review of an Order of the Environmental Protection Agency

Case: 09-71383 05/05/2011 Page: 7 of 51 ID: 7633149 DktEntry: 29-2 Page: 28 of 121

Argued and Submitted
November 1, 2010—San Francisco, California

Filed February 2, 2011

Before: Cynthia Holcomb Hall and Sidney R. Thomas
Circuit Judges, and Robert S. Lasnik, Chief District Judge.*

Opinion by Judge Thomas

*The Honorable Robert S. Lasnik, Chief United States District Judge for the Western District of Washington, sitting by designation.

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OPINION

THOMAS, Circuit Judge:

The Association of Irritated Residents, El Comité para el Bienestar de Earlimart, the Community of Children's Advocates Against Pesticide Poisoning, and the Natural Resources Defense Council, petition for review of a final action by the Environmental Protection Agency approving in part and disapproving in part revisions to California's State Implementation Plan for meeting air quality standards for ozone under the Clean Air Act. We have jurisdiction under 42 U.S.C. § 7607(b)(1). We grant the petition for review and remand to EPA for further consideration.

I

A

Congress enacted the Clean Air Act (the "Act") to help protect and enhance the nation's air quality. 42 U.S.C. §§ 7401-7671q. The Act requires the Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards ("NAAQS") for a variety of pollutants, one of which is ozone.[1] *Id.* §§ 7408-09. EPA then designates areas as

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[1]Ground-level ozone is a primary component of what is commonly known as "smog." It is formed when oxides of nitrogen (NOx), volatile

Case: 09-71383 05/05/2011 Page: 41 of 50 ID: 7683129 DktEntry: 28

"attainment" or "nonattainment" based on whether the areas meet the clean air standards for each particular pollutant. *Id.* § 7407(d). EPA classifies nonattainment areas based on the severity of the area's pollution, from Marginal to Extreme. *Id.* § 7511(a). The area at issue in this litigation—the Los Angeles-South Coast Air Basin ("South Coast")—is classified as Extreme. 73 Fed. Reg. 63,408, 63,409 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52).

Under the Act, states have primary responsibility for ensuring that the quality of their air satisfies the NAAQS, and they must detail their efforts in a State Implementation Plan ("SIP") for each region within that state. 42 U.S.C. § 7410(a). States must submit these SIPs and SIP revisions to EPA for review. EPA may either fully approve the plan, partially approve and partially disapprove the plan, or conditionally approve the plan. *Id.* § 7410(k). Once approved, SIPs become enforceable as federal law. *Id.* § 7413.

An EPA determination that a state has failed to submit a required plan, or EPA disapproval of a submitted plan, triggers two time periods. First, a "sanctions clock" begins during which time the state must either remedy the deficiency or face sanctions. *Id.* § 7509(a)-(b). Second, a "FIP clock" begins by the end of which EPA must either approve a state-submitted SIP or promulgate a Federal Implementation Plan ("FIP"). *Id.* § 7410(c)(1). Additionally, EPA must issue a "SIP call," and thereby require the state to make necessary revisions, if it finds that a previously approved SIP is "substantially inadequate" to attain or maintain air quality standards. *Id.* § 7410(k)(5).

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organic compounds (VOC), and oxygen react in the presence of sunlight, generally at elevated temperatures. When inhaled, even at very low levels, ozone can cause serious health problems by damaging lung tissue and sensitizing lungs to other irritants. *See* 73 Fed. Reg. 63,408, 63,409 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52).

The Act also contains "conformity" requirements. Under these conformity provisions, the federal government may not approve, accept, or fund any transportation plan, program, or project unless it conforms to an approved SIP. *Id.* § 7506(c). To make conformity determinations, transportation agencies must look to an approved SIP to find the maximum amount of pollution allowed from motor vehicle emissions. This motor vehicle emissions budget ("MVEB") is determined by the states in their SIPs by identifying the total allowable emissions consistent with meeting the statutory clean air requirement, and then allocating that total among various types of sources, such as motor vehicles. 40 C.F.R. § 93.101. Because SIPs sometimes take years to review, EPA may make preliminary adequacy determinations regarding the MVEBs found in the SIPs. *Id.* § 93.118. After further review, EPA may declare the MVEB to be inadequate. *Id.* § 93.118(e)(3).

In addition to the SIPs and conformity requirements applicable to all areas, the Act contains further requirements for nonattainment areas, depending on the severity of the ozone problem in the area. 42 U.S.C. §§ 7511-7511f. Two of these requirements are at issue in this case. The first requirement is for these nonattainment areas to submit SIP revisions demonstrating attainment of the ozone standard by the applicable date. These "attainment plans" have two main parts: (1) a control strategy to reach compliance; and (2) an attainment demonstration to show that under the strategy the area will meet the NAAQS by the statutory deadline. *Id.* §§ 7511a(c)(2)(a), (d)-(e); 7410(a)(2)(A).

The second requirement for nonattainment areas is to develop enforceable transportation strategies and control measures "to offset any growth in emissions from growth in vehicle miles traveled . . . and to attain reduction in motor vehicle emissions as necessary." *Id.* § 7511a(d)(1)(A). Suggested transportation control measures include programs for improved public transit, restrictions of certain lanes for high

Case: 09-71383 05/05/2011 Page: 61 of 121 ID: 7633149 DktEntry: 28-2

occupancy vehicles, and programs for secure bicycle storage facilities. *Id.* § 7408(f)(1)(A).

B

In 1994, California submitted a SIP revision that included an ozone attainment demonstration for the South Coast nonattainment area and a "Pesticide Element" designed to reduce emissions from pesticide applications. In 1997, EPA approved the SIP revision with respect to both the ozone attainment demonstration and the Pesticide Element. In 1999, California sought again to update the SIP with new emissions inventories and a new ozone attainment demonstration. EPA approved these elements in 2000. All of these plans and revisions form the 1997/1999 South Coast Ozone SIP ("1997/1999 SIP").

After EPA approved the 1997/1999 SIP, California conducted new modeling, demonstrating that the existing SIP underestimated vehicle pollution in the area. Specifically, California realized that, with respect to ozone:

> [T]he basic strategy of the 1997 Plan and the 1999 amendments must be significantly overhauled to address the new realities of higher mobile source emissions and lower carrying capacities for ozone as indicated by new modeling and meteorological episodes. Additional reductions, above and beyond those committed to in the 1997 Plan and 1999 amendments, will be necessary to demonstrate attainment with the federal ozone standard and present a significant challenge.

Concluding that "a plan update [was] necessary," California submitted the 2003 SIP Revision to EPA in 2004. The 2003 SIP Revision consisted, in relevant part, of three things: the 2003 Attainment Plan, PEST-1, and a demonstration that no transportation control measures were required. Petitioners

seek review of EPA's final determination as to each of these three elements.

The 2003 Attainment Plan revised the existing SIP in two ways. First, it updated the attainment demonstration (and therefore the MVEBs) to account for the increased emissions projections under the new modeling. Second, it added additional control measures to offset the increase in predicted pollution. In 2004, EPA found the MVEBs in the attainment demonstration adequate for purposes of the conformity provisions, but did not make a final decision as to the 2003 Attainment Plan as a whole. In 2008, California withdrew some of the 2003 Attainment Plan's key elements, including many of the control measures.

PEST-1 was a control strategy that called for continued implementation of the Pesticide Element approved in the 1997/1999 SIP. In 2008, we concluded that the portion of the Pesticide Element representing the enforceable commitment (the Wells Memorandum), was not part of the 1997/1999 SIP. *See El Comité para el Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062 (9th Cir. 2008).

Finally, because nonattainment areas must propose enforceable transportation control measures "to offset any growth in emissions from growth in vehicle miles traveled," California submitted to EPA a demonstration purporting to show that there would be no such growth in emissions. Although California acknowledged that vehicle miles traveled would increase by about 30%, it showed that aggregate motor vehicle emissions would decrease.

In 2008, EPA proposed to approve the control measures that were not withdrawn from the 2003 Attainment Plan (including PEST-1), but disapprove the attainment demonstration (and therefore the MVEBs) in the 2003 Attainment Plan because the demonstration was largely based on the withdrawn commitments. EPA explained the consequences of its

Case: 09-71383 05/05/2011 Page: 31 of 51 ID: 7633129 DktEntry: 29-2

proposed partial disapproval by saying: "No sanctions clocks or FIP requirement would be triggered by our disapprovals, if finalized, because the approved [1997/1999] SIP already contains the plan elements that we are proposing to disapprove." 73 Fed. Reg. 63,408, 63,419 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52). EPA also proposed to approve California's assertion that no transportation control measures were required based on California's demonstration that there would be no growth in aggregate vehicle emissions.

In 2009, after considering public comments from petitioners on the proposed rule, EPA finalized action on the 2003 SIP Revision as proposed. This timely petition for review followed.

Petitioners raise three issues in their petition for review. First, they contend EPA's failure to order California to submit a revised attainment plan for the South Coast after it disapproved the 2003 Attainment Plan was arbitrary and capricious. Second, petitioners contend EPA's approval of PEST-1 violates the Clean Air Act because PEST-1 lacks enforceable commitments. Third, petitioners contend EPA violated the Act by failing to require transportation control measures to combat the increase in vehicle miles traveled. We grant the petition as to all three claims.

II

[1] EPA's failure to evaluate the adequacy of the existing SIP was arbitrary and capricious. The Act requires each nonattainment area to submit a SIP that includes an attainment demonstration for the 1-hour ozone standard. 42 U.S.C. § 7511a(c)(2)(A). Although EPA approved such an attainment demonstration for the South Coast in the 1997/1999 SIP, California submitted a revised attainment demonstration in the 2003 Attainment Plan, which made clear that the attainment demonstration in the 1997/1999 SIP was not accurate. When EPA partially disapproved the 2003 Plan's attainment demon-

Case: 09-71383 05/05/2011 Page: 34 of 50 ID: 7683149 DktEntry: 28

stration (because California subsequently revoked many of the control strategies on which the attainment demonstration was based), EPA concluded that no further action was required. *See* 74 Fed. Reg. 10,176, 10,177 (Mar. 10, 2009) (to be codified at 40 C.F.R. pt. 52) ("[N]o sanctions clocks or Federal Implementation plan (FIP) requirement[s are] triggered by our disapprovals because the plan revisions that are the subject of the proposed disapprovals represent revisions to previously-approved SIP elements that EPA determined met the CAA requirements, and thus, the revisions are not required under the Act.").

[2] EPA is mistaken that its duties under the Act end upon approval. Instead, EPA had an affirmative duty to evaluate the existing SIP and determine whether a new attainment demonstration was necessary to ensure California satisfies the Act's attainment requirements. Its failure to evaluate the adequacy of the existing SIP in any way was arbitrary and capricious.

[3] Through the 2003 SIP Revision, EPA knew, or should have known, of the inadequacy of the 1997/1999 SIP. As California specifically stated, "this revision points to the urgent need for additional emission reductions (beyond those incorporated in the 1997/99 Plan) to offset increased emission estimates from mobile sources and meet all federal criteria pollutant standards within the time frames allowed under the federal Clean Air Act." EPA's public comments also indicate that it understood that the new modeling undermined the existing SIP. *See, e.g.*, 73 Fed. Reg. 63,408, 63,415 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52) ("[I]n view of the magnitude of the reductions now understood to be needed for attainment of the 1-hour ozone NAAQS in the South Coast, [California] has adopted [additional control measures]."); *id.* at 63,416 ("[California] revised the 1-hour ozone attainment demonstration in the 2003 South Coast AQMP in light of updated emissions inventories that show higher mobile source emissions than prior projections and updated modeling that indicates a lower carrying capacity in the air basin."). How-

Case: 09-71383 05/05/2011 Page: 75 of 121 ID: 7683429 DktEntry: 28-1

ever, even if EPA did not actually know the extent to which the new modeling undermined the existing SIP, it has a duty to evaluate the adequacy of the existing SIP as a whole when approving SIP revisions. *See Hall v. EPA*, 273 F.3d 1146, 1159 (9th Cir. 2001) ("The EPA must be able to determine that, with the revisions in place, the whole 'plan as . . . revised' can meet the Act's attainment requirements." (quoting *Train v. Natural Res. Def. Council*, 421 U.S. 60, 90 (1975)). In partially approving the 2003 Plan, EPA should have analyzed the adequacy of the whole 1997/1999 SIP.

[4] The closer question is whether, given the knowledge that a previously approved SIP likely no longer meets the Act's attainment requirements, EPA has an affirmative obligation to request a new attainment demonstration. Two sections of the Act may give rise to such an affirmative duty. The first is the requirement that EPA issue a FIP when it disapproves any plan or plan revision. 42 U.S.C. § 7410(c)(1); *see also id.* § 7509 (mandating sanctions upon disapproving a required State submission). The second is the requirement that EPA issue a SIP call upon a finding that the existing SIP is substantially inadequate. *Id.* § 7410(k)(5).

EPA argues that the FIP and sanction clocks are triggered only where the plan revision is "required" under the Act. The first step in statutory construction cases is to begin with the language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). The plain text refutes EPA's argument. Section 7410(c)(1) states:

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
>> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established

Case: 09-71383 05/05/2011 Page: 41 of 121 ID: 7683429 DktEntry: 28-1

under subsection (k)(1)(A) of this section, or

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

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

42 U.S.C. § 7410(c)(1). Although subsection (A) applies to "required" submissions, subsection (B), which applies to disapprovals of SIPs and SIP revisions, does not have such a limit. "Nor should we infer as much, as it is a general principle of statutory construct that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Barnhart*, 534 U.S. at 452 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[5] EPA contends that reading subsection (B) as requiring EPA to issue a FIP whenever it disapproves a discretionary revision would "yield absurd results, because it would require the agency to promulgate a FIP where the State's fully approved SIP remains in effect." EPA provides as an example a state proposing a revision to make an existing SIP less stringent, arguing that requiring a FIP when EPA disapproves such a relaxing of the SIP would be irrational. EPA's point is well taken in a situation where the existing SIP remains adequate to attain the NAAQS. The facts in this case, however, are much different because EPA knew, or should have known, that the "fully approved SIP" was no longer adequate. While it may seem counterintuitive to require EPA to promulgate a FIP when it disapproves a revision seeking to undercut an effective existing SIP, it is entirely logical to require EPA to promulgate a FIP when it disapproves a revision seeking to

Case: 09-71383 05/05/2011 Page: 74 of 121 ID: 7683429 DktEntry: 128-1

update what it recognizes are serious deficiencies in an existing SIP.

[6] Furthermore, although the plain language requires a FIP every time EPA disapproves a plan revision, the FIP can be avoided if an existing plan is in place that meets the Act's requirements because § 7410(c)(1) has a grace period in which states can bring their plans into compliance before the FIP is enacted. *See* 42 U.S.C. § 7410(c)(1) (mandating a FIP "unless the State corrects the deficiency"); *see also id.* § 7509(a) (mandating sanctions "unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination"). EPA must simply evaluate the existing SIP (as already required under *Hall*, 273 F.3d at 1159), and if it meets the Act's requirements, EPA can find that the state has "corrected the deficiency," 42 U.S.C. § 7410(c)(1).

This analysis aligns with Congress's intent in writing the statutory language to mandate promulgation of a FIP upon any disapproval. In 1988, when Congress was debating the amendments to the Clean Air Act, EPA sought an amendment that would have left promulgation of FIPs solely to EPA's discretion. *See Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 223 (9th Cir. 1992) (citing S. 1630, 101st Cong., § 105 (1989)). Although the Senate passed such an amendment, a House Committee deleted the language, and the "House language retaining EPA's mandatory obligation to promulgate a FIP whenever it disapproves a SIP was ultimately enacted by Congress and signed into law." *Id.* (citing Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399).

Even if, as EPA argues, the FIP requirement is triggered only when the revision was "required" under the Act—and not upon every EPA disapproval of a plan revision as we determined above—the partial disapproval of the 2003 SIP Revision here still triggers the FIP requirement because large

Case: 09-71383 05/05/2011 Page: 38 of 121 ID: 7683429 DktEntry: 38-1

portions of the 2003 Attainment Plan were not discretionary. For example, the Act explicitly requires states with nonattainment areas to update their SIPs every three years with a revised inventory of actual emissions from all sources of relevant pollutants. *See* 42 U.S.C. §§ 7502(c)(3); 7511a(1)(3)(A). Additionally, the Act requires transportation projects to conform to the existing SIP and states that, "[t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates . . . ." *Id.* § 7506(c)(1)(B). The conformity provisions thereby require a state to submit a SIP revision to ensure the MVEBs in the SIP are current, otherwise the state will not be able to receive federal funding. Indeed, the 2003 SIP Revision explicitly referenced these two reasons in explaining why it submitted the changes:

> The California Clean Air Act requires a nonattainment area to update its AQMP triennially to incorporate the most recent available technical information.[[2]] In addition, U.S. EPA requires that transportation conformity budgets be established based on the most recent planning assumptions (i.e., within the last 5 years). Both the 1997 SIP and the 1999 amendments were based on demographic forecasts of the mid-1990's using 1993 as the base year. Since then, updated demographic data has become available, new air quality episodes have been identified, and the science for estimating motor vehicle emissions and air quality modeling techniques for ozone and PM10 have improved. Therefore, a plan update is necessary to ensure continued progress toward attainment and to avoid a transportation conformity lapse and associated federal funding losses.

[2]Although the 2003 SIP Revision references the triennial requirement in the California Clean Air Act, the Federal Clean Air Act also mandates such a triennial inventory. *See* 42 U.S.C. §§ 7502(c)(3); 7511a(1)(3)(A).

Case: 09-71383 05/05/2011 Page: 41 of 121 ID: 7683429 DktEntry: 48-1

[7] In summary, EPA's duty to issue a FIP (or sanctions) represents one statutory source of EPA's duty to take further action upon partial disapproval of California's 2003 Attainment Plan.

[8] Alternatively, EPA's obligation to take further action can be derived from the statutory requirement that the Administrator issue a SIP call upon a finding that the existing SIP is substantially inadequate. 42 U.S.C. § 7410(k)(5) ("Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies."). EPA argues that the decision about when and whether to review an existing SIP for substantial inadequacy is entirely within the Administrator's discretion. In support of this argument, EPA cites the text of the statute and two out-of-jurisdiction cases. The text of § 7410(k)(5), however, only says that the Administrator must make the finding, not that the finding must be a product of Administrator-initiated review procedures. The two cited cases also provide little support for EPA because they only show that the Administrator must have some discretion in deciding whether to find a SIP substantially inadequate. *See Sierra Club v. Johnson*, 541 F.3d 1257, 1265-66 (11th Cir. 2008); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008). We do not dispute this point. However, the question is not whether EPA has discretion in determining substantial inadequacies exist, but whether EPA has unlimited discretion to ignore evidence indicating an existing SIP might be substantially inadequate and choose to do nothing. We believe EPA's failure to act in light of the strong evidence provided in the 2003 SIP Revision demonstrating the substantial inadequacies of the 1997/1999 Plan is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious

Case: 09-71383 05/05/2011 Page: 41 of 121 ID: 7739429 DktEntry: 28-1

if the agency . . . entirely failed to consider an important aspect of the problem . . . ."); *see also 1000 Friends of Maryland v. Browner*, 265 F.3d 216, 235 (4th Cir. 2001) (leaving open the possibility that "there may be cases where previously performed modeling is inadequate to demonstrate attainment such that EPA's failure to require new modeling in those cases might be found to be arbitrary or capricious"). EPA's decision to do nothing is especially troublesome in light of the Act's overall purpose of ensuring states come into compliance with clean air standards. *See* 42 U.S.C. § 7470.

[9] EPA also notes that a demonstration that the 1997/1999 SIP is outdated or ineffective is not equivalent to finding that the SIP as a whole is substantially inadequate because a SIP is a complex, multi-faceted set of obligations. Again, the determination about whether the SIP is substantially inadequate is within the Administrator's discretion. We merely determine that the Act requires EPA to evaluate the existing SIP and actually make the determination as to whether a new attainment demonstration is required.

[10] Because EPA's failure to evaluate the adequacy of the existing SIP was arbitrary and capricious in light of the 2003 SIP Revisions alerting EPA to the new modeling, we grant the petition for review. Specifically, EPA has an affirmative duty to ensure that California demonstrate attainment with the NAAQS, *see* 42 U.S.C. §§ 7410(a)(2)(A), 7502(c)(6), either by promulgating a FIP, issuing sanctions, or evaluating the necessity of a SIP call.

III

EPA's action in approving the pesticide element of the SIP was arbitrary and capricious. EPA approved PEST-1—the portion of the 2003 SIP Revision re-committing to implementing the Pesticide Elements from the 1997/1999 Plan—in its 2009 final action. Petitioners claim our decision in *Warmerdam*, 539 F.3d at 1072, in which we stated the Wells

Case: 09-71383 05/05/2011 Page: 41 of 51 ID: 7683429 DktEntry: 128-1

Memorandum was not part of the existing SIP, rendered the Pesticide Element's commitments discretionary, thereby violating the Act. *See* 42 U.S.C. § 7410(a)(2)(A) ("Each implementation plan . . . shall include enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance."); § 7502(c)(6) (same).

EPA does not address the merits of this contention. It only argues that petitioners lack standing to challenge the Pesticide Element. Specifically, EPA argues that petitioners' injuries were not caused by EPA's 2009 rulemaking and cannot be redressed by the relief they seek. We disagree.

[11] Petitioners bear the burden of demonstrating a causal connection between their injuries and EPA's conduct. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). EPA argues that because its 2009 action approving PEST-1 merely maintained the status quo with respect to the Pesticide Element, either approval or disapproval would have resulted in the same regulatory outcome: continuation of the existing Pesticide Element as approved by EPA in 1997. EPA's argument assumes incorrectly that approving PEST-1 does not require an evaluation of the existing Pesticide Element as part of the SIP as a whole. As we determined above, when EPA approves a plan revision, it must ensure that the whole plan, as revised, satisfies the Act's requirements. *Hall*, 273 F.3d at 1159. This responsibility is even more important where, as here, the revision simply reiterates the commitments of the prior plan.

EPA also claims it had a "false choice" because its approval of PEST-1 did not make the Pesticide Element any more or less enforceable. This contention is not entirely true. Although EPA approved an identical plan in the 1997/1999 SIP, it wasn't until our 2008 *Warmerdam* decision that EPA approved the plan with the knowledge that the plan may not include enforceable commitments. As first submitted in 1994,

Case: 09-71383 05/05/2011 Page: 77 of 121 ID: 7683429 DktEntry: 28-1

EPA worried the Pesticide Element did not meet the requirements of the Act, primarily because it failed to include specific dates for adoption and implementation of the regulations necessary to achieve the required reductions. *See Warmerdam*, 539 F.3d at 1067. EPA did not propose approval of the Pesticide Element until California submitted the Wells Memorandum, which committed to adopting any necessary regulations by specific years and in specific areas. *Id.* In proposing approval of the Pesticide Element, EPA responded to questions about the Pesticide Element's enforceability by citing to the Wells Memorandum, thereby indicating its belief that the Wells Memorandum provided the required enforceable commitments. *See, e.g.*, 62 Fed. Reg. 1150, 1169-70 (Jan. 8, 1997) (to be codified at 40 C.F.R. pt. 52). After *Warmerdam*, EPA affirmatively knew that the Wells Memorandum was not part of the 1997/1999 SIP, and therefore its approval of PEST-1 (and by incorporation the existing Pesticide Element) in light of this knowledge represents the causal link giving rise to petitioners' injuries.

[12] EPA further argues petitioners cannot demonstrate redressability because if it disapproves PEST-1 on remand, the existing Pesticide Element as approved in 1997 would remain in effect. As we determined above, however, any disapproval of a SIP revision triggers the FIP and sanction clocks unless EPA determines the existing Pesticide Element has sufficiently enforceable commitments to meet the Act's requirements. *See* 42 U.S.C. §§ 7410(c)(1); 7509. Therefore, a remand is required to allow EPA to make that determination.

IV

[13] EPA's failure to require transportation control measures was arbitrary and capricious. Petitioners contend EPA violated the Act when it partially approved the 2003 SIP Revision without requiring California to submit transportation control measures to offset the emissions resulting from an increase in vehicle miles traveled. EPA argues that because

Case: 09-71383 05/05/2011 Page: 74 of 121 ID: 7683429 DktEntry: 88-1

aggregate motor vehicle emissions will decrease each year, California did not need to adopt control measures. The disagreement centers on one sentence in the Act requiring transportation control measures "to offset any growth in emissions from growth in vehicle miles traveled." 42 U.S.C. § 7511a(d)(1)(A). The relevant sentence states in full:

> Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures ["TCMs"] to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area ["VMT"] and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements).

Id. § 7511a(d)(1)(A). Petitioners argue that in determining whether to impose TCMs, EPA should identify the level of emissions emanating solely from VMT in a prior year, and use that as the baseline from which to measure the change in emissions. EPA's current approach, in contrast, is to use the aggregate emissions from a prior year as the baseline against which to measure the change in emissions. Aggregate motor vehicle emissions reflects the combination of numerous variables unrelated to VMTs such as vehicle turnover, tailpipe control standards, and use of alternative fuels. Because the parties agree that VMTs will increase by around 30%, but that aggregate motor vehicle emissions will decrease, the question for the court is whether "any growth in emissions" can mean any growth in aggregate motor vehicle emissions, or is unambiguous in meaning any increase in the level of emissions solely from VMTs.

To interpret § 7511a(d)(1)(A), we utilize *Chevron*'s "familiar two-step procedure." *Nat'l Cable & Telecomm. Ass'n v.*

Case: 09-71383 05/05/2011 Page: 74 of 121 ID: 7683429 DktEntry: 128-1

Brand X Internet Servs., 545 U.S. 967, 986 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). To determine whether the phrase "to offset any growth in emissions from growth in [VMT]" is ambiguous, we must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed meaning of Congress." *Id.* at 842-43. At Chevron step one, if, employing the "traditional tools of statutory construction," we determine that Congress has directly and unambiguously spoken to the precise question at issue, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843. In determining congressional intent, we not only examine the precise statutory section in question but also analyze the provision in the context of the governing statute as a whole, presuming a congressional intent to create a "symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131-33 (2000). We also examine legislative history. *See N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1083 (9th Cir. 2010).

[14] We begin with the plain words of the statute. The use of the word "growth" in reference to both "emissions" and "vehicle miles traveled" suggests two baselines: one pegged to changes in emissions and the other pegged to changes in VMT. EPA argues that petitioners' interpretation reads the phrase "growth in emissions" out of the statute because the Act would then only require a simplistic analysis of whether VMT is increasing. Although EPA is correct in stating that any increase in VMT is very likely to result in an increase in aggregate emissions, we cannot ignore the possibility that with advances in clean car technology, one day VMT could increase without a corresponding increase in emissions. If that happens, under the statute, EPA would not need to impose TCMs even though VMT increased. Therefore, although some increase in emissions is required (such that there are two baselines), it doesn't change the ultimate question of whether

Case: 09-71383 05/05/2011 Page: 45 of 121 ID: 7683429 DktEntry: 28-1

the baseline for the increase in emissions can be viewed in terms of aggregate vehicle emissions (as EPA contends), or if the baseline must be viewed as any increase in emissions due solely to VMT.

[15] EPA's interpretation only gives effect to the second clause of the relevant sentence, and not to the first. According to the statute, states shall implement TCMs not only "to offset any growth in emissions from growth in [VMT]" but also "to attain reduction in motor vehicle emissions as necessary . . . to comply with the . . . periodic emissions reduction requirements[ ]." 42 U.S.C. § 7511a(d)(1)(A). While the second clause contemplates using TCMs to reduce aggregate emissions, the first clause contemplates using TCMs to reduce VMT. *See United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (utilizing principles of statutory construction to determine that general, catchall provisions should not trump more specific provisions). Looking at both clauses not only demonstrates that EPA's interpretation—equating "growth in emissions" with "growth in aggregate emissions"—is redundant, it shows that Congress used the phrase "motor vehicle emissions" when referring to aggregate emissions, but simply "emissions from growth in [VMT]" when referring to only those emissions from VMT.

This interpretation is bolstered by the legislative history of the provision, which clearly refutes EPA's interpretation. The House Committee Report, for example, specifically states how "growth in emissions" should be measured, explaining: "The baseline for determining whether there has been growth in emissions due to increased VMT is the level of vehicle emissions that would occur if VMT held constant in the area." H.R. REP. NO. 101-490, pt. 1, at 242 (1990). This Report is very persuasive because, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia v. United States*, 469

CaSase09-91738383 05/20/52/20111 Page74 17 of 21 DKE 7693429 DRage 2 28 f121

U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). EPA even admits that "it is true that the language of [the House Committee Report] appears to support the alternative interpretation of the statutory language," and that "the original authors of the provision and [the House Committee Report] may in fact have intended this result." 57 Fed. Reg. 13,498, 13,522 (April 16, 1992) (to be codified at 40 C.F.R. pt. 52).

[16] Further review of the legislative history provides additional support for our conclusion. *See, e.g.*, S. REP. NO. 101-228, at 44 (1989) ("Severe and extreme areas are required to offset growth in vehicle miles traveled by implementing the transportation controls listed . . . ."); 136 Cong. Rec. 16,956 (1990) (statement of Sen. Max Baucus) ("It is clear that the goals of this bill—a healthy and safe air supply for every American—will not be achieved without implementing strategies that effectively limit the growth in vehicle use in the major urban centers where pollution levels are the worst."). Therefore, because the statutory language and the legislative history demonstrates that Congress has spoken directly to the question at issue, we do not owe deference to EPA's interpretation, *Chevron*, 467 U.S. at 842-43; *Wilderness Society*, 353 F.3d at 1062, and we grant the petition for review.

V

In summary, EPA's approval of the 2003 SIP Revision was arbitrary and capricious. EPA should have ordered California to submit a revised attainment plan for the South Coast after it disapproved the 2003 Attainment Plan. EPA should have required transportation control measures. EPA is required to determine whether the Pesticide Element has sufficient enforcement mechanisms to satisfy the requirements of the Act. We grant the petition for review and remand to the EPA for further proceedings consistent with this opinion.

PETITION GRANTED.

632 F.3d 584, 72 ERC 1129, 11 Cal. Daily Op. Serv. 1580, 2011 Daily Journal D.A.R. 1913
(Cite as: 632 F.3d 584)

United States Court of Appeals,
Ninth Circuit.
ASSOCIATION OF IRRITATED RESIDENTS, an unincorporated association; El Comité para el Bienestar de Earlimart, an unincorporated association; Community of Children's Advocates Against Pesticide Poisoning, an unincorporated association, Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Lisa Jackson, in her official capacity as Administrator of the U.S. EPA; Laura Yoshii, in her official capacity as Regional Administrator of Region IX of the U.S. EPA, Respondents.
Natural Resources Defense Council, Inc., Petitioner,
v.
United States Environmental Protection Agency, Respondent.

Nos. 09-71383, 09-71404.
Argued and Submitted Nov. 1, 2010.
Filed Feb. 2, 2011.

Background: Environmental Protection Agency (EPA) approved in part and disapproved in part revisions to California's State Implementation Plan (SIP) for meeting air quality standards for ozone under Clean Air Act (CAA). Interested entities petitioned for judicial review.

Holdings: The Court of Appeals, Thomas, Circuit Judge, held that:
(1) EPA had affirmative duty to evaluate adequacy of existing SIP as whole and determine whether new attainment demonstration was necessary to ensure that state had satisfied attainment requirements of CAA;
(2) EPA had affirmative obligation to request new attainment demonstration after partially disapproving revision to SIP;
(3) EPA did not have unlimited discretion to ignore evidence indicating existing SIP might be substantially inadequate and choose to do nothing;
(4) petitioners had standing to challenge approval of pesticide element in revised SIP; and
(5) California was required under CAA to submit transportation control measures (TCMs) "to offset any growth in emissions from growth in vehicle miles traveled [VMT]."

Petition granted.

West Headnotes

[1] Environmental Law 149E 287

149E Environmental Law
149EVI Air Pollution
149Ek287 k. Ozone. Most Cited Cases

When approving state implementation plan (SIP) revisions for meeting air quality standards for ozone, Environmental Protection Agency (EPA) had affirmative duty to evaluate adequacy of existing SIP as whole and determine whether new attainment demonstration was necessary to ensure that state had satisfied attainment requirements of CAA, even if EPA did not actually know extent to which new modeling had undermined existing SIP. Clean Air Act, § 182(c)(2)(A), 42 U.S.C.A. § 7511a(c)(2)(A).

[2] Environmental Law 149E 287

149E Environmental Law
149EVI Air Pollution
149Ek287 k. Ozone. Most Cited Cases

Environmental Protection Agency (EPA) had affirmative obligation to request new attainment demonstration after partially disapproving revision to state implementation plan (SIP) for meeting air quality standards for ozone, where EPA knew, or should have known, that previously approved SIP likely no longer met attainment requirements of CAA and large portions of attainment plan were not discretionary. Clean Air Act, §§ 110(c)(1), (k)(5),

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172(c)(3), 42 U.S.C.A. §§ 7410(c)(1), (k)(5), 7502(c)(3).

[3] Statutes 361 ⚷188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

The first step in statutory construction cases is to begin with the language of the statute.

[4] Statutes 361 ⚷195

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k195 k. Express mention and implied exclusion. Most Cited Cases

When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

[5] Environmental Law 149E ⚷258

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek258 k. In general. Most Cited Cases

The Environmental Protection Agency (EPA) is required to promulgate a federal implementation plan (FIP) when it disapproves a revision seeking to update what it recognizes are serious deficiencies in an existing state implementation plan (SIP). Clean Air Act, §§ 110(c)(1), (k)(5), 172(c)(3), 42 U.S.C.A. §§ 7410(c)(1), (k)(5), 7502(c)(3).

[6] Environmental Law 149E ⚷287

149E Environmental Law
149EVI Air Pollution
149Ek287 k. Ozone. Most Cited Cases

Clean Air Act (CAA) required Environmental Protection Agency (EPA) to evaluate existing state implementation plan (SIP) for meeting air quality standards for ozone and actually make determination as to whether new attainment demonstration was required, particularly in light of SIP revisions alerting EPA to new modeling, although determination about whether SIP was substantially inadequate was within discretion of administrator; EPA did not have unlimited discretion to ignore evidence indicating that existing SIP might be substantially inadequate and choose to do nothing. Clean Air Act, § 110(k)(5), 42 U.S.C.A. § 7410(k)(5).

[7] Environmental Law 149E ⚷656

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek656 k. Other particular parties. Most Cited Cases

Interested entities had standing on petition for judicial review to challenge approval by Environmental Protection Agency (EPA) of pesticide element in revised state implementation plan (SIP), where causal link to petitioners' injuries was demonstrated on basis that portion of pesticide element representing enforceable commitment had not been part of original SIP and redressability was demonstrated on basis that any disapproval of SIP revision triggered federal implementation plan (FIP) and sanction clocks unless EPA determined existing pesticide element had sufficiently enforceable commitments to meet requirements of CAA. Clean Air Act, §§ 110(a)(2)(A), 172(c)(6), 42 U.S.C.A. §§ 7410(a)(2)(A), 7502(c)(6).

[8] Environmental Law 149E ⚷651

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 k. Cognizable interests and in-

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juries, in general. Most Cited Cases

On a petition for judicial review of final agency action under the CAA, the petitioners bear the burden, in order to establish the elements of Article III standing, of demonstrating a causal connection between their injuries and the conduct of the Environmental Protection Agency (EPA). U.S.C.A. Const. Art. 3, § 1 et seq.; Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[9] Environmental Law 149E ⚷261

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek261 k. Contents of implementation plans. Most Cited Cases

When Environmental Protection Agency (EPA) approves a revision of a state implementation plan (SIP), it must ensure that the whole plan, as revised, satisfies the requirements of the CAA. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[10] Environmental Law 149E ⚷258

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek258 k. In general. Most Cited Cases

Any disapproval of a state implementation plan (SIP) revision triggers the federal implementation plan (FIP) and sanction clocks unless the Environmental Protection Agency (EPA) determines an existing provision has sufficiently enforceable commitments to meet the requirements of the CAA. Clean Air Act, § 110(c)(1), 42 U.S.C.A. § 7410(c)(1).

[11] Environmental Law 149E ⚷273

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek273 k. Mobile sources; motor vehicles. Most Cited Cases

California was required under CAA to submit transportation control measures (TCMs) in its state implementation plan (SIP) for nonattainment area "to offset any growth in emissions from growth in vehicle miles traveled [VMT]"; even if aggregate motor vehicle emissions would decrease each year, baseline had to be viewed as any increase in emissions due solely to VMT. Clean Air Act, § 182(d)(1)(A), 42 U.S.C.A. § 7511a(d)(1)(A).

[12] Statutes 361 ⚷181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases

If, using the traditional tools of statutory construction, the Court of Appeals concludes the statute is clear as to the precise question at issue, it must give effect to the unambiguously expressed intent of Congress.

[13] Statutes 361 ⚷208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and related clauses. Most Cited Cases

Statutes 361 ⚷212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other matters. Most Cited Cases

Statutes 361 ⚷217.4

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361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative history in general. Most Cited Cases

When determining congressional intent, the Court of Appeals not only examines the precise statutory section in question but also analyzes the provision in the context of the governing statute as a whole, presuming a congressional intent to create a symmetrical and coherent regulatory scheme; the Court also examines legislative history.

[14] Statutes 361 217.3

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.3 k. Legislative hearings, reports, etc. Most Cited Cases

The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.

***587** Brent J. Newell and Marybelle N. Nzegwu, San Francisco, CA, and David Pettit, Melissa Lin Perrella, and Adriano Martinez, Santa Monica, CA, for petitioners.

Austin D. Saylor, United States Department of Justice, for respondent.

On Petition for Review of an Order of the Environmental Protection Agency. EPA No. EPA-R09-OAR-2008-0677.

Before: CYNTHIA HOLCOMB HALL and SIDNEY R. THOMAS, Circuit Judges, and ROBERT S. LASNIK, Chief District Judge.FN*

FN* The Honorable Robert S. Lasnik, Chief United States District Judge for the Western District of Washington, sitting by designation.

OPINION

THOMAS, Circuit Judge:

The Association of Irritated Residents, El Comité para el Bienestar de Earlimart, the Community of Children's Advocates Against Pesticide Poisoning, and the Natural Resources Defense Council, petition for review of a final action by the Environmental Protection Agency approving in part and disapproving in part revisions to California's State Implementation Plan for meeting air quality standards for ozone under the Clean Air Act. We have jurisdiction under 42 U.S.C. § 7607(b)(1). We grant the petition for review and remand to EPA for further consideration.

I

A

Congress enacted the Clean Air Act (the "Act") to help protect and enhance the nation's air quality. 42 U.S.C. §§ 7401-7671q. The Act requires the Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards ("NAAQS") for a variety of pollutants, one of which is ozone.FN1 *Id.* §§ 7408-09. EPA then designates areas as "attainment" or "nonattainment" based on whether the areas meet the clean air standards for each particular pollutant. *Id.* § 7407(d). EPA classifies nonattainment areas based on the severity of the area's pollution, from Marginal to Extreme. *Id.* § 7511(a). The area at issue in this litigation-the Los ***588** Angeles-South Coast Air Basin ("South Coast")-is classified as Extreme. 73 Fed.Reg. 63,408, 63,409 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52).

FN1. Ground-level ozone is a primary component of what is commonly known as "smog." It is formed when oxides of nitrogen (NOx), volatile organic compounds (VOC), and oxygen react in the presence of sunlight, generally at elevated temperat-

ures. When inhaled, even at very low levels, ozone can cause serious health problems by damaging lung tissue and sensitizing lungs to other irritants. *See* 73 Fed.Reg. 63,408, 63,409 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52).

Under the Act, states have primary responsibility for ensuring that the quality of their air satisfies the NAAQS, and they must detail their efforts in a State Implementation Plan ("SIP") for each region within that state. 42 U.S.C. § 7410(a). States must submit these SIPs and SIP revisions to EPA for review. EPA may either fully approve the plan, partially approve and partially disapprove the plan, or conditionally approve the plan. *Id.* § 7410(k). Once approved, SIPs become enforceable as federal law. *Id.* § 7413.

An EPA determination that a state has failed to submit a required plan, or EPA disapproval of a submitted plan, triggers two time periods. First, a "sanctions clock" begins during which time the state must either remedy the deficiency or face sanctions. *Id.* § 7509(a)-(b). Second, a "FIP clock" begins by the end of which EPA must either approve a state-submitted SIP or promulgate a Federal Implementation Plan ("FIP"). *Id.* § 7410(c)(1). Additionally, EPA must issue a "SIP call," and thereby require the state to make necessary revisions, if it finds that a previously approved SIP is "substantially inadequate" to attain or maintain air quality standards. *Id.* § 7410(k)(5).

The Act also contains "conformity" requirements. Under these conformity provisions, the federal government may not approve, accept, or fund any transportation plan, program, or project unless it conforms to an approved SIP. *Id.* § 7506(c). To make conformity determinations, transportation agencies must look to an approved SIP to find the maximum amount of pollution allowed from motor vehicle emissions. This motor vehicle emissions budget ("MVEB") is determined by the states in their SIPs by identifying the total allowable emissions consistent with meeting the statutory clean air requirement, and then allocating that total among various types of sources, such as motor vehicles. 40 C.F.R. § 93.101. Because SIPs sometimes take years to review, EPA may make preliminary adequacy determinations regarding the MVEBs found in the SIPs. *Id.* § 93.118. After further review, EPA may declare the MVEB to be inadequate. *Id.* § 93.118(e)(3).

In addition to the SIPs and conformity requirements applicable to all areas, the Act contains further requirements for nonattainment areas, depending on the severity of the ozone problem in the area. 42 U.S.C. §§ 7511-7511f. Two of these requirements are at issue in this case. The first requirement is for these nonattainment areas to submit SIP revisions demonstrating attainment of the ozone standard by the applicable date. These "attainment plans" have two main parts: (1) a control strategy to reach compliance; and (2) an attainment demonstration to show that under the strategy the area will meet the NAAQS by the statutory deadline. *Id.* §§ 7511a(c)(2)(a), (d)-(e); 7410(a)(2)(A).

The second requirement for nonattainment areas is to develop enforceable transportation strategies and control measures "to offset any growth in emissions from growth in vehicle miles traveled ... and to attain reduction in motor vehicle emissions as necessary." *Id.* § 7511a(d)(1)(A). Suggested transportation control measures include programs for improved public transit, restrictions of certain lanes for high occupancy vehicles, and programs for secure bicycle storage facilities. *Id.* § 7408(f)(1)(A).

***589** B

In 1994, California submitted a SIP revision that included an ozone attainment demonstration for the South Coast nonattainment area and a "Pesticide Element" designed to reduce emissions from pesticide applications. In 1997, EPA approved the SIP revision with respect to both the ozone attainment demonstration and the Pesticide Element. In 1999, California sought again to update the SIP

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with new emissions inventories and a new ozone attainment demonstration. EPA approved these elements in 2000. All of these plans and revisions form the 1997/1999 South Coast Ozone SIP ("1997/1999 SIP").

After EPA approved the 1997/1999 SIP, California conducted new modeling, demonstrating that the existing SIP underestimated vehicle pollution in the area. Specifically, California realized that, with respect to ozone:

> [T]he basic strategy of the 1997 Plan and the 1999 amendments must be significantly overhauled to address the new realities of higher mobile source emissions and lower carrying capacities for ozone as indicated by new modeling and meteorological episodes. Additional reductions, above and beyond those committed to in the 1997 Plan and 1999 amendments, will be necessary to demonstrate attainment with the federal ozone standard and present a significant challenge.

Concluding that "a plan update [was] necessary," California submitted the 2003 SIP Revision to EPA in 2004. The 2003 SIP Revision consisted, in relevant part, of three things: the 2003 Attainment Plan, PEST-1, and a demonstration that no transportation control measures were required. Petitioners seek review of EPA's final determination as to each of these three elements.

The 2003 Attainment Plan revised the existing SIP in two ways. First, it updated the attainment demonstration (and therefore the MVEBs) to account for the increased emissions projections under the new modeling. Second, it added additional control measures to offset the increase in predicted pollution. In 2004, EPA found the MVEBs in the attainment demonstration adequate for purposes of the conformity provisions, but did not make a final decision as to the 2003 Attainment Plan as a whole. In 2008, California withdrew some of the 2003 Attainment Plan's key elements, including many of the control measures.

PEST-1 was a control strategy that called for continued implementation of the Pesticide Element approved in the 1997/1999 SIP. In 2008, we concluded that the portion of the Pesticide Element representing the enforceable commitment (the Wells Memorandum), was not part of the 1997/1999 SIP. *See El Comité Para El Bienestar de Earlimart v. Warmerdam,* 539 F.3d 1062 (9th Cir.2008).

Finally, because nonattainment areas must propose enforceable transportation control measures "to offset any growth in emissions from growth in vehicle miles traveled," California submitted to EPA a demonstration purporting to show that there would be no such growth in emissions. Although California acknowledged that vehicle miles traveled would increase by about 30%, it showed that aggregate motor vehicle emissions would decrease.

In 2008, EPA proposed to approve the control measures that were not withdrawn from the 2003 Attainment Plan (including PEST-1), but disapprove the attainment demonstration (and therefore the MVEBs) in the 2003 Attainment Plan because the demonstration was largely based on the withdrawn commitments. EPA explained the consequences of its proposed partial ***590** disapproval by saying: "No sanctions clocks or FIP requirement would be triggered by our disapprovals, if finalized, because the approved [1997/1999] SIP already contains the plan elements that we are proposing to disapprove." 73 Fed.Reg. 63,408, 63,419 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52). EPA also proposed to approve California's assertion that no transportation control measures were required based on California's demonstration that there would be no growth in aggregate vehicle emissions.

In 2009, after considering public comments from petitioners on the proposed rule, EPA finalized action on the 2003 SIP Revision as proposed. This timely petition for review followed.

Petitioners raise three issues in their petition for review. First, they contend EPA's failure to or-

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der California to submit a revised attainment plan for the South Coast after it disapproved the 2003 Attainment Plan was arbitrary and capricious. Second, petitioners contend EPA's approval of PEST-1 violates the Clean Air Act because PEST-1 lacks enforceable commitments. Third, petitioners contend EPA violated the Act by failing to require transportation control measures to combat the increase in vehicle miles traveled. We grant the petition as to all three claims.

II

[1] EPA's failure to evaluate the adequacy of the existing SIP was arbitrary and capricious. The Act requires each nonattainment area to submit a SIP that includes an attainment demonstration for the 1-hour ozone standard. 42 U.S.C. § 7511a(c)(2)(A). Although EPA approved such an attainment demonstration for the South Coast in the 1997/1999 SIP, California submitted a revised attainment demonstration in the 2003 Attainment Plan, which made clear that the attainment demonstration in the 1997/1999 SIP was not accurate. When EPA partially disapproved the 2003 Plan's attainment demonstration (because California subsequently revoked many of the control strategies on which the attainment demonstration was based), EPA concluded that no further action was required. *See* 74 Fed.Reg. 10,176, 10,177 (Mar. 10, 2009) (to be codified at 40 C.F.R. pt. 52) ("[N]o sanctions clocks or Federal Implementation plan (FIP) requirement[s are] triggered by our disapprovals because the plan revisions that are the subject of the proposed disapprovals represent revisions to previously-approved SIP elements that EPA determined met the CAA requirements, and thus, the revisions are not required under the Act.").

EPA is mistaken that its duties under the Act end upon approval. Instead, EPA had an affirmative duty to evaluate the existing SIP and determine whether a new attainment demonstration was necessary to ensure California satisfies the Act's attainment requirements. Its failure to evaluate the adequacy of the existing SIP in any way was arbitrary and capricious.

[2] Through the 2003 SIP Revision, EPA knew, or should have known, of the inadequacy of the 1997/1999 SIP. As California specifically stated, "this revision points to the urgent need for additional emission reductions (beyond those incorporated in the 1997/99 Plan) to offset increased emission estimates from mobile sources and meet all federal criteria pollutant standards within the time frames allowed under the federal Clean Air Act." EPA's public comments also indicate that it understood that the new modeling undermined the existing SIP. *See, e.g.,* 73 Fed.Reg. 63,408, 63,415 (Oct. 24, 2008) (to be codified at 40 C.F.R. pt. 52) ("[I]n view of the magnitude of the reductions now understood to be needed for attainment of the 1-hour ozone NAAQS in the South ***591** Coast, [California] has adopted [additional control measures]."); *id.* at 63,416 ("[California] revised the 1-hour ozone attainment demonstration in the 2003 South Coast AQMP in light of updated emissions inventories that show higher mobile source emissions than prior projections and updated modeling that indicates a lower carrying capacity in the air basin."). However, even if EPA did not actually know the extent to which the new modeling undermined the existing SIP, it has a duty to evaluate the adequacy of the existing SIP as a whole when approving SIP revisions. *See Hall v. EPA,* 273 F.3d 1146, 1159 (9th Cir.2001) ("The EPA must be able to determine that, with the revisions in place, the whole 'plan as ... revised' can meet the Act's attainment requirements.") (quoting *Train v. Natural Res. Def. Council,* 421 U.S. 60, 90, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975)). In partially approving the 2003 Plan, EPA should have analyzed the adequacy of the whole 1997/1999 SIP.

The closer question is whether, given the knowledge that a previously approved SIP likely no longer meets the Act's attainment requirements, EPA has an affirmative obligation to request a new attainment demonstration. Two sections of the Act may give rise to such an affirmative duty. The first

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is the requirement that EPA issue a FIP when it disapproves any plan or plan revision. 42 U.S.C. § 7410(c)(1); *see also id.* § 7509 (mandating sanctions upon disapproving a required State submission). The second is the requirement that EPA issue a SIP call upon a finding that the existing SIP is substantially inadequate. *Id.* § 7410(k)(5).

[3][4] EPA argues that the FIP and sanction clocks are triggered only where the plan revision is "required" under the Act. T he first step in statutory construction cases is to begin with the language of the statute. *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). The plain text refutes EPA's argument. Section 7410(c)(1) states:

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator-
>
> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1). Although subsection (A) applies to "required" submissions, subsection (B), which applies to disapprovals of SIPs and SIP revisions, does not have such a limit. "Nor should we infer as much, as it is a general principle of statutory construct that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Barnhart,* 534 U.S. at 452, 122 S.Ct. 941 (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)).

[5] EPA contends that reading subsection (B) as requiring EPA to issue a FIP whenever it disapproves a discretionary revision would "yield absurd results, because it would require the agency to promulgate a FIP where the State's fully approved SIP remains in effect." EPA provides as an example a state proposing a ***592** revision to make an existing SIP less stringent, arguing that requiring a FIP when EPA disapproves such a relaxing of the SIP would be irrational. EPA's point is well taken in a situation where the existing SIP remains adequate to attain the NAAQS. The facts in this case, however, are much different because EPA knew, or should have known, that the "fully approved SIP" was no longer adequate. While it may seem counterintuitive to require EPA to promulgate a FIP when it disapproves a revision seeking to undercut an effective existing SIP, it is entirely logical to require EPA to promulgate a FIP when it disapproves a revision seeking to update what it recognizes are serious deficiencies in an existing SIP.

Furthermore, although the plain language requires a FIP every time EPA disapproves a plan revision, the FIP can be avoided if an existing plan is in place that meets the Act's requirements because § 7410(c)(1) has a grace period in which states can bring their plans into compliance before the FIP is enacted. *See* 42 U.S.C. § 7410(c)(1) (mandating a FIP "unless the State corrects the deficiency"); *see also id.* § 7509(a) (mandating sanctions "unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination"). EPA must simply evaluate the existing SIP (as already required under *Hall,* 273 F.3d at 1159), and if it meets the Act's requirements, EPA can find that the state has "corrected the deficiency," 42 U.S.C. § 7410(c)(1).

This analysis aligns with Congress's intent in writing the statutory language to mandate promulgation of a FIP upon any disapproval. In 1988, when Congress was debating the amendments to the

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Clean Air Act, EPA sought an amendment that would have left promulgation of FIPs solely to EPA's discretion. *See Coal. for Clean Air v. S. Cal. Edison Co.,* 971 F.2d 219, 223 (9th Cir.1992) (citing S. 1630, 101st Cong., § 105 (1989)). Although the Senate passed such an amendment, a House Committee deleted the language, and the "House language retaining EPA's mandatory obligation to promulgate a FIP whenever it disapproves a SIP was ultimately enacted by Congress and signed into law." *Id.* (citing Clean Air Act Amendments of 1990, Pub.L. No. 101-549, 104 Stat. 2399).

Even if, as EPA argues, the FIP requirement is triggered only when the revision was "required" under the Act-and not upon every EPA disapproval of a plan revision as we determined above-the partial disapproval of the 2003 SIP Revision here still triggers the FIP requirement because large portions of the 2003 Attainment Plan were not discretionary. For example, the Act explicitly requires states with nonattainment areas to update their SIPs every three years with a revised inventory of actual emissions from all sources of relevant pollutants. *See* 42 U.S.C. §§ 7502(c)(3); 7511a(1)(3)(A). Additionally, the Act requires transportation projects to conform to the existing SIP and states that, "[t]he determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates...." *Id.* § 7506(c)(1)(B). The conformity provisions thereby require a state to submit a SIP revision to ensure the MVEBs in the SIP are current, otherwise the state will not be able to receive federal funding. Indeed, the 2003 SIP Revision explicitly referenced these two reasons in explaining why it submitted the changes:

> The California Clean Air Act requires a nonattainment area to update its AQMP triennially to incorporate the most recent***593** available technical information.[FN2] In addition, U.S. EPA requires that transportation conformity budgets be established based on the most recent planning assumptions (i.e., within the last 5 years). Both the 1997 SIP and the 1999 amendments were based on demographic forecasts of the mid-1990's using 1993 as the base year. Since then, updated demographic data has become available, new air quality episodes have been identified, and the science for estimating motor vehicle emissions and air quality modeling techniques for ozone and PM10 have improved. Therefore, a plan update is necessary to ensure continued progress toward attainment and to avoid a transportation conformity lapse and associated federal funding losses.

FN2. Although the 2003 SIP Revision references the triennial requirement in the California Clean Air Act, the Federal Clean Air Act also mandates such a triennial inventory. *See* 42 U.S.C. §§ 7502(c)(3); 7511a(1)(3)(A).

In summary, EPA's duty to issue a FIP (or sanctions) represents one statutory source of EPA's duty to take further action upon partial disapproval of California's 2003 Attainment Plan.

[6] Alternatively, EPA's obligation to take further action can be derived from the statutory requirement that the Administrator issue a SIP call upon a finding that the existing SIP is substantially inadequate. 42 U.S.C. § 7410(k)(5) ("Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard ... or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies."). EPA argues that the decision about when and whether to review an existing SIP for substantial inadequacy is entirely within the Administrator's discretion. In support of this argument, EPA cites the text of the statute and two out-of-jurisdiction cases. The text of § 7410(k)(5), however, only says that the Administrator must make the finding, not that the finding

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must be a product of Administrator-initiated review procedures. The two cited cases also provide little support for EPA because they only show that the Administrator must have some discretion in deciding whether to find a SIP substantially inadequate. *See Sierra Club v. Johnson,* 541 F.3d 1257, 1265-66 (11th Cir.2008); *Citizens Against Ruining the Env't v. EPA,* 535 F.3d 670, 677-78 (7th Cir.2008). We do not dispute this point. However, the question is not whether EPA has discretion in determining substantial inadequacies exist, but whether EPA has unlimited discretion to ignore evidence indicating an existing SIP might be substantially inadequate and choose to do nothing. We believe EPA's failure to act in light of the strong evidence provided in the 2003 SIP Revision demonstrating the substantial inadequacies of the 1997/1999 Plan is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem....”); *see also 1000 Friends of Maryland v. Browner,* 265 F.3d 216, 235 (4th Cir.2001) (leaving open the possibility that “there may be cases where previously performed modeling is inadequate to demonstrate attainment such that EPA's failure to require new modeling in those cases might be found to be arbitrary or capricious”). EPA's decision to do nothing is especially troublesome in light of the Act's overall purpose of ensuring states come into compliance***594** with clean air standards. *See* 42 U.S.C. § 7470.

EPA also notes that a demonstration that the 1997/1999 SIP is outdated or ineffective is not equivalent to finding that the SIP as a whole is substantially inadequate because a SIP is a complex, multi-faceted set of obligations. Again, the determination about whether the SIP is substantially inadequate is within the Administrator's discretion. We merely determine that the Act requires EPA to evaluate the existing SIP and actually make the determination as to whether a new attainment demonstration is required.

Because EPA's failure to evaluate the adequacy of the existing SIP was arbitrary and capricious in light of the 2003 SIP Revisions alerting EPA to the new modeling, we grant the petition for review. Specifically, EPA has an affirmative duty to ensure that California demonstrate attainment with the NAAQS, *see* 42 U.S.C. §§ 7410(a)(2)(A), 7502(c)(6), either by promulgating a FIP, issuing sanctions, or evaluating the necessity of a SIP call.

III

[7] EPA's action in approving the pesticide element of the SIP was arbitrary and capricious. EPA approved PEST-1-the portion of the 2003 SIP Revision re-committing to implementing the Pesticide Elements from the 1997/1999 Plan-in its 2009 final action. Petitioners claim our decision in *Warmerdam,* 539 F.3d at 1072, in which we stated the Wells Memorandum was not part of the existing SIP, rendered the Pesticide Element's commitments discretionary, thereby violating the Act. *See* 42 U.S.C. § 7410(a)(2)(A) (“Each implementation plan ... shall include enforceable emission limitations and other control measures, means, or techniques ... as well as schedules and timetables for compliance.”); § 7502(c)(6) (same).

EPA does not address the merits of this contention. It only argues that petitioners lack standing to challenge the Pesticide Element. Specifically, EPA argues that petitioners' injuries were not caused by EPA's 2009 rulemaking and cannot be redressed by the relief they seek. We disagree.

[8][9] Petitioners bear the burden of demonstrating a causal connection between their injuries and EPA's conduct. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). EPA argues that because its 2009 action approving PEST-1 merely maintained the status quo with respect to the Pesticide Element, either approval or disapproval would have resulted in the same regulatory outcome: continuation of the existing Pesticide Element as approved by EPA in

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1997. EPA's argument assumes incorrectly that approving PEST-1 does not require an evaluation of the existing Pesticide Element as part of the SIP as a whole. As we determined above, when EPA approves a plan revision, it must ensure that the whole plan, as revised, satisfies the Act's requirements. *Hall,* 273 F.3d at 1159. This responsibility is even more important where, as here, the revision simply reiterates the commitments of the prior plan.

EPA also claims it had a "false choice" because its approval of PEST-1 did not make the Pesticide Element any more or less enforceable. This contention is not entirely true. Although EPA approved an identical plan in the 1997/1999 SIP, it wasn't until our 2008 *Warmerdam* decision that EPA approved the plan with the knowledge that the plan may not include enforceable commitments. As first submitted in 1994, EPA worried the Pesticide Element did not meet the requirements of the Act, primarily because it failed to include***595** specific dates for adoption and implementation of the regulations necessary to achieve the required reductions. *See Warmerdam,* 539 F.3d at 1067. EPA did not propose approval of the Pesticide Element until California submitted the Wells Memorandum, which committed to adopting any necessary regulations by specific years and in specific areas. *Id.* In proposing approval of the Pesticide Element, EPA responded to questions about the Pesticide Element's enforceability by citing to the Wells Memorandum, thereby indicating its belief that the Wells Memorandum provided the required enforceable commitments. *See, e.g.,* 62 Fed.Reg. 1150, 1169-70 (Jan. 8, 1997) (to be codified at 40 C.F.R. pt. 52). After *Warmerdam,* EPA affirmatively knew that the Wells Memorandum was not part of the 1997/1999 SIP, and therefore its approval of PEST-1 (and by incorporation the existing Pesticide Element) in light of this knowledge represents the causal link giving rise to petitioners' injuries.

[10] EPA further argues petitioners cannot demonstrate redressability because if it disapproves PEST-1 on remand, the existing Pesticide Element as approved in 1997 would remain in effect. As we determined above, however, any disapproval of a SIP revision triggers the FIP and sanction clocks unless EPA determines the existing Pesticide Element has sufficiently enforceable commitments to meet the Act's requirements. *See* 42 U.S.C. §§ 7410(c)(1); 7509. Therefore, a remand is required to allow EPA to make that determination.

IV

[11] EPA's failure to require transportation control measures was arbitrary and capricious. Petitioners contend EPA violated the Act when it partially approved the 2003 SIP Revision without requiring California to submit transportation control measures to offset the emissions resulting from an increase in vehicle miles traveled. EPA argues that because aggregate motor vehicle emissions will decrease each year, California did not need to adopt control measures. The disagreement centers on one sentence in the Act requiring transportation control measures "to offset any growth in emissions from growth in vehicle miles traveled." 42 U.S.C. § 7511a(d)(1)(A). The relevant sentence states in full:

> Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures ["TCMs"] to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area ["VMT"] and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements).

Id. § 7511a(d)(1)(A). Petitioners argue that in determining whether to impose TCMs, EPA should identify the level of emissions emanating solely from VMT in a prior year, and use that as the baseline from which to measure the change in emissions. EPA's current approach, in contrast, is to use the aggregate emissions from a prior year as the

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baseline against which to measure the change in emissions. Aggregate motor vehicle emissions reflects the combination of numerous variables unrelated to VMTs such as vehicle turnover, tailpipe control standards, and use of alternative fuels. Because the parties agree that VMTs will increase by around 30%, but that aggregate motor vehicle emissions ***596** will decrease, the question for the court is whether "any growth in emissions" can mean any growth in aggregate motor vehicle emissions, or is unambiguous in meaning any increase in the level of emissions solely from VMTs.

[12][13] To interpret § 7511a(d)(1)(A), we utilize *Chevron*'s "familiar two-step procedure." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 986, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). To determine whether the phrase "to offset any growth in emissions from growth in [VMT]" is ambiguous, we must determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed meaning of Congress." *Id.* at 842-43, 104 S.Ct. 2778. At Chevron step one, if, employing the "traditional tools of statutory construction," we determine that Congress has directly and unambiguously spoken to the precise question at issue, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843, 104 S.Ct. 2778. In determining congressional intent, we not only examine the precise statutory section in question but also analyze the provision in the context of the governing statute as a whole, presuming a congressional intent to create a "symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 131-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). We also examine legislative history. *See N. Cal. River Watch v. Wilcox,* 620 F.3d 1075, 1083 (9th Cir.2010).

We begin with the plain words of the statute. The use of the word "growth" in reference to both "emissions" and "vehicle miles traveled" suggests two baselines: one pegged to changes in emissions and the other pegged to changes in VMT. EPA argues that petitioners' interpretation reads the phrase "growth in emissions" out of the statute because the Act would then only require a simplistic analysis of whether VMT is increasing. Although EPA is correct in stating that any increase in VMT is very likely to result in an increase in aggregate emissions, we cannot ignore the possibility that with advances in clean car technology, one day VMT could increase without a corresponding increase in emissions. If that happens, under the statute, EPA would not need to impose TCMs even though VMT increased. Therefore, although some increase in emissions is required (such that there are two baselines), it doesn't change the ultimate question of whether the baseline for the increase in emissions can be viewed in terms of aggregate vehicle emissions (as EPA contends), or if the baseline must be viewed as any increase in emissions due solely to VMT.

EPA's interpretation only gives effect to the second clause of the relevant sentence, and not to the first. According to the statute, states shall implement TCMs not only "to offset any growth in emissions from growth in [VMT]" but also "to attain reduction in motor vehicle emissions as necessary ... to comply with the ... periodic emissions reduction requirements [ ]." 42 U.S.C. § 7511a(d)(1)(A). While the second clause contemplates using TCMs to reduce aggregate emissions, the first clause contemplates using TCMs to reduce VMT. *See United States v. Wenner,* 351 F.3d 969, 975 (9th Cir.2003) (utilizing principles of statutory construction to determine that general, catchall provisions should not trump more specific provisions). Looking at both clauses not only demonstrates that EPA's interpretation-equating***597** "growth in emissions" with "growth in aggregate emissions"-is redundant, it shows that Congress used the phrase "motor vehicle emissions" when referring to aggregate emissions, but simply "emissions from

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growth in [VMT]" when referring to only those emissions from VMT.

[14] This interpretation is bolstered by the legislative history of the provision, which clearly refutes EPA's interpretation. The House Committee Report, for example, specifically states how "growth in emissions" should be measured, explaining: "The baseline for determining whether there has been growth in emissions due to increased VMT is the level of vehicle emissions that would occur if VMT held constant in the area." H.R. REP. NO. 101-490, pt. 1, at 242 (1990). This Report is very persuasive because, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia v. United States,* 469 U.S. 70, 76, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) (quoting *Zuber v. Allen,* 396 U.S. 168, 186, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969)). EPA even admits that "it is true that the language of [the House Committee Report] appears to support the alternative interpretation of the statutory language," and that "the original authors of the provision and [the House Committee Report] may in fact have intended this result." 57 Fed.Reg. 13,498, 13,522 (April 16, 1992) (to be codified at 40 C.F.R. pt. 52).

Further review of the legislative history provides additional support for our conclusion. *See, e.g.,* S. REP. NO. 101-228, at 44 (1989) ("Severe and extreme areas are required to offset growth in vehicle miles traveled by implementing the transportation controls listed...."); 136 Cong. Rec. 16,956 (1990) (statement of Sen. Max Baucus) ("It is clear that the goals of this bill-a healthy and safe air supply for every American-will not be achieved without implementing strategies that effectively limit the growth in vehicle use in the major urban centers where pollution levels are the worst."). Therefore, because the statutory language and the legislative history demonstrates that Congress has spoken directly to the question at issue, we do not owe deference to EPA's interpretation, *Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778; *Wilderness Society v. Fish & Wildlife Service,* 353 F.3d 1051, 1062 (2003), and we grant the petition for review.

V

In summary, EPA's approval of the 2003 SIP Revision was arbitrary and capricious. EPA should have ordered California to submit a revised attainment plan for the South Coast after it disapproved the 2003 Attainment Plan. EPA should have required transportation control measures. EPA is required to determine whether the Pesticide Element has sufficient enforcement mechanisms to satisfy the requirements of the Act. We grant the petition for review and remand to the EPA for further proceedings consistent with this opinion.

PETITION GRANTED.

C.A.9,2011.
Association of Irritated Residents v. U.S. E.P.A.
632 F.3d 584, 72 ERC 1129, 11 Cal. Daily Op. Serv. 1580, 2011 Daily Journal D.A.R. 1913

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