Case Nos. 10-71457 and 10-71458 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al., and
COMMITTEE FOR A BETTER ARVIN, et al.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT,
Intervenor

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

BRIEF OF RESPONDENTS

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STATEMENT OF JURISDICTION

This case concerns an action by the United States Environmental Protection Agency ("EPA") approving revisions to the California State Implementation Plan ("SIP") for the San Joaquin Valley extreme nonattainment area for the one-hour ozone National Ambient Air Quality Standard ("NAAQS") under section 110 of the Clean Air Act ("CAA"), 42 U.S.C. § 7410. 75 Fed. Reg. 10,420 (Mar. 8, 2010). Respondents United States Environmental Protection Agency, Lisa P. Jackson, Administrator, and Jared Blumenfeld, Regional Administrator, EPA Region 9 (collectively "EPA") agree with the jurisdictional statement in the brief filed by petitioners Sierra Club, Committee for a Better Arvin, et al. ("Petitioners"). This Court has jurisdiction over this case pursuant to CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Respondents agree that the petition was timely filed.

ISSUES PRESENTED FOR REVIEW

1. Whether EPA reasonably interpreted the CAA to allow EPA to approve the rate of progress and attainment demonstrations in California's SIP submittal based on data that were current and accurate when the proposed SIP was submitted, without requiring the State and EPA to continually re-evaluate such data, and modeling analyses based on such data, as the notice-and-comment rulemaking review of the proposed SIP progressed.

2. Whether EPA acted arbitrarily and capriciously in relying upon the emissions inventory data that were submitted with California's proposed SIP revision, where subsequent emissions inventory data, which were developed pursuant to modeling methods that were not available when California submitted the proposed SIP revision, and which were submitted to EPA for a control strategy for a different NAAQS, yielded different emissions estimates.

3. Whether EPA's interpretation of the CAA, allowing California to rely in its SIP on emissions reductions from California regulations that undergo the required procedures under the CAA, and that receive waivers of Federal preemption of the regulation of mobile sources, without requiring these measures to also undergo the similar process of receiving SIP approval, is reasonable.

4. Whether EPA's March 2010 approval of proposed revisions to the SIP for the San Joaquin Valley extreme nonattainment area for the one-hour ozone standard was arbitrary and capricious based on EPA's long-standing policy that attainment demonstrations for the one-hour standard show attainment beginning in the year when attainment is required, and not prior to the year when attainment is required.

STATEMENT OF THE CASE

On March 8, 2010, EPA issued a final rule approving revisions to the California SIP for the San Joaquin Valley extreme nonattainment area for the one-hour ozone NAAQS. 75 Fed. Reg. 10,420 (Mar. 8, 2010). The proposed SIP

revisions relied upon applicable emission controls, including California state measures, to show that required reductions in emissions would be made and used modeling of future air quality conditions to show that the area would progress toward attaining the one-hour ozone NAAQS.

Petitioners challenge EPA's approval of the San Joaquin Valley Area SIP for the one-hour ozone NAAQS, arguing that EPA violated the CAA and the Administrative Procedure Act ("APA") in using the data that California submitted with the proposed SIP revisions and not data submitted to support other SIP revisions that California proposed several years later, for the eight-hour ozone NAAQS. As Respondents demonstrate below, EPA reasonably interpreted the CAA to require that the data be current and accurate as of the time the State submitted them to EPA, and not as of some subsequent time. EPA's approval of the proposed SIP revision was not arbitrary or capricious, because the action was supported by the administrative record that was before EPA and was consistent with the CAA and EPA regulations and policy. Accordingly, EPA's action was consistent with both the CAA and the APA.

Petitioners also challenge EPA's action because the proposed SIP revisions credited the San Joaquin Valley Area with emission reductions that resulted from California emission controls on motor vehicles and motor engines for which EPA had waived Federal preemption under CAA section 209, 42 U.S.C. § 7543. EPA

reasonably interprets the CAA to allow emission reductions from control measures for which Federal preemption has been waived, after complying with the CAA's notice and comment requirements, to be counted in the SIP, even though those California regulations are not also submitted for approval as part of the SIP. This interpretation of the CAA is reasonable because the CAA accords California a unique process so that its emission controls for mobile sources can take the place of the Federal emission control regulations for mobile sources. Accordingly, just as other States can rely on emission reductions from Federal mobile source control measures in their SIPs, California can rely on emission reductions from its regulations for which Federal preemption has been waived.

These petitions for review should be denied.

STATEMENT OF FACTS

A. The Clean Air Act and the National Ambient Air Quality Standard for Ozone

The Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through shared Federal and state responsibility. The Act requires EPA to establish, review, and revise National Ambient Air Quality Standards ("NAAQS") for air pollutants that it determines may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. §§ 7408-7409. Once EPA has established a

NAAQS, EPA must designate areas that do not meet the NAAQS as "nonattainment." 42 U.S.C. § 7407(d)(1).

EPA established a NAAQS for ozone[1/] in 1979. 44 Fed. Reg. 8202 (Feb. 9, 1979). The 1979 ozone NAAQS set the acceptable level of ozone in the ambient air at 0.12 parts per million ("ppm"), based on monitored levels averaged over one hour. 40 C.F.R. § 50.9; 44 Fed. Reg. at 8220. In 1997, EPA revised the ozone standard to be more protective of human health. 62 Fed. Reg. 38,856 (July 18, 1997). The revised standard set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an eight-hour period. 62 Fed. Reg. at 38,859; 50 C.F.R. § 50.10. EPA issued the eight-hour standard as a revision of the one-hour standard, rather than as a separate, additional standard, because EPA concluded that the one-hour standard was no longer needed to protect human health. *Id*. at 38,859, 38,861. Effective June 15, 2005, the 1979 ozone standard was revoked for most areas of the country, including the San Joaquin Valley. *See* 70 Fed. Reg. 44,470 , 44,473 (Aug. 3, 2005); *see also* 40 C.F.R. § 50.9(b); 69 Fed. Reg. 23,858 (Apr. 30, 2004), 69 Fed. Reg. 23,951, 23,996 (Apr. 30, 2004). However, EPA retained as "anti-backsliding" requirements many of the obligations that applied based on an area's attainment status for the one-hour ozone standard. *See* 40 C.F.R. § 51.905.

[1/] Ground-level ozone, the pollutant at issue here, is formed from chemical reactions between nitrogen oxides (NOx) and volatile organic compounds, in the presence of sunlight.

Thus, although the one-hour ozone standard no longer applies, certain areas remain obligated to meet certain regulatory requirements for the one-hour ozone standard that applied to those areas as of the date that the one-hour standard was revoked.

B. State Implementation Plans

States have primary authority for ensuring that their air quality meets the NAAQS. CAA § 107(a), 42 U.S.C. § 7407(a). Once EPA has promulgated area designations, the CAA requires States to develop state implementation plans ("SIPs") to bring nonattainment areas into attainment with the NAAQS and to maintain air quality in areas that are in attainment. CAA § 110, 42 U.S.C. § 7410. After reasonable notice and public hearings, a State must adopt the SIP and submit it to EPA for review and approval. CAA § 110(a), 42 U.S.C. § 7410(a). EPA must approve the SIP if it meets the CAA's requirements. CAA § 110(k)(3), 42 U.S.C. § 7410(k)(3). The general requirements for all SIPs are set forth in CAA section 110, 42 U.S.C. § 7410. These include enforceable emissions limitations, other control mechanisms to meet the requirements of the CAA, and enforcement programs. General requirements for nonattainment area SIPs are in CAA sections 171-179B, 42 U.S.C. §§ 7501-7509a. SIPs for nonattainment areas must include an emissions inventory, an attainment demonstration, reasonable progress measures, nonattainment area permit requirements for new or modified major stationary sources, and contingency measures to be taken if the area fails to make

reasonable further progress or to attain the NAAQS by the required date. CAA § 172(c), 42 U.S.C. § 7502(c).

The CAA also establishes specific requirements for ozone nonattainment area SIPs. CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f. Section 181(a)(1) provides five nonattainment area classifications, ranging from "marginal" to "extreme," based on the severity of the ozone problem in the area. 42 U.S.C. § 7511(a)(1). Areas with "higher" classifications, such as "extreme," are provided more time to attain, but these areas are subject to more stringent planning and control obligations. For example, the regulatory threshold for stationary sources in areas with "higher" classifications is smaller than that for "lower" classifications, so that in an "extreme" area, sources that emit 10 tons per year ("tpy") of VOC or NOx are considered major sources, while in marginal and moderate areas, the threshold is 100 tpy.

Each SIP for an "extreme" ozone nonattainment area, such as the San Joaquin Valley, must contain an "attainment demonstration," by which the State demonstrates that the area will achieve the ozone NAAQS by the applicable attainment date. CAA § 182(c)(2)(A), (e), 42 U.S.C. § 7511a(c)(2)(A), (e). An attainment demonstration includes both a technical analysis that uses emissions inventory data input to computer models to predict whether the area will meet the applicable ozone standard by the deadline, and the State's plan for achieving the

actual emissions reductions needed for attainment (its "control strategy"). *BCCA Appeal Group v. EPA*, 355 F.3d 817, 823 (5th Cir. 2003); *El Comité Para El Bienestar De Earlimart v. Warmerdam*, 539 F.3d 1062, 1066 (9th Cir. 2008); *see also* 40 C.F.R. § 51.112. This attainment demonstration "must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective." *Environmental Defense v. EPA*, 369 F.3d 193, 197 (2nd Cir. 2004) (quoting CAA § 182(c)(2)(A), 42 U.S.C. § 7511a(c)(2)(A)). A photochemical grid model uses as its basis a "base year" emissions inventory. It analyzes how emissions from various sources combine to create ozone and attempts to predict how changes to different variables, such as meteorology, population growth, and planned emissions reductions from different sources would affect ambient ozone concentrations in the attainment year. *See id.* at 197.

Emissions inventory data are important for both the attainment demonstration and the related "rate-of-progress" demonstration required by CAA sections 172(c)(2) and 182(c)(2), 42 U.S.C. §§ 7502(c)(2), 7511a(c)(2). The emissions inventory is a comprehensive, accurate, and current inventory of actual emissions from all sources of the relevant pollutant(s) in the area as of a specific calendar year. *See* CAA §§ 172(c)(3), 182(a)(1), 42 U.S.C. §§ 7502(c)(3), 7511a(a)(1); *see also* 70 Fed. Reg. 71,612, 71,677 (Nov. 29, 2005) (noting that several CAA ozone

planning requirements, including milestones that measure progress toward attainment, are "keyed to" the emissions inventory). States are required to submit new emissions inventories every three years. *See* CAA § 182(a)(3), 42 U.S.C. § 7511a(a)(3); 40 C.F.R. § 51.30(b). Emissions inventories should include both anthropogenic and biogenic sources of ozone precursor emissions from stationary, area, and mobile sources capable of affecting air quality within the nonattainment area, so that emissions from these sources are adequately accounted for in modeling demonstrations and control strategy development. *See* "General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990," 57 Fed. Reg. 13,498, 13,502 (April 16, 1992) ("General Preamble"). Because most emission sources do not monitor and report emissions continuously, emissions inventories are, by nature, "estimates of actual releases to the atmosphere." 70 Fed. Reg. at 71,666. After developing a "base year" emissions inventory, States use modeling and other analyses to calculate projected future emissions and target emission levels, which then inform the State's development of progress milestones and control strategies for attaining the NAAQS. *See* General Preamble, 57 Fed. Reg. at 13,507-10.

C. Regulation of Mobile Sources Under the CAA

While the CAA assigns to States the primary responsibility for developing SIPs, EPA has the primary responsibility for regulating emissions from mobile

sources through Federal regulation. *See generally* CAA §§ 202-219, 42 U.S.C. §§ 7521-7554. States are generally preempted from establishing their own emission standards for mobile sources. CAA § 209(a), (e)(1), 42 U.S.C. § 7543(a), (e)(1). However, States may rely on the emissions reductions from Federal mobile source emission standards in developing their SIPs. CAA § 182(b)(1)(C), 42 U.S.C. § 7511a(b)(1)(C).

The CAA allows California to petition EPA for a waiver of the Federal preemption of mobile source emission standards. CAA § 209(b), 42 U.S.C. § 7543(b). The CAA also allows California to seek authorization from EPA to adopt and enforce emission standards for nonroad engines or vehicles. CAA § 209(e)(2), 42 U.S.C. § 7543(e)(2). In keeping with the broad discretion that Congress intended to give California, EPA is required to grant the waiver or authorization unless it affirmatively finds that: California does not need the standards; California's determination that its standards would be, in the aggregate, at least as protective of public health and welfare as the Federal standards was arbitrary and capricious; or that California's standards are not consistent with CAA § 209. CAA §§ 209(b), (e)(2), 42 U.S.C. §§ 7543(b), (e)(2); *see Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1120-23 (D.C. Cir. 1979).

In enacting these provisions, Congress recognized "California's unique problems and pioneering efforts" respecting air quality. *Motor & Equip. Mfrs.*

Ass'n, 627 F.2d at 1110, quoting S. Rep. No. 90-403, at 33 (1967). As other States rely on emissions reductions from Federal mobile source emission standards in developing their SIPs, California relies on the emissions reductions from its own mobile source standards, which have been exempted from federal preemption, in developing SIPs, including the SIP at issue in this case.

D. EPA Action on the San Joaquin Valley One-Hour Ozone Plan

The San Joaquin Valley ozone nonattainment area includes eight counties: San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare, and the valley portion of Kern. This area was classified in 1991 as a serious nonattainment area for the one-hour ozone NAAQS. 56 Fed. Reg. 56,694, 56,729 (Nov. 6, 1991). The CAA, as amended in 1990, set a deadline of November 15, 1999, for serious ozone nonattainment areas to come into attainment. 42 U.S.C. § 7511(a)(1). EPA approved California's serious area SIP for the San Joaquin Valley on January 8, 1997. 62 Fed. Reg. 1150 (Jan. 8, 1997). In 2001, EPA issued a finding that the San Joaquin Valley Area had failed to attain the one-hour ozone standard by the required deadline. 66 Fed. Reg. 56,476 (Nov. 8, 2001). Accordingly, by operation of law, the area was reclassified to severe nonattainment for the one-hour ozone NAAQS with a new attainment deadline, November 15, 2005. *Id.*; 42 U.S.C. § 7511(a)(1). After determining that sufficient controls could not be implemented in time for the area to come into attainment by the deadline, California requested a

voluntary reclassification to extreme nonattainment under the one-hour ozone standard, as provided under CAA section 181(b)(3), 42 U.S.C. § 7511(b)(3). 69 Fed. Reg. 8126 (Feb. 23, 2004); *see* Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board, to Wayne Nastri, Regional Administrator, EPA Region 9 (Jan. 9, 2004) (transmitting request for reclassification of the San Joaquin Valley area to extreme nonattainment for the one-hour ozone standard). In 2004, EPA granted California's request, establishing the area's deadline for attaining the one-hour ozone standard as November 15, 2010. 69 Fed. Reg. 20,550 (Apr. 16, 2004).

California adopted the San Joaquin Valley "Extreme Ozone Attainment Demonstration Plan" on October 8, 2004, and submitted it to EPA on November 15, 2004. 74 Fed. Reg. 33,933, 33,934 (July 14, 2009); *see* Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board, to Wayne Nastri, Regional Administrator, EPA Region 9 (Nov. 15, 2004). California amended the Plan (hereinafter the "2004 Plan") in October 2005 to synchronize the rulemaking schedule with that in the San Joaquin Valley's plan for the NAAQS for particulate matter less than or equal to 10 micrometers in diameter. 74 Fed. Reg. at 33,934. These amendments were submitted to EPA on March 6, 2006. *Id.* In August 2008, the District adopted "Clarifications Regarding the 2004 Extreme Ozone Attainment Demonstration Plan," and California submitted them to EPA on September 5,

2008. *See* Letter from James N. Goldstene, Executive Officer, California Air Resources Board, to Wayne Nastri, Regional Administrator, EPA Region 9 (Sept. 5, 2008)(with enclosures). The 2008 Clarifications updated information on certain control programs in the SIP.

In 2008, EPA proposed to approve the 2004 Plan in full. 73 Fed. Reg. 61,381 (Oct. 16, 2008). In response to comments on the proposed full approval, EPA withdrew the original proposal and instead re-proposed to approve certain elements of the 2004 Plan: the attainment demonstration, the rate-of-progress demonstration and related contingency measures, other control measures, and the District's rule on school bus fleets. 74 Fed. Reg. 33,933 (July 14, 2009). EPA proposed to disapprove the Plan's contingency measures that would be triggered if the area failed to attain the standard by its deadline. *Id.* After receiving supplemental technical information from California, EPA proposed in October 2009 to approve the contingency measures in the 2004 Plan. 74 Fed. Reg. 50,936 (Oct. 2, 2009). On March 8, 2010, EPA published final approval of all elements of the 2004 Plan. 75 Fed. Reg. 10,420 (Mar. 8, 2010). Along with the final approval notice, EPA released a technical support document, which provides detailed analysis in support of EPA's action to approve the 2004 Plan and provides detailed responses to comments that EPA received on the July 2009 and October 2009 proposals. *See* Office of Air Planning, Air Division, EPA Region 9, Final Technical Support

Document for the Action on the San Joaquin Valley Extreme One-Hour Ozone Standard Plan and San Joaquin Portion of the 2003 State Strategy, Dec. 11, 2009 (hereinafter "TSD").

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), provides the standard of review for EPA actions under CAA section 307(b), 42 U.S.C. § 7607(b).[2/] *Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004). Under this standard, a reviewing court may not set aside a final agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). This standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's action is presumed to be valid as long as "the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) and *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983)).

[2/] This case involves an EPA action that is not listed in CAA section 307(d)(1), 42 U.S.C. § 7607(d)(1), and thus is not subject to the substitute judicial review provisions of CAA section 307(d), 42 U.S.C. § 7607(d).

Where an agency decision involves the evaluation of complex scientific issues and data within the agency's technical expertise, deference is strongly warranted. *Baltimore Gas & Elec. Co.*, 462 U.S. at 103; *NW Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006) ("[W]e must 'be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency.'" (quoting *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004)); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 801-02 (D.C. Cir. 1998) (Deference to EPA expertise is particularly warranted "when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act.").

Under the narrow APA standard of review, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Therefore, review is not to be based upon subsequent events or materials received or developed after the agency's decision. Rather, "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. at 743-44 (citations omitted).

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If congressional intent is clear from the statutory language, the inquiry ends. *Id.* at 842-43. If the statute is silent or ambiguous on a particular issue, the Court must accept the agency's interpretation if it is reasonable; the agency's interpretation need not represent the only permissible reading of the statute nor the reading that the Court might originally have given it. *Id.* at 843 & n.11; *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *see also Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir. 1995). However, as Justice Scalia recently observed in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 n.4 (2009), the key inquiry is simply whether the agency's interpretation is reasonable, for "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."

An agency's interpretation of its own regulations also "[is entitled to] substantial deference," and may not be overruled "unless an 'alternative reading is compelled by the regulations' plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); *Fed. Express Corp.*

v. Holowecki, 552 U.S. 389, 395-96 (2008); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1539 (9th Cir. 1993) (citations omitted). Such deference is particularly appropriate where the regulations "concern[] 'a complex and highly technical regulatory program,' in which the identification and classification of relevant criteria 'necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted); *Cent. Ariz.*, 990 F.2d at 1539-40.

SUMMARY OF THE ARGUMENT

EPA based its approval of the revisions to the California SIP for the one-hour ozone standard for the San Joaquin Valley extreme nonattainment area on information that California provided, which showed that the proposed SIP revisions fulfilled the requirements of the CAA, and on EPA's reasonable interpretations of the CAA. First, EPA reasonably interpreted the CAA's requirements for emissions inventories to allow "current" and "accurate" to mean that the emissions inventory data were current and accurate at the time California submitted them to EPA. Second, EPA's reliance upon the emissions inventory data that California submitted with the 2004 Plan, instead of data submitted several years later for a different plan for a different NAAQS, was supported by the administrative record and was not arbitrary or capricious, and accordingly did not violate the APA. Third, EPA reasonably interpreted the CAA to allow California

to rely in its SIP on emissions reductions from California mobile source regulations for which Federal preemption had been waived under the procedures established pursuant to CAA section 209. Fourth, EPA's approval of the attainment demonstration in the 2004 Plan was consistent with the Agency's long-standing interpretation of the CAA's provisions for ozone nonattainment areas, and Petitioners confuse the separate and distinct CAA requirements governing attainment demonstrations and attainment determinations. Finally, Petitioners impermissibly rely on emissions data that post-date EPA's action, and thus were not in the administrative record, to support their challenge to EPA's action. For these reasons, as discussed below, Petitioners' challenges to EPA's approval of the San Joaquin Valley Area SIP must fail.

ARGUMENT

The Clean Air Act sets out specific and detailed requirements for SIPs. *See, e.g.*, CAA §§ 110(a)(2), 171-193, 42 U.S.C. §§ 7410(a)(2), 7501-7515. Because the San Joaquin Valley Area is classified as an extreme nonattainment area for the one-hour ozone NAAQS, it must have a SIP that meets the specific requirements for extreme ozone nonattainment areas in CAA section 182, 42 U.S.C. § 7511a, as well as the applicable nonattainment area SIP requirements in CAA section 172,

42 U.S.C. § 7502.[3] *See El Comité Para el Bienestar de Earlimart v. Warmerdam*, 539 F.3d. at 1066. Petitioners disagree with California's 2004 Plan for the San Joaquin Valley Area to come into compliance with the one-hour ozone NAAQS, and they challenge EPA's approval of the 2004 Plan on several grounds. *See* Pet. Br. at 24-51. For the reasons discussed below, EPA's approval of the 2004 Plan was consistent with both the CAA and the APA and should be upheld.

I. EPA Appropriately Relied on the Data Before It in Taking Action on the 2004 Plan.

A. EPA's Interpretation of the CAA, Requiring Emissions Inventories to Be Comprehensive, Current, and Accurate as of the Time the State Submits a Proposed SIP, Is Reasonable.

Petitioners argue that EPA violated the CAA by approving the 2004 Plan based upon the data that California submitted with that plan. Pet. Br. at 24-29. Specifically, they argue that EPA should have relied upon emissions inventories that California submitted in 2007 in connection with the SIP for the eight-hour ozone NAAQS ("2007 Plan"), and that EPA's reliance upon the emissions inventories in the 2004 Plan in its review of the 2004 Plan for the one-hour ozone NAAQS violated section 172(c)(3) of the CAA. *Id.* This argument must fail.

[3] EPA revoked the one-hour standard because, when EPA promulgated the eight-hour standard, EPA determined that the one-hour standard was no longer necessary to protect public health and the environment with an adequate margin of safety. EPA promulgated regulations specifying which requirements of CAA sections 172 and 182, 42 U.S.C. §§ 7502, 7511a, would continue to apply for purposes of the one-hour standard after its revocation. 40 C.F.R. Part 51, Subpart X.

EPA reasonably interprets the CAA's requirement that States submit comprehensive, current, and accurate emissions inventories to mean that emissions inventories must be comprehensive, current, and accurate at the time they are submitted to EPA. CAA §§ 182(a)(1), (3), 42 U.S.C. §§ 7511a(a)(1), (3). Not only is EPA's interpretation of the statutory language reasonable, but also it is entitled to heightened deference, because it involves the evaluation of complex scientific data within EPA's technical expertise that should not be reversed unless "there is 'simply no rational relationship' between the means used to account for any imperfections and the situation to which those means are applied." *Am. Iron & Steel Inst. v.* EPA, 115 F.3d 979, 1004 (D.C. Cir. 1997).

If agencies are constantly required to revise decisions when new or better data become available, the administrative process would never come to a close. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978), *citing ICC v. Jersey City*, 322 U.S. 503, 514 (1944). *See also Nance v. EPA*, 645 F.2d 701, 717 (9th Cir. 1981) ("The administrative process cannot provide for the constant reopening of the record to consider new facts, and it is for the agency, not this court to determine when such reopening is appropriate, unless the failure to reconsider can be characterized an abuse of discretion." (citations omitted)). Adopting this principle in the SIP context, EPA explained that "[t]he Clean Air Act requires that SIP inventories and control measures be based on the

most current information and applicable models that are available when a SIP is developed." Memorandum, John Seitz, Office of Air Quality Planning and Standards, and Margo Oge, Office of Transportation and Air Quality, "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity," January 18, 2002 ("Seitz Memo"), at 9 (citing CAA section 172(c)(3), 42 U.S.C. § 7502(c)(3), and 40 C.F.R. § 51.112(a)(1)). EPA has consistently applied this policy in approving SIPs. *See* TSD at 85. Further, the D.C. Circuit cited the Seitz Memo in upholding EPA's approval of the attainment demonstration for the one-hour standard for the Washington, D.C., area, where the plan relied upon a mobile source emissions model and did not use the updated version of the model that had become available after the plan was submitted to EPA. "To require states to revise completed plans every time a new model is announced would lead to significant costs and potentially endless delays in the approval processes. EPA's decision to reject that course, and to accept the use of [the existing mobile source emissions model] in this case, was neither arbitrary nor capricious." *Sierra Club v. EPA*, 356 F.3d 296, 308 (D.C. Cir. 2004), *amended in other part by* Nos. 03-1084, 03-1103, 03-1115, 03-1152, 2004 WL 877850 (D.C. Cir. Apr. 16, 2004).

CAA sections 182(a)(1) and (3) require each State having an ozone nonattainment area to submit a "comprehensive, accurate, current inventory of

actual emissions from all sources" as described in CAA section 172(c)(3), 42 U.S.C. § 7502(c)(3) and "in accordance with guidance provided by the Administrator," and to periodically update the inventory.[4] 42 U.S.C. § 7511a(a)(1), (a)(3). This emissions inventory, which reflects the State's best estimates of emissions to the ambient air in a recent calendar year, provides the starting point, or "base year" inventory, for measuring the area's progress toward attainment, for example, in the reasonable further progress demonstration required under CAA section 182(c)(2)(B), 42 U.S.C. § 7511a(c)(2)(B); *see also* CAA § 182(b)(1)(B), 42 U.S.C. § 7511a(b)(1)(B) (defining "baseline emissions" for purposes of rate-of-progress plans).

Base year emissions inventories necessarily cover a broad range of emissions sources for which actual emissions are difficult to measure or estimate. *See generally* 70 Fed. Reg. at 71,666 (emissions inventories are, by nature, "estimates of actual releases to the atmosphere"). In addition, States and EPA are

[4] After the one-hour ozone NAAQS was revoked, the San Joaquin Valley was no longer subject to a specific obligation to adopt and submit emissions inventories for the one-hour ozone standard. *See* 40 C.F.R. §§ 51.905(a)(1)(i), 51.900(f)(4). Thus, EPA's approval of the 2004 Plan did not constitute an "action" on the emissions inventories under CAA section 172(c)(3) or 182(a)(1). Had EPA deemed the emissions inventories to satisfy a specific CAA requirement, the governing provision would have been CAA section 182(a)(1), 42 U.S.C. § 7511a(a)(1). *See also* 57 Fed. Reg. 13,498, 13,503 (Apr. 16, 1992) (for ozone nonattainment areas, "[b]y meeting the specific inventory requirements [of CAA section 182(a)(1)], the State will also satisfy the general inventory requirements of [CAA] section 172(c)(3)").

continually working to improve the accuracy of these inventories, including developing new mobile source emissions models. As a result, emissions inventories submitted in later years routinely reflect improved methodologies for estimating emissions. *See* TSD at 84-88; 40 C.F.R. pt. 51, subpart A. Because of the ever-evolving nature of calculating emissions inventories, EPA has explained in numerous guidance documents how States may develop adequate base year emissions inventories based on the most current mobile source model available at the time of SIP development and how, in turn, these emissions inventories should be used in modeling and attainment demonstrations for nonattainment areas. *See* TSD at 84-87, *citing*, *inter alia*, General Preamble, 57 Fed. Reg. at 13,502-03, 13508, 13,517; Office of Mobile Sources, EPA, "Procedures for Emissions Inventory Preparation, Volume IV: Mobile Source," June 1992.

EPA's approval of the rate-of-progress and attainment demonstrations in the 2004 Plan under CAA sections 172(c)(2), 181(a), and 182(c)(2), 42 U.S.C. §§ 7502(c)(2), 7511(a), and 7511a(c)(2), based on an evaluation of the emissions inventories that California submitted with the 2004 Plan, was consistent with the CAA. *See* 75 Fed. Reg. at 10,422. EPA determined that the 2000 base year emissions inventory in the 2004 Plan was comprehensive, accurate, and current at the time it was submitted on November 15, 2004, and that this inventory and the projected emissions inventories for 2008 and 2010 were developed consistent with

EPA's guidance. *See* 75 Fed. Reg. at 10,422; 74 Fed. Reg. at 33,940; TSD at 84-89. Thus, EPA reasonably determined that the base year emissions inventory and the projected emissions inventories provided appropriate bases for the rate-of-progress and attainment demonstrations in the 2004 Plan. TSD at 84-89.

Petitioners point out that California updated its on-road mobile source model in 2006, two years after submitting the 2004 Plan to EPA, and that EPA approved the use of the new model in 2008. California used the new model when it developed the emissions inventory it included with its 2007 Plan for the eight-hour ozone standard. While these developments were taking place, EPA was evaluating the 2004 Plan, and, in October 2008, EPA initially proposed to approve the 2004 Plan. 73 Fed. Reg. 61,381 (Oct. 16, 2008). EPA issued the final approval in March 2010. 75 Fed. Reg. 10,420 (March 8, 2010). Notwithstanding the new emissions estimates that California developed and submitted to EPA with the 2007 Plan, EPA was obligated under CAA section 110(k), 42 U.S.C. § 7410(k), to act on the 2004 Plan, and EPA did so consistent with the applicable CAA and regulatory requirements.

After Petitioners filed their Opening Brief, this Court issued an opinion in *Association of Irritated Residents v. EPA*, 632 F.3d 584 (9th Cir. 2011) ("*A.I.R.*").[5]

[5] One petition for rehearing or rehearing en banc has been submitted. Docket Nos. 09-71383 and 09-71404 (consolidated), Docket No. 37, *Intervenor-Pending South Coast Air Quality Management District, Petition for Panel Rehearing and Petition*

That case involved EPA's action on proposed revisions to the SIP for the one-hour ozone standard for the Los Angeles-South Coast Air Basin. *Id* at 587-88. An approved SIP for the area was in place, but after conducting new modeling for the one-hour ozone standard, California submitted to EPA proposed SIP revisions, including a revised attainment demonstration that relied on additional control measures. *Id.* at 589. California later withdrew certain of the proposed additional control measures and the State specifically represented that the currently approved plan was not sufficient to provide for attainment. *Id.* EPA approved the control measures that had not been withdrawn. *Id.* at 589-90. However, EPA disapproved the attainment demonstration because California had substantially based the attainment demonstration upon emissions reductions resulting from the withdrawn control measures. *Id.* This Court held that EPA's action was arbitrary and capricious, because EPA had a duty under CAA section 110(*l*) to evaluate whether the SIP, as a whole, would provide for attainment of the NAAQS when EPA approved a revision to the already approved SIP. *Id.* at 590-91.

Although both the *A.I.R.* case and this case involve EPA action on attainment demonstration SIP submittals, there are several pivotal distinctions. In *A.I.R.*, the State already had an approved attainment demonstration for the one-hour ozone

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for Rehearing En Banc. This Court has set a deadline of May 5, 2011, for EPA to file a petition for rehearing or rehearing en banc. Docket Nos. 09-71383 and 09-71404 (consolidated), Docket No. 34, *Order Granting Respondent's Motion for a 45-Day Extension for Filing a Petition for Panel Rehearing or Rehearing En Banc.*

NAAQS extreme nonattainment area, but the State submitted a replacement attainment demonstration to address deficiencies that the State had expressly identified. *Id.* at 589. EPA disapproved the submitted attainment demonstration for the one-hour ozone NAAQS, leaving in place the existing attainment demonstration for the one-hour ozone NAAQS, which the State had characterized as deficient. *Id.* This was precisely the defect that this Court indicated EPA should have addressed.

Here, EPA approved a SIP revision for the San Joaquin Valley Area for the one-hour ozone NAAQS that California had submitted pursuant to a CAA requirement, and California later submitted proposed SIP revisions for the San Joaquin Valley Area for the eight-hour ozone NAAQS. These SIP submittals were required under the CAA; California did not determine that the SIP for the one-hour ozone standard for the San Joaquin Valley Area was in any way deficient. Further, the issue in *A.I.R.* was whether EPA correctly evaluated the 2004 Plan under CAA section 110(*l*). Here, the question is whether EPA reasonably interpreted the statutory language, "current" and "accurate" in CAA section 182(a)(1), 42 U.S.C. § 7511a(a)(1). Thus, nothing in *A.I.R.* resolved the legal issues presented in this case.

For these reasons, EPA's finding that the emissions inventories in the 2004 Plan provided an appropriate basis for approving the rate-of-progress and

attainment demonstrations in the 2004 Plan was reasonable and was consistent with the requirements of the CAA. *See, e.g., Latino Issues Forum v. EPA*, 558 F.3d 936, 943-44 (9th Cir. 2009) (where language of the CAA was ambiguous and EPA's statutory interpretation was reasonable, this Court upheld EPA's interpretation.). Nothing in *A.I.R.* disturbs this conclusion.

B. Requiring California to Use the Updated Model for the 2004 Plan Would Have Been Inconsistent with EPA Guidance and Practice.

Petitioners also argue that EPA's reliance on the data in the 2004 Plan was arbitrary and capricious and therefore violated the APA. Pet. Br. at 29-32. This argument fails as well. EPA has well-established criteria and procedures for evaluating SIP submittals, EPA followed these criteria, and EPA explained the rationale for its action. *See, e.g.*, TSD at 83-91. EPA's action, therefore, was not arbitrary or capricious.

This Court must "apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. at 743-44 (citations omitted). Here, the administrative record shows that EPA "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d at 1140.

The TSD explains in detail EPA's rationale for relying on the emissions inventory that was submitted with the 2004 SIP revision. The 2004 Plan used the

mobile source model that was the most current available for inventory purposes at the time California prepared the submission. TSD at 84. As discussed above, EPA's long-standing policy is that States should use the most current mobile source model available at the time it is developing a SIP. TSD at 84-86. The TSD discusses several documents that state EPA's position, applied here, that States need not revise submitted SIPs to reflect the availability of models that become available after the SIP was submitted to EPA for approval. *See* TSD at 85.

Petitioners contend that EPA violated the APA because, when EPA approved the SIP revisions, the data in the 2004 Plan were allegedly wrong, and EPA allegedly knew that the data were wrong. Pet. Br. at 29. This contention mischaracterizes the legal issue, which is whether EPA acted arbitrarily or capriciously in reviewing the 2004 Plan with the emissions inventories that California submitted with that Plan. EPA concluded, based on the information it had, that the emissions inventories in the 2004 Plan were comprehensive, accurate, and current at the time California developed and submitted the 2004 Plan. TSD at 84-87. The fact that subsequent inventories submitted by the State contain different numbers does not make the earlier emissions inventories "wrong." If this were the case, EPA could never rely on any emissions inventory in approving a SIP, because air quality agencies regularly improve the accuracy of their emissions estimates by collecting inventory data, updating methodologies, and improving

emission factors, *see* TSD at 87, and States routinely submit these revised emissions inventories to EPA, as required by the Act. *See* CAA § 182(a)(3), 42 U.S.C. § 7511a(a)(3).

Moreover, Petitioners fail to substantiate their assertion that the emissions inventory data submitted by the State in 2007 made the data in the 2004 Plan "wrong" or otherwise undermined the validity of the 2004 Plan. Petitioners' argument essentially rests on the premise that the 2007 changes to the NOx inventory estimates "significantly altered the understanding of the relationship between NOx and VOC emissions and ambient concentrations of ozone." Pet. Br. at 29-30. In support of this assertion, Petitioners point to language in the 2004 and 2007 submittals which they claim shows that while the 2004 Plan had predicted that reductions in ambient ozone concentrations would be affected roughly equally by reductions in either NOx or VOC, the 2007 Plan allegedly showed that "reaching the same level of ozone concentrations can only be achieved through significant reductions in NOx, and that VOC reductions 'will not change the NOx carrying capacity measurably.'" Pet. Br. at 31. Petitioners assert that this "new, contradictory information" in the 2007 Plan invalidated the assumptions relied upon in the 2004 Plan, and that EPA was obligated to provide a basis for either ignoring this new data or reconciling it with the information in the 2004 Plan. Pet. Br. at 31-32.

These arguments are unavailing. First, Petitioners take the language in the 2007 Plan about the relationship between NOx and VOC emissions on ozone concentrations out of context. The quoted language in the 2007 Plan states, more fully, that for certain monitoring sites "that are projected to have the worst ozone problems in 2020, reductions in VOC emissions *will assist in reducing ozone levels early on in the control program*, but will not change the NOx carrying capacity measurably."[6] 2007 Plan at 3-9 (emphasis added). As explained further in the 2007 Plan, the District's modeling analyses "indicated that VOC control would be advantageous in the beginning years of the control program" but that "as more NOx is reduced the curved lines transition to flat indicating that further VOC emissions reductions are not useful." *Id.* Thus, the conclusion in the 2007 Plan was not that VOC reductions would not help reduce ozone levels, but rather that VOC reductions would become less useful as ambient NOx and ozone levels decline. The portions of the 2007 Plan cited by Petitioners describe a time period later than, and thus not relevant for, the 2010 attainment date for the one-hour ozone standard. *See* TSD at 90.

Second, Petitioners' arguments appear to rest on a fundamental misunderstanding of the information submitted in the 2007 Plan. In support of their claim that the 2007 inventory data undermined the assumptions in the 2004

[6] "Carrying capacity" is the level of emissions that the atmosphere can "carry" and still demonstrate attainment. 2004 Plan at 5-9 n.2.

Plan, Petitioners cite to the discussions about the Valley's "carrying capacity" in both the 2004 Plan and the 2007 Plan. Pet. Br. at 31-32. The 2004 Plan included a diagram plotting the carrying capacity for the one-hour ozone standard at Bakersfield in 2010. TSD at 90. The 2007 Plan included a diagram plotting the carrying capacity for the eight-hour ozone standard at Arvin in 2020. The diagram in the 2004 Plan has isopleths[7] in increments of 5 parts per billion, ranging from 95 parts per billion to 130 parts per billion, to reflect the one-hour ozone standard of 0.12 parts per million.[8] TSD at 90. The diagram in the 2007 Plan has isopleths in increments of 1 part per billion, ranging from 80 parts per billion to 97 parts per billion, to reflect the eight-hour ozone standard of 0.08 parts per million.[9] The 2007 Plan specifically states that the modeling results for the eight-hour standard could not be used to evaluate current ozone levels (*i.e.*, to evaluate the 2004 Plan): "[S]ince 2020 is expected to have significantly fewer emissions than currently exist in the inventory, 2020 modeling results cannot be used to evaluate ozone responses at current emission levels near 600 tpd of NOx." 2007 Plan at 3-11. Accordingly,

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[7] An isopleth is a line on a graph showing concentrations of ozone in the ambient air as functions of NOx and VOC reductions.

[7] A concentration of 0.12 parts per million (the level of the one-hour ozone standard) is equivalent to 120 parts per billion. Likewise, a concentration of 0.08 parts per billion (the level of the eight-hour ozone standard) is equivalent to 80 parts per billion.

8 Generally, an area is considered to be attaining the eight-hour ozone standard when ambient ozone concentrations are less than or equal to 0.084 parts per million, based on the rounding convention in 40 C.F.R. pt. 50, Appx. I.

Petitioners' reliance upon these portions of the 2004 Plan and 2007 Plan is misplaced. Given the complex technical issues raised by a revised emissions inventory prepared for a different ozone NAAQS and for a different time period, EPA reasonably concluded that the existence of the 2007 emissions data did not, in itself, warrant a disapproval of the 2004 Plan.[10]

Under the APA, this Court must ensure that EPA did not rely on factors which Congress did not intend it to consider, entirely fail to consider an important aspect of an issue, offer an explanation for its determination that contravenes the evidence before it, or provide an explanation that is so implausible that it could not be ascribed to a difference in view or the product of EPA's expertise. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc). Here, EPA reasonably followed its longstanding practice and relied upon the data before it. Furthermore, EPA did not ignore the data in the 2007 Plan, but reasonably concluded, given the variety of factors that EPA evaluates in determining whether an area will attain, the data in the 2007 Plan did not undermine the rate-of-progress or attainment demonstration in the 2004 Plan. TSD at 86-91. Accordingly, EPA's approval of the 2004 Plan was consistent with the requirements of the APA.

[10] The State and the District have performed air quality modeling to evaluate the revised inventory's effect on ozone levels in the Valley and this modeling analysis forms the basis of the attainment demonstration for the eight-hour ozone standard in the 2007 Plan. EPA intends to evaluate and provide an opportunity for public comment on these analyses in the context of a rulemaking on the 2007 Plan. *See* TSD at 89 n.19, 90.

II. EPA's Treatment of California Waiver Measures Was Consistent with the Requirements of the CAA.

Petitioners argue that EPA violated the CAA by approving the 2004 Plan without including in the SIP the statewide control measures for which EPA has waived Federal preemption under CAA § 209, 42 U.S.C. § 7543.[11] This argument is unavailing. The CAA recognizes California's unique air quality problems and pioneering efforts to remedy those problems by allowing EPA to waive the CAA's general prohibition on State regulation of emissions from mobile sources. *See* 74 Fed. Reg. at 33,938-39. As discussed above, EPA must waive Federal preemption for California state regulations that are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards" if these regulations meet certain conditions. CAA § 209(b), (e)(2), 42 U.S.C. § 7543(b), (e)(2) (the "waiver provisions"). In approving the 2004 Plan, EPA considered emissions reductions resulting from California regulations that had received waivers under CAA section 209 ("waiver measures"). Against this background, it is reasonable for EPA to

[11] Petitioners assert that the plan also relies on State non-waiver measures that have not been submitted as part of the SIP, but they do not identify these particular measures. Pet. Br. at 34, 43, and 44. EPA's position is that "non-waiver" measures (i.e., State measures not subject to the waiver process under section 209 of the CAA) must be submitted and approved to be credited for SIP planning purposes, and EPA took affirmative steps to ensure that significant State non-waiver measures, such as updated vehicle inspection and maintenance (I/M) program regulations, updated diesel and gasoline regulations, and updated consumer product regulations, were approved into the SIP prior to final action on the San Joaquin Valley One-Hour Extreme Area Plan. *See* 75 Fed. Reg. at 10,436.

interpret the CAA to recognize California's unique status regarding the regulation of emissions from mobile sources, and to allow air quality improvements resulting from such regulation to be counted in the air quality data that are considered in SIP submittals.

A. EPA Reasonably Interprets the CAA's SIP Provisions and Waiver Provisions to Give Effect to Both.

Petitioners argue that EPA's action on the 2004 Plan violates the CAA because California did not submit for SIP approval statewide regulations that had already received EPA approval through the CAA section 209 waiver process, and that EPA must require California to submit these regulations for a second approval process as part of the SIP. Pet. Br. at 32-41. EPA's procedures for addressing California regulations that have received waiver approval under CAA section 209 reasonably give effect to both the CAA's unique treatment of California mobile source control measures and to the CAA's requirements for SIPs. Accordingly, EPA's approval of the 2004 Plan must be upheld.

EPA's interpretation of the CAA implements one of the fundamental tenets of statutory interpretation, "that a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, 36 (1998). Likewise, in interpreting a statute, it is necessary to "look to the provisions of the whole law, and to its object and policy." *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439,

455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). In *Latino Issues Forum v. EPA*, 558 F.3d at 933-34, this Court held that EPA had acted lawfully in applying its interpretation of the CAA, although both parties had proffered reasonable interpretations of the ambiguous language in the CAA.

In response to comments on this rulemaking, EPA clarified its interpretation of the CAA. Since the 1970 Clean Air Act Amendments initiated the requirement that States submit SIPs, EPA has never required California to submit mobile source waiver measures for approval into its SIP. However, through its approval of many California attainment demonstration SIP revisions, EPA has allowed California to take emission reduction credit for mobile source waiver measures, even though they are not in the SIP. In so doing, EPA has taken into account California's unique and pioneering role in the development of mobile source regulations. Indeed, California's motor vehicle emission standards predate EPA's standards for motor vehicles, and the waiver provisions for California standards predate the advent of the SIP requirement itself. *See* 74 Fed. Reg. at 33,938. Moreover, Congress has retained the waiver provisions for California in all subsequent amendments to the Clean Air Act. *See, e.g.*, Pub. L. No. 101-549, title II, § 222(b), 104 Stat. 2502 (Nov. 15, 1990).

Thus, the structure and evolution of the Clean Air Act establish a single process under which California may be authorized to adopt and enforce its own mobile source emissions standards. Prior to the 1990 Clean Air Act Amendments, EPA had reasonably interpreted the Act in allowing California to count emissions reductions from its waiver measures in connection with SIPs, and the enactment of CAA section 193 in the 1990 Clean Air Act Amendments provided further statutory support for EPA's interpretation.[12] Pub. L. No. 101-549, § 108(*l*), 104 Stat. 2469 (Nov. 15, 1990).

CAA section 193 is a general savings clause that, among other things, provides for EPA statutory interpretations that predate the 1990 Clean Air Act Amendments to remain in effect, so long as they are not inconsistent with the Act. When Congress enacted section 193, it did not insert into the statute any language rendering EPA's treatment of California's motor vehicle standards inconsistent with the Act. Rather, as EPA observed in this rulemaking, the 1990 CAA Amendments "extended the California waiver provisions to most types of nonroad vehicles and engines, once again reflecting Congressional intent to provide California with the broadest possible discretion in selecting the best means to

[12] In relevant part, CAA section 193 states: "Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990, shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator." CAA § 193, 42 U.S.C. § 7515.

protect the health of its citizens and the public welfare." 75 Fed. Reg. at 10,425. EPA pointed out that "[r]equiring the waiver measures to undergo SIP review in addition to the statutory waiver process is not consistent with providing California with the broadest possible discretion as to on-road and nonroad vehicle and engine standards" but would, instead, add to California's regulatory burden and thus contravene Congress's intent. *Id*. Moreover, where Congress intends State control measures that are otherwise preempted under title II of the Clean Air Act to be incorporated into SIPs, it has done so explicitly. *See, e.g.*, CAA § 211(c)(4)(C), 42 U.S.C. § 7545(c)(4)(C) (State fuels regulations), CAA § 211(m), 42 U.S.C. § 7545(m) (oxygenated gasoline regulations); and CAA § 246, 42 U.S.C. § 7586 (centrally fueled fleets).

Accordingly, in CAA section 193, Congress effectively ratified EPA's longstanding pre-1990 practice[13] of allowing emission reduction credit for California standards that had received waivers of Federal preemption, notwithstanding the absence of the standards in the SIP itself. And even without considering section 193, the Act's structure, evolution, and provision for the waiver of Federal preemption for California mobile source emissions standards support EPA's long-standing interpretation of the CAA to allow California to rely

[13] *See, e.g.*, 44 Fed. Reg. 60,758 (Oct. 22, 1979); 45 Fed. Reg. 63,843 (Sept. 26, 1980); TSD at 95-99.

on emission reductions resulting from waiver measures in SIPs, even though the waiver measures are not in the SIP itself.

Moreover, the CAA does not require SIPs to contain all of the emissions-reducing control measures relied upon by a State to attain and maintain the NAAQS. SIP content requirements are set forth in CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2), of the Clean Air Act. In relevant part, CAA section 110(a)(2) provides that each SIP "shall – (A): include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), . . . , as may be *necessary or appropriate* to meet the applicable requirements of this chapter . . . ." (emphasis added). 42 U.S.C. § 7410(a)(2)(A). As a general matter, Federal measures, including those establishing emissions standards for mobile sources, are quantifiable, permanent, and independently enforceable by EPA and citizens without regard to whether they are approved into a SIP, and thus EPA has never found such measures to be "necessary or appropriate" to include in SIPs to support emissions reductions credit in attainment demonstrations. Section 209 of the CAA establishes a process under which EPA allows California's "waiver measures" to substitute for Federal measures, and like the Federal measures for which they substitute, EPA has historically found, and continues to find, based on considerations of enforceability, permanence, and quantifiability, that such

measures are not "necessary or appropriate" for California to include in its SIP to meet the applicable requirements of the CAA.

Petitioners assert that failing to require that waiver measures be included in the SIP renders the resulting emissions reductions unenforceable and unverifiable. Pet. Br. at 33. This claim is inaccurate. First, the waiver process itself bestows enforcement authority on the State of California. In this rulemaking, EPA stated:

> CARB has as long a history of enforcement of vehicle/engine emissions standards as EPA, and CARB's enforcement program is equally as rigorous as the corresponding EPA program. The history and rigor of CARB's enforcement program lends assurance to California SIP revisions that rely on the emissions reductions from [waiver measures] in the same manner as EPA's mobile source enforcement program lends assurance to other State's SIPs in their reliance on emissions reductions from the [Federal Motor Vehicle Control Program].

75 Fed. Reg. at 10,425. While it is true that citizens and EPA are not authorized to enforce California waiver measures under the Clean Air Act, because they are not in the SIP, citizens and EPA are authorized to enforce EPA standards in the event that vehicles operate in California without either California or EPA certification. *See* CAA §§ 202(a), 213(a)(3), 304(a)(1), (f), 42 U.S.C. §§ 7521(a), 7547(a)(3), 7604(a)(1), (f).

Second, EPA verifies the emission reductions from waiver measures through review and approval of California's "EMFAC" motor vehicle emissions factor model used to estimate existing and future emissions from motor vehicles, which is

analogous to the model used to show emission reductions resulting from Federal mobile source standards. As discussed in Section I above, California updates this model periodically to reflect updated methods and data, as well as newly-established emissions standards. In 2003, EPA approved the model that California used in developing the 2004 Plan for use in SIP development in California. 68 Fed. Reg. 15,720 (April 1, 2003). Petitioners' contention that emission reductions resulting from waiver measures are unverifiable lacks merit. Emissions reductions from California waiver measures are verifiable, as are emissions reductions resulting from Federal mobile source standards, which States other than California use in developing their SIPs.

B. Allowing Emission Reduction Credit for California Waiver Measures Is Consistent with Allowing Emission Reduction Credit for Federal Mobile Source Control Measures.

Petitioners assert that "all of the measures used to attain the standard, to demonstrate the required rate of progress in reducing emissions, or to satisfy the contingency measure requirements of the Act must be included in the SIP" and claim that "with limited exceptions, ARB has not submitted the State-adopted regulations relied upon in the extreme area plan." Pet. Br. at 33. Petitioners further assert that because the State-adopted rules have not been submitted or approved by EPA as part of the SIP, EPA's approval of the extreme area plan violates the Clean Air Act and EPA's regulations. *Id*. at 35. In so stating,

Petitioners ignore the fact that the CAA specifically allows States to rely on emissions reductions from Federal mobile source control measures, which are not approved into SIPs, in at least one instance, and that, in California, waiver measures substitute for Federal mobile source control measures.

First, as stated above, under the CAA, States have the primary responsibility for developing SIPs, whereas EPA has the primary responsibility for developing emissions standards and other requirements for mobile sources. States other than California are allowed to, and generally do, take emissions reduction credit for Federal mobile source regulations to meet SIP planning requirements, including attainment demonstrations, rate of progress demonstrations, and contingency measures, because such measures are quantifiable, permanent, and independently enforceable. Such Federal mobile source regulations and other Federal control measures are not approved into SIPs.

The CAA provisions for ozone nonattainment areas do not require emission reductions to have been made pursuant to a SIP-approved measure in order to be creditable to show that an area is progressing toward attainment. With one exception, the CAA does not explicitly address the issue of creditability from emissions control measures for the purposes of meeting reasonable further progress and attainment demonstration requirements. The single exception is CAA section 182(b)(1)(C), which provides, "[E]missions reductions are creditable … to the

extent they have actually occurred . . . from the implementation of measures required under the applicable implementation plan, *rules promulgated by the Administrator*, or a permit under subchapter V of this chapter." 42 U.S.C. § 7511a(b)(1)(C) (emphasis added). Petitioners' assertion that SIPs can credit only those emissions reduction that result from measures approved into the SIP is incorrect. For purposes of demonstrating that an area is making reasonable further progress toward attainment, and, by extension, for attainment demonstration purposes, credit is expressly allowed for rules promulgated by the Administrator. In the case of California's "waiver" rules, the State's rules substitute for the rules promulgated by the Administrator, and thus are creditable.

Likewise, the Act does not limit contingency measures to measures approved into the SIP. Contingency measures are:

> [S]pecific measures to be undertaken if the area fails to make reasonable further progress, or to attain the [NAAQS] by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

CAA § 172(c)(9), 42 U.S.C. § 7502(c)(9). In other words, the statute requires contingency measures to be extra reductions that are not relied on for rate of progress demonstration or attainment demonstration, to provide a cushion while the plan is revised to meet a missed milestone. Nothing in the CAA precludes a State from relying on Federal measures, which are not approved into the SIP, in its

contingency measures. The CAA only requires that the SIP identify (and thereby "include") all of the measures that are intended to serve as contingency measures, including Federal measures. However, where a State relies on State or local measures for contingency purposes, instead of relying on Federal measures, such State and local measures must not only be identified, but also must be approved into the SIP. *Id.* EPA has approved numerous SIPs consistent with this interpretation of the CAA. *See, e.g.*, 62 Fed. Reg. 15,844 (Apr. 3, 1997); 62 Fed. Reg. 66,279 (Dec. 18, 1997); and 66 Fed. Reg. 30,811 (June 8, 2001).

In the case of California's mobile source standards, a waiver under CAA section 209 substitutes the California requirement for a corresponding Federal measure, and thus confers creditability to the California measure, even though it is not approved into the SIP. *See, e.g.*, CAA § 209(b)(3), 42 U.S.C. § 7543(b)(3) ("In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver . . . , compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this chapter."). Thus, reliance upon emission reductions from waiver measures is acceptable for contingency measure purposes in the same way that reliance on the Federal measures is acceptable.

C. EPA Explained the Analogous Requirements in the California Waiver Process and the SIP Process.

EPA reasonably determined that requiring California regulations that had already been through the waiver approval process to undergo the SIP approval process would be burdensome and duplicative. In the preamble to the final rule, EPA described the ways in which the waiver review and approval process is analogous to the SIP review and approval process. 75 Fed. Reg. at 10,425. Both provide an opportunity for public notice and comment at the state rulemaking level. *Id.* Both also require public notice and opportunity for comment during the EPA review process. *Id.* Moreover, both preclude relaxation of the regulations beyond a certain point: waiver measures cannot be relaxed beyond the statutory requirement to be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards, and SIP measures cannot be relaxed beyond the antibacksliding provisions in CAA sections 110(*l*) and 193, 42 U.S.C. §§ 7410(*l*), 7515. *Id.*; *see also* TSD at 97-98.

For these reasons, EPA's conclusion that it would not be necessary to require California mobile source regulations that had already received waiver approval to undergo SIP approval was reasonable and should be upheld.

III. EPA Reasonably Approved the Attainment Demonstration in the 2004 Plan in March 2010.

A. EPA's Approval of the Attainment Demonstration in the 2004 Plan Was Consistent with the Requirements of the CAA.

Petitioners argue that EPA's approval of the attainment demonstration in the 2004 Plan was illegal because monitoring data for the summers of 2008 and 2009 indicated "there was no mathematical or legal possibility that the Valley would attain" by the November 15, 2010 deadline. Pet. Br. at 45-51. Petitioners appear to assume that a demonstration of attainment by November 15, 2010, requires a demonstration that the area will have air quality measurements at or below the level of the standard three years prior to that date. Petitioners' arguments misconstrue the requirements governing EPA's action on an attainment demonstrations under CAA section 182(c)(2), 42 U.S.C. § 7511a(c)(2).

A determination of attainment of the one-hour ozone standard is based on the number of exceedances (*i.e.*, monitoring data showing pollutant concentrations at or above the level of the standard) recorded at each monitoring site in the area during the three-year period preceding the attainment date.[14] An attainment demonstration, on the other hand, is a predictive tool for assessing what air quality well be at a future time. An attainment demonstration is based on air quality modeling showing that projected concentrations of the relevant pollutant in the

[14] An area attains the one-hour ozone standard when the expected number of days per calendar year with the maximum hourly concentrations above 0.12 parts per million at each monitor in the area, averaged over the most recent three-year period, is equal to or less than 1. 40 C.F.R. § 50.9(a) & App. H.

attainment year[15] will be at or below the level of the relevant ambient air quality standard. *See* 75 Fed. Reg. at 10,431 (*citing* CAA § 182(c)(2), 42 U.S.C. § 7511a(c)(2)); *see also* General Preamble at 13,502-10. EPA has long taken the position that for an ozone nonattainment area subject to the requirements of subpart 2 of title I, part D of the CAA, the provisions applicable here, a State may demonstrate that in the attainment year, the area will have air quality such that the area could be eligible for the first of two one-year extensions allowed under CAA section 181(a)(5), 42 U.S.C. § 7511(a)(5). Under CAA section 181(a)(5), an area that does not have three years of monitored data demonstrating attainment of the ozone NAAQS but has complied with all requirements and commitments pertaining to the area in the applicable SIP, and that has no more than one exceedance of the NAAQS in the attainment year, may receive a one-year extension of its attainment date. If the same conditions are met in the following year, the area may receive an additional one-year extension. 42 U.S.C. § 7511(a)(5). If the area has no more than one exceedance in this final extension year, then it will have three years of data indicating that it has attained the ozone NAAQS.

EPA's interpretation of the Act is consistent with the structure of subpart 2 of title I, part D of the CAA, which requires many of the measures needed to attain

[15] For ozone, the attainment year is defined as the calendar year that includes the last full ozone season prior to the statutory attainment date. 40 C.F.R. § 51.900(g).

the ozone NAAQS to be implemented by the attainment date. *See, e.g.*, 42 U.S.C. § 7511a(b)(1) (requiring moderate nonattainment areas to provide for VOC emissions reductions of 15 percent by November 15, 1996, the attainment date for these areas); 42 U.S.C. § 7511a(c)(2)(B) (requiring rate of progress reductions of three percent per year averaged over three years from November 15, 1996 "until the attainment date"); *see also* 42 U.S.C. § 7511(b)(2) (requiring the Administrator to determine whether an ozone nonattainment area has attained the ozone standard within 6 months following "the applicable attainment date (including any extension thereof)." Since the 1990 Clean Air Act Amendments were enacted, all of the attainment demonstrations that EPA has approved for the one-hour ozone standard have followed this approach. *See, e.g.*, 61 Fed. Reg. 10,920 (Mar. 18, 1996) and 62 Fed. Reg. 1150 (Jan. 8, 1997) (proposed and final approval of California's attainment plans for six nonattainment areas); 66 Fed. Reg. 54,143 (Oct. 25, 2001) (approval of Pennsylvania's 1-hour ozone attainment plan for Philadelphia area); 67 Fed. Reg. 30,574 (May 7, 2002) (approval of Georgia's 1-hour ozone attainment plan for Atlanta); 67 Fed. Reg. 5170 (Feb. 4, 2002) (approval of New York's 1-hour ozone attainment plan); *Environmental Defense v. EPA*, 369 F.3d 193 (2nd Cir. 2004) (denying petition for review of EPA's approval of New York's 1-hour ozone attainment plan based on, *inter alia*, EPA's reasonable interpretation of the extension provision in CAA section 181(a)(5)).

Petitioners argue that EPA's approval of the attainment demonstration was illegal because the exceedances of the 1-hour ozone standard recorded in 2008 and 2009 rendered attainment impossible by the applicable attainment date of November 15, 2010. This argument conflates the requirements governing attainment *demonstrations* under CAA section 182(c)(2) with the requirements governing attainment *determinations* under CAA section 181(b)(2). Although a *determination* of attainment by November 15, 2010 under CAA section 181(b)(2) would require the area to have no more than three exceedances of the one-hour ozone standard at any one monitor during the three-year period preceding that date, CAA section 182(c)(2) does not require the same for approval of an attainment *demonstration*. In approving the 2004 Plan, EPA did not make an attainment determination under CAA section 181(b)(2).[16] EPA signed the final rule approving the 2004 Plan on December 11, 2009, based in part on a determination that the State had adequately demonstrated that the San Joaquin Valley would have ozone concentrations at or below the one-hour ozone standard in the 2010 ozone season.[17] 75 Fed. Reg. at 10,431; TSD at 113-17 (noting that air quality trends show a

[16] CAA section 181(b)(2) requires the Administrator to determine whether an ozone nonattainment area has attained the ozone standard "[w]ithin 6 months *following* the applicable attainment date (*including any extension thereof*) . . . ." 42 U.S.C. § 7511(b)(2) (emphasis added).

[17] Because the San Joaquin Valley has a May to October ozone season for the one-hour ozone standard, the attainment year ozone season began in May 2010. *See* 2004 Plan at 3-1; 40 C.F.R. § 51.50.

decreasing number of days with air quality exceeding the standard). More specifically, EPA determined that the 2004 Plan demonstrated that the San Joaquin Valley would have clean air during the attainment year and would ultimately attain the one-hour ozone standard by the applicable attainment date in light of the extension provision in CAA section 181(a)(5), 42 U.S.C. § 7511(a)(5).[18] As such, EPA's approval of the attainment demonstration in the 2004 Plan was consistent with the requirements of CAA section 182(c)(2), 42 U.S.C. § 7511a(c)(2), and the overall structure of subpart 2 of title I, part D of the CAA.

B. Review of this Issue Is Limited to the Administrative Record that Was Before EPA at the Time of the Determination.

Petitioners cite extra-record air quality monitoring data to support their assertion that EPA's approval of the 2004 Plan was unsupported because the San Joaquin Valley did not attain the one-hour ozone standard by November 15, 2010. *See* Pet. Br. at 51. Petitioners cannot rely upon data that came into existence after EPA made its determination and, thus, was not in the administrative record before

[18] Petitioners argue that EPA's approval of the 2004 Plan is inconsistent with its September 9, 2010, proposed rule to disapprove Arizona's attainment demonstration for the NAAQS for particulate matter less than or equal to 10 micrometers in diameter ("PM-10") for Maricopa County. Pet. Br. at 48-49. However, that action was subject to different CAA requirements. CAA section 181(a)(5), 42 U.S.C. § 7511a(a)(5), provides an option to extend the "applicable attainment date" for ozone nonattainment areas based on clean air in the attainment year, while the CAA's requirements for serious PM-10 nonattainment areas, such as Maricopa County, do not provide such an option. *See* CAA §§ 188-190, 42 U.S.C. §§ 7513-7513b.

EPA. Under the narrow APA standard of review, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. at 142; *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. at 743-44. Had Petitioners moved to supplement the administrative record, the appropriateness of citing to data that postdates EPA's approval of the 2004 Plan could have been debated in that context. However, Petitioners did not follow required procedures and, instead, simply included references to these data in their brief. Pet. Br. at 51. Petitioners cannot rely on this information.

There are narrow exceptions to the doctrine that review of an agency action under the APA is limited to the administrative record. "[D]e novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions." *Camp v. Pitt*, 411 U.S. at 142; *see also Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (APA limits review to the administrative record "except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review.") (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). Petitioners do not demonstrate how this matter fits within these narrow exceptions.

The task of this Court is to determine, based upon the record evidence that was before EPA at the time EPA determined to approve the 2004 Plan, whether EPA's determination was arbitrary, capricious, or not in accordance with the law. The information that Petitioners cite in their brief did not exist at the time that EPA made its decision and, thus, cannot be related to this question. *See, e.g.*, *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d at 1144-45 ("[C]onsideration of extra-record evidence to determine the correctness . . . [or] wisdom of the agency's decision is not permitted.") (citations and quotation marks omitted).

EPA's determination was based on the information in the administrative record. EPA reasonably approved the 2004 Plan based upon this information, and EPA explained at length its rationale. *See, e.g.*, TSD at 7-17. Accordingly, EPA's approval of the attainment demonstration must be upheld.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitions for Review and should uphold EPA's approval of the revisions to the San Joaquin Valley area SIP for the one-hour ozone standard.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points, and contains 12,575 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii). I have relied on Microsoft Word's calculation feature.

Date: May 5, 2011 */s/Monica Derbes Gibson*

STATEMENT OF RELATED CASES

The Respondents are not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

On May 5, 2011, I electronically filed the foregoing Respondents' Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that counsel for all parties in this case are registered with the Ninth Circuit CM/ECF system and that service will be accomplished by the CM/ECF system.

Date: May 5, 2011 */s/Monica Derbes Gibson*