ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1406 (consolidated with Nos. 16-1410, 16-1428, 16-1429, 16-1432, 16-1435, 16-1436, 16-1437, 16-1438, 16-1439, 16-1440, 16-1441, 16-1442, 16-1443, 16-1444, 16-1445, 16-1448, and 17-1066)

STATE OF WISCONSIN, *et al.*,

Petitioners,

v.

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

Respondents.

**On Petitions for Judicial Review of Final Agency Action of the United States Environmental Protection Agency
81 Fed. Reg. 74,504 (Oct. 26, 2016)**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), this Certificate is submitted on behalf of Industry Petitioners in these consolidated cases: the Utility Air Regulatory Group; Murray Energy Corporation; Western Farmers Electric Cooperative; the Midwest Ozone Group; the Indiana Energy Association and the Indiana Utility Group; Luminant Generation Company LLC and five affiliated entities (Big Brown Power Company LLC, Luminant Mining Company LLC, La Frontera Holdings, LLC, Oak Grove Management Company LLC, and Sandow Power Company LLC); Mississippi Power Company; the Ohio Utility Group and its member companies (AEP Generation Resources Inc., Buckeye Power, Inc., The Dayton Power and Light Company, Duke Energy Ohio, Inc., Dynegy Commercial Asset Management, LLC, First Energy Solutions, and Ohio Valley Electric Corporation); Wisconsin Paper Council, Wisconsin Manufacturers and Commerce, Wisconsin Industrial Energy Group, and Wisconsin Cast Metals Association; Oklahoma Gas and Electric Company; and Prairie State Generating Company, LLC.

A. Parties, Intervenors, and *Amici Curiae*.

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

Petitioners:

Case No. 16-1406:	State of Wisconsin State of Alabama State of Arkansas State of Ohio State of Wyoming
Case No. 16-1410:	Utility Air Regulatory Group
Case No. 16-1428:	State of Texas Texas Commission on Environmental Quality
Case No. 16-1429:	Murray Energy Corp.
Case No. 16-1432:	Western Farmers Electric Cooperative
Case No. 16-1435:	Utility Air Regulatory Group
Case No. 16-1436:	Midwest Ozone Group
Case No. 16-1437:	Indiana Energy Association Indiana Utility Group
Case No. 16-1438:	City of Ames, Iowa
Case No. 16-1439:	Luminant Generation Company LLC Big Brown Power Company LLC Luminant Mining Company LLC La Frontera Holdings, LLC Oak Grove Management Company LLC Sandow Power Company LLC
Case No. 16-1440:	Mississippi Power Company

Case No. 16-1441: The Ohio Utility Group
AEP Generation Resources Inc.
Buckeye Power, Inc.
The Dayton Power and Light Company
Duke Energy Ohio, Inc.
Dynegy Commercial Asset Management, LLC
First Energy Solutions
Ohio Valley Electric Corporation

Case No. 16-1442: Wisconsin Paper Council
Wisconsin Manufacturers and Commerce
Wisconsin Industrial Energy Group
Wisconsin Cast Metals Association

Case No. 16-1443: Sierra Club
Appalachian Mountain Club

Case No. 16-1444: Oklahoma Gas and Electric Company

Case No. 16-1445: Prairie State Generating Company, LLC

Case No. 16-1448: State of Delaware Department of Natural Resources and Environmental Control

Case No. 17-1066: Cedar Falls Utilities

Respondents:

Respondents are the United States Environmental Protection Agency ("EPA") and Scott Pruitt, in his capacity as Administrator of EPA.

Intervenors:

Intervenors in support of Respondents in Case Nos. 16-1443 and 16-1448 are the Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC; Murray Energy Corporation; and the Utility Air Regulatory Group.

Intervenors in support of Respondents in other cases are the States of New York, Maryland, New Hampshire, Rhode Island, and Vermont and the Commonwealth of Massachusetts; and American Lung Association, Appalachian Mountain Club, Environmental Defense Fund, and Sierra Club.

Cedar Falls Utilities is an Intervenor-Petitioner (*see* ECF No. 1658440 (Order of Jan. 31, 2017); ECF No. 1660648 (Feb. 10, 2017)).

Amici Curiae:

The American Thoracic Society is an *amicus curiae* in support of Intervenor-Respondents American Lung Association, Environmental Defense Fund, and Sierra Club.

B. Ruling Under Review

These consolidated cases involve petitions to review final EPA action entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" and published at 81 Fed. Reg. 74,504 (Oct. 26, 2016), Joint Appendix ("JA") ___-___.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court, apart from Case No. 17-1066, which was transferred to this Court from the United States Court of Appeals for the Eighth Circuit (which took no dispositive or other action on the merits of the case) and was consolidated with the other cases herein, under lead case No. 16-1406. Undersigned counsel are not aware of any other related cases currently pending in this Court or in any other court.

RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Industry Petitioners make the following statements:

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

Murray Energy Corporation ("Murray Energy") is a corporation organized and existing under the laws of the State of Ohio. Murray Energy's parent is Murray Energy Holdings Company, which itself has no parent company, and no publicly-held corporation owns 10 percent or more of its stock. Murray Energy is the largest privately-owned coal company in the United States, and the largest underground coal mine operator in the United States, employing over 4,600 Americans and producing approximately fifty (50) million tons of bituminous coal annually.

Prairie State Generating Company, LLC ("PSGC"), is principally engaged in the business of generating electricity for cooperatives and public power companies. PSGC does not have a parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

Luminant Generation Company LLC, a Texas limited liability company, is the legal entity that owns numerous Luminant generation facilities and assets associated with Luminant's competitive power generation business in the State of Texas. ***Big Brown Power Company LLC***, a Texas limited liability company, is the legal entity that owns Big Brown Power Plant in Freestone County, Texas. ***Luminant Mining Company LLC***, a Texas limited liability company, is the legal entity that owns the mine assets utilized in connection with mining lignite used to fuel the Big Brown Power Plant, the Monticello Power Plant, and the Martin Lake Power Plant as well as certain mine assets utilized in connection with mining lignite used to fuel the Sandow 4 Power Plant and the Sandow 5 Power Plant. Luminant Mining Company LLC also owns the lignite reserves associated with the Big Brown Power Plant. ***La Frontera Holdings, LLC***, a Delaware limited liability company, is the legal entity that owns the Odessa, Forney, and Lamar facilities and related assets. ***Oak Grove Management Company LLC***, a Delaware limited liability company, is the legal entity that owns the facility and related assets associated with Oak Grove Units 1 and 2, new lignite-fueled generation units near Robertson County, Texas. ***Sandow Power Company LLC***, a Texas limited liability company, is the legal entity that owns the Sandow Unit 5 facility, a new lignite-fueled generation unit located in Rockdale, Texas, and related assets. Luminant Generation Company LLC, Big Brown Power Company LLC, Luminant Mining Company LLC, La Frontera Holdings, LLC, Oak Grove Management Company LLC, and Sandow Power Company LLC are wholly-

owned subsidiaries of Vistra Asset Company LLC, which is a Delaware limited liability company and is a wholly-owned subsidiary of Vistra Operations Company LLC, which is a Delaware limited liability company and is a wholly-owned subsidiary of Vistra Intermediate Company LLC, which is a Delaware limited liability company and is a wholly-owned subsidiary of Vistra Energy Corp., which is a publicly-held corporation. Vistra Energy Corp. is traded publicly on the NYSE under the symbol "VST." Apollo Management Holdings L.P., Brookfield Asset Management Private Institutional Capital Adviser (Canada), L.P., and Oaktree Capital Management, L.P., are publicly-held entities and each has subsidiaries that own more than 10 percent of Vistra Energy Corp.'s stock.

The Indiana Energy Association ("IEA") is a not-for-profit association of individual electric generating companies that participates on behalf of its members collectively in administrative proceedings that affect electric generators. IEA has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly-held company has a 10-percent or greater ownership interest in IEA.

The Indiana Utility Group ("IUG") is a continuing association of individual electric generating companies operated for the purpose of promoting the general interests of the membership of electric generators. IUG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly-held company has a 10-percent or greater ownership interest in IUG.

The Midwest Ozone Group ("MOG") is a continuing association of individual electric generating companies operated for the purpose of promoting the general interests of the membership of electric generators. MOG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly-held company has a 10-percent or greater ownership interest in MOG.

Western Farmers Electric Cooperative ("Western Farmers") does not have a parent corporation, and no publicly-held company has a 10-percent or greater ownership interest in Western Farmers. Western Farmers is a non-profit generation and transmission rural electrical cooperative that supplies wholesale electricity to its member owners, which include 21 member distribution cooperatives in Oklahoma and New Mexico. None of those cooperatives is publicly traded.

Oklahoma Gas and Electric Company ("OG&E") is an Oklahoma corporation. OG&E's parent corporation is OGE Energy Corporation, also an Oklahoma corporation. OGE Energy Corporation is a publicly-held corporation, and there are no publicly-held corporations owning 10 percent or more of the stock of OGE Energy Corporation. OG&E's general nature and purpose, insofar as relevant to this litigation, is the production, transmission, distribution, and sale of electric energy to wholesale and retail customers in Oklahoma and western Arkansas.

Wisconsin Paper Council has no parent company, and no publicly-held company has a 10-percent or greater ownership in it.

Wisconsin Manufacturers and Commerce has no parent company, and no publicly-held company has a 10-percent or greater ownership in it.

Wisconsin Industrial Energy Group has no parent company, and no publicly-held company has a 10-percent or greater ownership in it.

Wisconsin Cast Metals Association has no parent company, and no publicly-held company has a 10-percent or greater ownership interest in it.

Mississippi Power Company ("MPC") is a wholly-owned subsidiary of Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of any of MPC's stock. No publicly-held company holds 10 percent or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically-integrated electric utilities, including MPC. MPC operates coal and natural-gas generating capacity.

The ***Ohio Utility Group*** is an association of individual electric utilities in the State of Ohio. The electric utilities own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers. The Ohio Utility Group has no outstanding shares or debt securities in

the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public. Its members include the following:

AEP Generation Resources Inc. is a wholly-owned subsidiary of AEP Energy Supply LLC, which is wholly-owned by American Electric Power Company, Inc. American Electric Power Company, Inc., is a publicly-traded company.

Buckeye Power, Inc., is an Ohio nonprofit corporation operating on a cooperative basis, a so-called generation and transmission electric cooperative, or "G&T," that provides wholesale electric service to its 25 members constituting all of the electric distribution cooperatives engaged in the retail sale of electricity within the State of Ohio, 24 of which are also Ohio nonprofit corporations operating on a cooperative basis. Buckeye owns or controls the output of natural gas-fired and coal-fired power plants to supply the wholesale power requirements of its members. It is wholly-owned by its 25 member electric distribution cooperatives, none of which are publicly-traded. Buckeye Power, Inc., does not have a parent corporation, and no publicly-held corporation owns 10 percent or more of its stock or other membership interests.

The Dayton Power and Light Company is owned 100-percent by DPL Inc., which, in turn, is 100-percent held by AES DPL Holdings, LLC, which, in turn, is 100-percent owned by The AES Corporation ("AES"). AES is a publicly-owned company.

Duke Energy Ohio, Inc., has securities that are publicly-held. Its common stock, however, is owned 100-percent by Cinergy Corp., which in turn is 100-percent held by Duke Energy Corporation. Duke Energy Corporation is a publicly-owned company.

Dynegy Commercial Asset Management, LLC, is not a publicly-held corporation. Dynegy Commercial Asset Management, LLC, is wholly-owned by Dynegy Resource I, LLC, which is wholly-owned by Dynegy Resource Holdings, LLC, which is wholly-owned by Dynegy Inc., a publicly-held corporation. One publicly-held company, Blackrock, Inc., holds 10 percent or more of Dynegy Inc.'s stock.

FirstEnergy Solutions Corp. is a wholly-owned subsidiary of FirstEnergy Corp., a diversified energy company whose 10 electric utility operating companies comprise one of the nation's largest investor-owned electric systems. FirstEnergy Corp. is a publicly-held corporation.

Ohio Valley Electric Corporation is not a publicly-held corporation.

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*Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CSAPR	Cross-State Air Pollution Rule
DV	design value
EGUs	electricity-generating units, or electric generating units
EPA	United States Environmental Protection Agency
IEA	Indiana Energy Association
IPM	Integrated Planning Model
IUG	Indiana Utility Group
JA	Joint Appendix
lb/mmBTU	pounds per million British thermal units
NAAQS	national ambient air quality standard(s)
NOx	nitrogen oxide
ppb	part(s) per billion
PSGC	Prairie State Generating Company
RACT	reasonably available control technology
SCR	selective catalytic reduction
SIP	state implementation plan
TSD	Technical Support Document
UARG	Utility Air Regulatory Group
VOC	volatile organic compounds

JURISDICTION

These petitions challenge the "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS [National Ambient Air Quality Standard]" ("CSAPR Update Rule" or "Rule"), an Environmental Protection Agency ("EPA") regulation under the Clean Air Act ("CAA"). 81 Fed. Reg. 74,504, 74,510 (Oct. 26, 2016) (citing CAA sections 110(a)(2)(D)(i)(I) and 110(c)(1), 42 U.S.C. § 7410(a)(2)(D)(i)(I), (c)(1)), JA___. The petitions were timely filed under CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

ISSUES

1. Whether it was arbitrary or otherwise unlawful for EPA to identify downwind areas to be addressed by the Rule without giving proper weight to actual, measured air quality, and without properly accounting for (i) EPA's overstatement of projected ozone at near-shoreline receptors, (ii) effects of non-U.S. emissions, and (iii) emission-reduction requirements that are effective in 2017.

2. Whether EPA acted arbitrarily or otherwise unlawfully by disregarding, in its over-control analysis, some upwind states' emission reductions required by the Rule and thereby failing to assure against over-control; by failing to give proper weight to reasonable required emission controls and associated ozone improvements in downwind nonattainment areas; and by failing to support and explain important elements of its emission-budget calculation methodology.

3. Whether EPA's approach to implementing the "interference with maintenance" clause of section 110(a)(2)(D)(i)(I) was arbitrary or otherwise unlawful because it resulted in over-control.

4. Whether EPA's failure to adjust emission budgets upwards to account for the infeasibility of new combustion-control installations by the beginning of the 2017 ozone season was arbitrary or otherwise unlawful.

5. Whether emission-budget determinations for specific states—Illinois, Indiana, Mississippi, and Oklahoma—were arbitrary or otherwise unlawful.

6. Whether emission-allowance allocations for certain Oklahoma units arbitrarily or otherwise unlawfully departed from EPA's allocation rules.

STATUTES AND REGULATIONS

The Statutory Addendum includes relevant CAA provisions.

STATEMENT OF THE CASE

The Rule's federal implementation plans establish statewide emission "budgets" limiting ozone-season (May-through-September) nitrogen oxide ("NOx") emissions from electricity-generating units ("EGUs") in 22 states that EPA found to contribute significantly to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in other states. 81 Fed. Reg. at 74,506, JA___. EPA invoked CAA section 110(a)(2)(D)(i)(I), which requires each state to prohibit emissions "in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]."

In 2011, EPA promulgated CSAPR under this provision to address, *inter alia*, the 1997 ozone NAAQS. 76 Fed. Reg. 48,208, 48,230 (Aug. 8, 2011). CSAPR took effect in 2015, following litigation in this Court and the Supreme Court, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) ("*EME Homer I*"), *rev'd & remanded*, 134 S. Ct. 1584 (2014), *on remand*, 795 F.3d 118 (D.C. Cir. 2015) ("*EME Homer II*"). In *EME Homer I*, this Court vacated CSAPR. 696 F.3d at 37-38. Although the Supreme Court reversed, it expressly agreed with this Court that the CAA prohibits EPA from requiring "over-control" of upwind states' emissions:

> EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold[1] [EPA] has set. If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked, [EPA] will have overstepped its authority … to eliminate those "amounts [that] contribute … to nonattainment."

EME Homer, 134 S. Ct. at 1608 (emphasis omitted) (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I)). The Court concluded "wholesale invalidation" of CSAPR was unwarranted, *id.*, but remanded for adjudication of "particularized, as-applied

[1] EPA used an air-quality "contribution" threshold to "link" upwind states (due to their emissions) to downwind states that have ambient-air-quality monitoring "receptors" with EPA-projected ozone problems. ("Receptors" are monitors that measure ozone in the air; the words "receptor" and "monitor" are used interchangeably. "Monitored" ozone means ozone concentrations as measured at monitors (or "receptors").) CSAPR's contribution threshold was one percent of the 80-parts-per-billion ("ppb") ozone NAAQS promulgated in 1997. Any state's contribution to a downwind receptor that was below this one-percent threshold was not significant and not evaluated for controls. *EME Homer*, 134 S. Ct. at 1596 & n.3.

challenge[s]" resting on arguments that CSAPR compelled over-control of upwind-state emissions, *id.* at 1609. On remand, finding "clear transgressions of the statutory boundaries as set forth by the Supreme Court," *EME Homer II*, 795 F.3d at 130, this Court held EPA failed to avoid over-control of several states and remanded 11 states' ozone-season NOx budgets, *id.* at 127-32.

The Rule revises CSAPR to address interstate transport for the more stringent 75-ppb ozone NAAQS promulgated in 2008. EPA used a four-step process to develop new ozone-season NOx emission budgets imposed on upwind states:

> (1) Identifying downwind [air-quality] receptors that are expected to have problems attaining or maintaining [NAAQS]; (2) determining which upwind states contribute to these identified problems in amounts sufficient to "link" them to the downwind air quality problems; (3) for states linked to downwind air quality problems, identifying upwind emissions that significantly contribute to downwind nonattainment or interfere with downwind maintenance of a [NAAQS]; and (4) for states that are found to have emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS downwind, reducing the identified upwind emissions via regional emission allowance trading programs.

81 Fed. Reg. at 74,507, JA___.

In calculating state budgets, EPA used a computer model (Integrated Planning Model ("IPM") version 5.15 ("v.5.15")) to project EGU behavior under current and future conditions. EPA, Ozone Transport Policy Analysis Final Rule Technical Support Document ("OTPA-TSD") 5, EPA-HQ-OAR-2015-0500-0555, JA___. EPA ran multiple IPM scenarios, including base ("business-as-usual") cases and cost-threshold cases that reflected projected emission reductions available up to a

particular emission-control-cost level. EPA calculated budgets based on a $1,400-per-ton control-cost level. *Id.* at 7-9, JA___-___. EPA established budgets as the minimum of 2015 actual emissions or IPM-projected 2017 emissions, applying a formula involving both historic and model-derived data. 81 Fed. Reg. at 74,547-48, JA___-___; *see infra* Argument V.D.

The Rule also includes EPA's purported response to this Court's remand of unlawful ozone-season CSAPR budgets for the 1997 ozone NAAQS. 81 Fed. Reg. at 74,523-25, JA___-___.

The Rule's budgets took effect May 1, 2017. *Id.* at 74,554, JA___.

STANDARD OF REVIEW

Because the Rule imposes federal implementation plans under CAA § 110(c)(1), *id.* at 74,510-12, JA___-___, CAA section 307(d)(9) applies,[2] subjecting the Rule to reversal if "arbitrary, capricious, an abuse of discretion, or otherwise" unlawful, 42 U.S.C. § 7607(d)(9).

SUMMARY OF ARGUMENT

Critical aspects of the Rule are arbitrary, unsupported, and unlawful. Among other things, the Rule's defects prevented EPA from ensuring against impermissible over-control of upwind-state emissions.

Ignoring logic and its own prior practice, EPA arbitrarily relied exclusively on air-quality modeling to identify downwind "problem" areas to be addressed by the

[2] CAA § 307(d)(1)(B), 42 U.S.C. § 7607(d)(1)(B).

Rule, without giving meaningful weight to current measured, real-world air quality. Moreover, EPA's disregard of key factors meant that it failed to ensure against unjustified overstatement of downwind ozone concentrations for which upwind states were held liable: EPA (i) failed to account properly for its methodology's overstatement of projected ozone at near-shoreline receptors; (ii) disregarded non-U.S. emissions' substantial effects; and (iii) failed to consider all emission-reduction requirements that were effective by ozone-season 2017.

In assessing whether the Rule over-controls, EPA considered only those air-quality effects at each downwind receptor that were attributable to the Rule's emission-reduction requirements in the subset of regulated upwind states that EPA "linked" to that particular downwind receptor. EPA's over-control analysis was, therefore, fatally flawed by its refusal to consider the full effects of required emission reductions throughout the multistate region regulated by the Rule. Moreover, failing to give proper recognition to the CAA principle that each state bears primary responsibility for assuring NAAQS attainment within its borders, EPA did not account properly for ozone-reducing effects of emission controls reasonably available in downwind states with nonattainment areas. And EPA failed to support and explain factual aspects of its modeling that conflicted with announced EPA determinations concerning projected EGU retirements and emission rates.

Furthermore, EPA arbitrarily required the same degree of emission reductions from all upwind states, regardless of the nature of the downwind "problem" to be

resolved—thereby requiring states linked solely to projected "maintenance-only" receptors to reduce emissions to the same degree as states linked to projected nonattainment receptors. And EPA arbitrarily failed to adjust state emission budgets upwards to account for the infeasibility of accomplishing new combustion-control installations by ozone-season 2017.

Moreover, several state- and facility-specific determinations were arbitrary and unsupported.[3] EPA's heat-input calculation and redefinition of "existing" units produced inequitable results for certain Illinois EGUs. Significant elements of EPA's budget-calculation methodology yielded unsupported, arbitrarily stringent budgets for Indiana and Mississippi and required costly emission reductions in Mississippi for no air-quality benefit. Calculation errors produced an unrealistically low budget for Oklahoma. And EPA's unexplained departure from data-substitution rules improperly reduced certain Oklahoma EGUs' allowances.

STANDING

Petitioners include owners (and associations of owners) of EGUs that are directly regulated by the Rule and thus have standing because they suffer concrete, particularized injury-in-fact caused by the Rule and remediable by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992); *Sierra Club v. EPA*, 292 F.3d

[3] Petitioners presenting arguments summarized in this paragraph are noted *infra* in Arguments V-VI.

895, 899-900 (D.C. Cir. 2002) (standing in such cases "is self-evident"). Only one petitioner need have standing. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

ARGUMENT

I. EPA's Approach to Identifying Downwind Receptors Was Arbitrary and Inconsistent with the Prohibition on Over-Control.

The Rule is fundamentally flawed for at least two threshold reasons: EPA failed to properly consider measured air quality in identifying downwind "problem" receptors; and, because EPA's modeling did not properly account for important factors, it overstated downwind ozone levels and lacked "a 'rational relationship' to the real world," *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001) (citation omitted). Due to these deficiencies, the Rule fails to comply with the CAA's prohibition on over-control.

A. EPA Failed To Properly Consider Measured Ozone and Provided No Reasoned Explanation for Its Decision.

In earlier interstate-transport rules—the "NOx SIP [State Implementation Plan] Call" and Clean Air Interstate Rule ("CAIR")—EPA recognized it must check air-quality-modeling results against real-world data. Those rules used a "monitored-plus-modeled" approach to identify downwind areas to be addressed: EPA "evaluate[d] downwind areas for which [air-quality] *monitors indicate[d] current nonattainment*, ***and*** *air quality models indicate[d] [projected] future nonattainment*, taking into account CAA control requirements and growth." 63 Fed. Reg. 57,356, 57,375 (Oct.

27, 1998) (NOx SIP Call) (emphases added); *see* 70 Fed. Reg. 25,162, 25,241 (May 12, 2005) (CAIR).

Thus, EPA in those rules used modeling to project whether those areas that currently monitor (measure) nonattainment—*i.e.*, air quality shown to violate the NAAQS based on real-world data—would continue to have nonattainment air quality in a relevant future year, considering projected emission changes. As EPA noted in the CSAPR Update Rule, EPA in those earlier rules "explained that it had the most confidence in its projections of nonattainment for those [downwind] counties that also *measure* nonattainment for the most recent period of available ambient data." 81 Fed. Reg. at 74,531, JA___ (emphasis added). In CAIR, EPA explained:

> In light of the uncertainties inherent in regionwide modeling … we have the most confidence in our projection of nonattainment for those counties that are not only *forecast* to be nonattainment in [the relevant future year] … but that also *measure* nonattainment for the most recent period of available ambient data….

70 Fed. Reg. at 25,241 (emphases added).

In CSAPR, EPA substituted a "modeled-only" approach, based on a unique circumstance: When EPA promulgated CSAPR in 2011, recent monitoring data reflected emission reductions achieved through compliance with CAIR, a rule that this Court held was promulgated unlawfully[4] and that was to be superseded by CSAPR. This circumstance made CSAPR "a unique case" in which, EPA said, it had to "drop[]

[4] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008).

the 'monitored' part of the modeled + monitored test" because, even though the monitoring data were real, "the most recent monitoring data" reflected substantial effects of the unlawfully-promulgated CAIR. 76 Fed. Reg. at 48,230. For this reason, EPA determined that, in CSAPR, it was "compelled" to "deviate" from its established monitored-plus-modeled policy and to disregard monitored data. 81 Fed. Reg. at 74,531, JA___; *EME Homer II*, 795 F.3d at 135.

But EPA's rationale for abandoning the "monitored" part of its monitored-plus-modeled approach in the unique case presented in CSAPR—*i.e.*, that monitored data at that time were influenced by CAIR—was inapplicable to the CSAPR Update Rule because, at the time of EPA's rulemaking here, CSAPR had already replaced CAIR, 79 Fed. Reg. 71,663 (Dec. 3, 2014) (terminating CAIR December 31, 2014), and thus the relevant air-quality measurements were unaffected by CAIR. Although EPA in the CSAPR Update Rule purported to use a version of the monitored-plus-modeled approach, *see* 81 Fed. Reg. at 74,531, JA___, EPA, as discussed below, actually assigned no meaningful weight to current measured, real-world air quality in the Rule, and failed to provide any adequate explanation for its decision.

In the Rule, EPA classified as a "downwind problem receptor[]," *id.* at 74,518, JA___—*i.e.*, a receptor to which an upwind state could be "linked" and, thus, subjected to the Rule's emission-control requirements—any downwind receptor:

(A) whose 2017 projected (*i.e.*, modeled) *average* ozone concentration (or ozone "design value" ("DV"))[5] exceeded the NAAQS; *or*

(B) whose 2017 projected average DV did not exceed—but whose 2017 projected *maximum* DV[6] *did* exceed—the NAAQS.

Category-B receptors were called "maintenance-only" receptors. Category-A receptors were called "nonattainment" receptors—unless a category-A receptor had current, real-world air quality equal to or better than the NAAQS, in which case EPA shifted that receptor to category B, thereby including it among the "maintenance-only" receptors. *Id.* at 74,531, 74,532, JA___, ___.

But EPA's category-shifting was immaterial because, under the Rule, *all* "downwind problem receptors"—category-A and category-B alike—were equally subject to linkage with upwind states *even if* those receptors' air quality satisfied the NAAQS based on their real-world, *measured* DVs. EPA applied a $1,400-per-ton criterion to quantify each upwind state's emission-reduction obligation (as reflected in the state's emission budget), irrespective of whether that state was linked to "nonattainment" (category-A) receptors or exclusively to "maintenance-only" (category-B) receptors—and, most crucially, *irrespective of whether the linked receptors*

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[5] This model-projected "average" was the average of projected 2017 DVs extrapolated from three three-year-average monitored values (2009-2011; 2010-2012; 2011-2013) spanning the five-year period 2009-2013. 81 Fed. Reg. at 74,532, JA___.

[6] The model-projected "maximum" was the projected 2017 concentration extrapolated from the *highest* of the three-year-average concentrations described *supra* note 5.

actually attain the NAAQS. By requiring the same degree of emission reductions from upwind states linked to *any* projected downwind "problem" receptor—regardless of that receptor's attainment of the NAAQS—EPA negated any consideration of real-world, measured air quality.

A fatal defect is the absence of any reasoned basis for negating consideration of real-world air quality in this way. EPA could not and did not rely on continuation of the unique circumstances that had caused EPA to disregard monitored air-quality data in CSAPR; in fact, EPA recognized those circumstances no longer existed. *Id.* at 74,531, JA___. Indeed, EPA claimed it was relying, in its CSAPR Update rulemaking, on monitored data, *id.*, but, as discussed above, it did not actually do so. EPA's sole rationale for requiring emission reductions even for states linked to downwind areas whose monitored data showed attainment was that, in EPA's view, future weather conditions especially conducive to ozone formation could cause some currently-attaining areas to slip into nonattainment. *Id.* at 74,531-32, JA___-___. But this ignored comments pointing out that the multiyear-average form of measuring an area's ozone already addresses inter-annual variability. Utility Air Regulatory Group Comments ("UARG") 13-14, EPA-HQ-OAR-2015-0500-0253, JA___-___. Indeed, EPA recognized that using multiyear averages tends to "smooth out" inter-annual variability. Response to Comments ("RTC") 11, EPA-HQ-OAR-2015-0500-0572, JA___; *cf.* 81 Fed. Reg. at 74,532 & n.117, JA___ (noting some individual years with

comparatively high measured concentrations but also noting DVs' multiyear-average form).

Moreover, EPA's rationale here would, if valid, have equally compelled discarding the "monitored" part of the monitored-plus-modeled approach in the NOx SIP Call and CAIR, yet EPA did not do so in those rules. Indeed, EPA failed to explain why, particularly given the multiyear-average nature of DVs, it was justified in abruptly abandoning its long-standing determination that it has "the most confidence" in projections of downwind problem areas where those areas "measure nonattainment for the most recent period." 81 Fed. Reg. at 74,531, JA___; 70 Fed. Reg. at 25,241. The inevitable fact that in any given area, ozone will be higher in some individual years than in other individual years, *see* 81 Fed. Reg. at 74,531-32, JA___-___, does not contradict the fact that DVs' multiyear form—as reflected in "the most recent [three-year] period of available ambient data," *id.* at 74,531, JA___—addresses year-to-year variability, as EPA itself recognized, *e.g.*, RTC 11, JA___.

Particularly given the absence of any reasoned justification for EPA's approach, it was arbitrary for EPA to deem receptors with current monitored attainment to be "problem" receptors under the Rule. This flaw had real consequences: Nine of the thirteen "maintenance-only" receptors *attained* the NAAQS with current measured

ozone, *see* 81 Fed. Reg. at 74,533 Table V.D-2 & n.121, JA___;[7] and four states—Iowa, Kentucky, Tennessee, and Wisconsin—were linked *solely* to one or more of those nine receptors, *see id.* at 74,538-39 Tables V.E-2, V.E-3, JA___-___, and thus would have been excluded from the Rule had EPA removed currently-attaining receptors from consideration.

B. By Failing To Properly Account for Important Factors, EPA's Air-Quality Assessment Failed To Assure that the Rule Does Not Over-Control.

EPA was obligated to ensure that the Rule does not "require[] an upwind State to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked." *EME Homer*, 134 S. Ct. at 1608 (emphasis omitted). As described below, however, EPA's failure to account for critical factors prevented it from ensuring against over-control.

1. EPA Unlawfully Based Regulation on Off-Shore Ozone.

As State Petitioners' brief explains (at Argument III), the Rule reflects an arbitrary approach to evaluating ozone at near-shoreline monitors, unlawfully basing regulation on off-shore ozone. That argument is incorporated here.[8]

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[7] These nine are Jefferson, Kentucky; Harford, Maryland; Allegan, Michigan; Richmond and Suffolk, New York; Hamilton, Ohio; Philadelphia; and Harris, Texas (monitors 482011034 and 482011039).

[8] *See* Circuit Handbook 37.

2. EPA Arbitrarily Disregarded International-Transport Effects.

The Rule arbitrarily disregards effects of emissions from non-U.S. sources. EPA's modeling quantified contributions to downwind areas from seven emission-source categories, including "Canada and Mexico" and "boundary concentrations" (*i.e.*, pollution "transported *into* the modeling domain," which includes the 48 contiguous states), 81 Fed. Reg. at 74,536 (emphasis added), JA___; *id.* at 74,526, JA___; EPA, Air Quality Modeling Technical Support Document 3, EPA-HQ-OAR-2015-0500-0575, JA___, and EPA's data showed these non-U.S. contributions are very large, *see, e.g.*, UARG 28-33, JA___-___. EPA, however, arbitrarily disregarded this information, preventing EPA from ensuring that the Rule avoids over-control.

CAA section 179B(a) bars EPA from disapproving SIPs to the extent non-U.S. emissions cause nonattainment. EPA must approve a SIP if it meets all

> requirements applicable to it under the [CAA] other than a requirement that [it] … demonstrate attainment and maintenance of the relevant [NAAQS] by the [applicable] attainment date … and … the submitting State establishes … that [its] implementation plan … would be adequate to attain and maintain the relevant [NAAQS] by the attainment date … *but for emissions emanating from outside of the United States.*

42 U.S.C. § 7509a(a) (emphasis added; footnote omitted). This and other CAA provisions reflect a common-sense principle: Because states cannot control or regulate non-U.S. sources' emissions, they should not be liable for reducing their own emissions to address air-quality problems attributable to non-U.S. emissions. *Cf.* CAA § 107(a), 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for

assuring air quality *within* … *such State*….") (emphasis added); CAA § 110(a)(1), (2)(A), 42 U.S.C. § 7410(a)(1), (2)(A) (requiring each state to submit a SIP that "provides for implementation, maintenance, and enforcement" of NAAQS "within such State" through "enforceable emission limitations and other control measures"). And if, as this Court held, "section 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions," *North Carolina*, 531 F.3d at 921, the CAA surely does not require upwind states to offset downwind air-quality impacts attributable to other *countries'* emissions. Yet, because EPA's over-control analysis[9] would let upwind states off the hook only where their linked downwind receptors no longer have nonattainment—and, in many cases, not even then, *see supra* Argument I.A.—EPA effectively required upwind states to bear emission-reduction burdens to compensate for nonattainment-producing effects of non-U.S. emissions.

Many EPA-identified receptors would have 2017 projected average or maximum DVs *below* 76 ppb—thus attaining the NAAQS—absent non-U.S. contributions. *See, e.g.*, UARG 28-33, JA___-___; Air Quality Modeling Technical Support Document, Appx. C, at C-4 (table), JA__. EPA's arbitrary failure to account *in any way* for non-U.S. emissions' effects led it to identify as "problem" receptors many whose problems were actually attributable not to upwind-state but to non-U.S.

[9] *See* 81 Fed. Reg. at 74,551-52, JA___-___; *infra* Argument II.A.

emissions—emissions that are beyond upwind states' authority to control. Because the Rule regulates states on the basis of air-quality problems caused by non-U.S. emissions, EPA failed to assure against over-control.

3. EPA Arbitrarily Disregarded Existing Emission-Reduction Requirements.

EPA also failed to fully consider effects of emission-reduction requirements in place by ozone-season 2017. This failure created the risk that EPA identified downwind "problem" receptors—and thereby "linked," and regulated, upwind states—erroneously.

In responding to comments on this issue,[10] EPA claimed it accounted for "on-the-books state rules through February 1, 2016," 81 Fed. Reg. at 74,528, JA___, including Pennsylvania's rule mandating additional NOx reductions by January 2017. EPA failed, however, to account for that rule's volatile organic compound ("VOC") emission reduction requirements.[11] VOC emissions contribute to ozone and are subject to RACT emission-control requirements in ozone nonattainment areas and

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[10] *See, e.g.*, Pennsylvania Coal Alliance Comments 2-3, EPA-HQ-OAR-2015-0500-0298, JA___-___; Olympus Power Comments 12-14, EPA-HQ-OAR-2015-0500-0291, JA___-___.

[11] *Compare* EPA, Pennsylvania RACT ["Reasonably Available Control Technology"] Memorandum, EPA-HQ-OAR-2015-0500-0558, JA___-___ (considering Pennsylvania's RACT requirements for NOx—*but not Pennsylvania's RACT requirements for VOCs*); 81 Fed. Reg. at 74,539, JA___ (same), *with* Pennsylvania, "Additional RACT Requirements for Major Sources of NO_x and VOCs," EPA-HQ-OAR-2015-0500-0461 (text of Pennsylvania's RACT regulations limiting *both* NOx and VOC emissions), JA___-___; *see, e.g.*, Pennsylvania Coal Alliance Comments 2-3, JA.

throughout Ozone Transport Region states, including Pennsylvania. CAA §§ 182(b)(2), 184(a), (b)(1)(B), (2), 42 U.S.C. §§ 7511a(b)(2), 7511c(a), (b)(1)(B), (2); Midwest Ozone Group Comments 3, EPA-HQ-OAR-2015-0500-0327, JA___. Although its contribution analysis purported to account for each upwind state's "NOx *and* VOC emissions," 81 Fed. Reg. at 74,536 (emphasis added), JA___, EPA, without explanation, disregarded comments that it must consider ozone-reducing effects of Pennsylvania's RACT requirements for VOC emissions. *See, e.g.*, Pennsylvania Coal Alliance Comments 2, JA___ (EPA improperly disregarded "substantial upwind emission reductions [that] will … be achieved with the implementation of Pennsylvania's RACT … requirements for the control of NOx *and VOC* from major sources commencing in January 2017") (emphasis added). Remand is necessary for EPA to rectify this arbitrary omission.

II. EPA's Emission-Budget Determinations Failed To Assure Against Over-Control and Were Inadequately Supported and Explained.

A. By Refusing To Account for All States' Emission Reductions Required by the Rule, EPA Failed To Demonstrate that the Rule Does Not Violate the Prohibition Against Over-Control.

EPA's over-control analysis considered effects of the Rule's mandated emission reductions in (i) the state containing the receptor and (ii) "*only*" *those upwind states that EPA "linked" to that receptor using its one-percent-of-the-NAAQS contribution threshold*. RTC 443 (emphases added), JA___; 81 Fed. Reg. at 74,549-52, JA___-___. This was a fatally inadequate analysis. UARG 48-50, JA___-___. A given receptor receives

contributions from several states' emissions, although only some of those states contribute at least 0.75 ppb—and thus were linked by EPA—to that receptor. *See* Air Quality Modeling Technical Support Document, Appx. C, JA___-___. Many states contributing less than 0.75 ppb to certain receptors are subject to the Rule because they are linked to one or more *other* downwind "problem" receptors and thus are required to reduce emissions to comply with the Rule, thereby lowering ozone even at receptors to which they themselves are not "linked" by a 0.75-ppb-or-greater contribution. By definition, the magnitude of *aggregate* ozone reductions at a given receptor from required emission reductions in *all* states subject to the Rule will exceed that receptor's ozone reductions that are attributable to the more limited scope of emission reductions that EPA analyzed.

As a legal and factual matter, any valid EPA over-control analysis had to consider the full effects of required emission reductions from *all* states subject to the Rule. For many receptors, "non-linked" states' contributions,[12] taken together, are large, and the Rule-required reduction of even a fraction of these contributions could drive projected DVs below 76.0 ppb—and thus into over-control territory. *See id.* (showing, *e.g.*, that non-linked states contribute in aggregate: 4.16 ppb to Harris monitor 482011034, which has 2017 projected average and maximum DVs of 75.7 ppb and 76.6 ppb (only 0.7 ppb over attainment), respectively; 4.38 to Hamilton,

[12] "Non-linked states" means—with respect to a given downwind receptor—all states that are subject to the Rule but that EPA did not link to that receptor.

whose average and maximum DVs are 74.6 and 77.4; 4.65 to Richmond, whose average and maximum DVs are 75.8 and 77.4; 4.40 to Sheboygan, whose average and maximum DVs are 76.2 and 78.7; and 4.71 to New Haven, whose average and maximum DVs are 76.2 and 79.2).

As these numbers illustrate, non-linked states' aggregated contributions can be considerable. Likewise, aggregated reductions in those contributions—due to emission reductions required by the Rule in *all* regulated states—can appreciably reduce downwind receptors' projected ozone. This is especially important because, as noted above,[13] several receptors had EPA-projected DVs only barely—in some cases, mere tenths of one ppb—above the 75.9-ppb attainment level. Had EPA fulfilled its legal obligation to consider the ozone-reducing effects of the Rule's mandated emission reductions in *all* upwind states at *each* downwind receptor of interest, it would be far likelier that the Rule would be found to over-control.

Yet, based on its unsupported claim that non-linked states' emission reductions "have little air quality impact at the downwind receptor[s]," EPA blithely dismissed the "air quality improvements" that "result[]" from non-linked states' reductions as "incidental" and therefore unworthy of analysis. RTC 443, JA___. EPA refused to quantify or even estimate the ozone-reducing impacts of these Rule-mandated emission reductions—even though it acknowledged those impacts exist. *Id.* Had

[13] *See also* 81 Fed. Reg. at 74,533 Tables V.D-1, V.D-2, JA___.

EPA conducted such an analysis, the result might well have been that the Rule's emission budgets would be found to over-control. And EPA in any event has no record support for its claim of "little" air-quality impact at downwind receptors.

EPA's failure, in its over-control analysis, to quantify and account for ozone reductions resulting from emission reductions required by the Rule—in *all* states subject to the Rule—was arbitrary and unlawful. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rule is "arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem"). Moreover, that failure is particularly indefensible given EPA's determinations that "the ozone transport problem … results from the collective impacts of relatively small contributions from a number of upwind states," and that, "[a]lthough individual states … may have a relatively small impact on downwind air quality, the cumulative impact of emissions reductions from upwind states … is an important part of resolving the impact of transported emissions on downwind air quality problems." RTC 457, JA___.

Finally, EPA asserted, without explanation or support, that an over-control analysis accounting for all upwind-state reductions "would undermine the requirement that each state that significantly contributes to nonattainment or interferes with maintenance … should do its 'fair share' to address the air quality problems to which the state is linked." *Id.* at 443, JA___. But the CAA provides—and the Supreme Court and *EME Homer II* opinions establish—no "fair-share" criterion for section

110(a)(2)(D)(i)(I) regulation. Moreover, particularly given the magnitude of aggregated non-linked states' contributions,[14] a complete over-control analysis—far from "undermin[ing]" the CAA's interstate-transport provision—was *required* to implement that provision, as construed by this Court and the Supreme Court.

B. EPA Failed To Properly Consider Reasonable Required Controls and Associated Air-Quality Improvements in Downwind Nonattainment Areas.

The state in which a nonattainment (or maintenance-only) receptor is located has "the primary responsibility" for "achiev[ing] and maintain[ing]" NAAQS in that area. CAA § 107(a); CAA § 110(a)(1) (each state's SIP must "provide[] for implementation, maintenance, and enforcement" of NAAQS "within such State"). Consequently, in developing interstate-transport rules, EPA must account for local emission controls required under the CAA. *See, e.g.*, UARG 39-40, JA___-___. EPA recognized this principle in the NOx SIP Call and CAIR. 63 Fed. Reg. at 57,377 ("[T]hat a nonattainment problem persists, *notwithstanding fulfillment of CAA requirements by the downwind sources*, is a factor suggesting that it is reasonable for the upwind sources to be part of the solution to the ongoing nonattainment problem.") (emphasis added); 70 Fed. Reg. at 25,184 (regional emission reductions needed because "it would be difficult if not impossible for many nonattainment areas to reach attainment *through local measures alone*") (emphasis added).

[14] *See supra* 19-20.

Thus, EPA evaluated emission-control options in CAIR to determine typical emission reductions that would be reasonable in downwind nonattainment areas, and determined, based on that analysis, that upwind-state emission reductions were also necessary, *as a supplement to local downwind-nonattainment-area controls*, to help achieve downwind attainment. 70 Fed. Reg. at 25,194; 69 Fed. Reg. 4566, 4596-99 (Jan. 30, 2004) (proposing CAIR). Thus, in CAIR, EPA effectively recognized the CAA's assignment to the nonattaining state of primary responsibility for achieving attainment.

Here, however, EPA conducted no such assessment of reasonably expected downwind-state nonattainment-area controls—or, if it did, it presented no results in the record. That failure means some upwind-state emission reductions required by the Rule may be unnecessary, and EPA therefore failed to ensure against over-control.

C. EPA Failed To Support and Explain Important Elements of Its Emission-Budget Calculation Methodology.

Key elements of EPA's modeling for calculating emission budgets were unexplained, unsupported, and arbitrary.

Addressing comments that EPA assumed unrealistically large numbers of EGU shutdowns,[15] EPA said it changed its modeling to avoid such errors. EPA asserted it "constrained the model to prevent [EGU] retirement projections" before 2020, except for units with "announced plans to retire." Summary of EPA's Review of Comments

[15] *E.g.*, UARG 43-44, Attachment 2, at 2-1—2-9, JA___-___, ___-___.

on the National Electric Energy Data System (NEEDS) v.5.15 and [IPM] v.5.15, at 2, EPA-HQ-OAR-2015-0500-0544, JA___; RTC 321, 328, JA___, ___. But the record shows EPA's modeling actually assumed many coal-fired EGUs would be "idled" (which amounts to the same thing) in 2018, notwithstanding the absence of any announcement that they would close.[16] EPA never explained its "idling" assumption, which conflicted with its assertion, in responding to comments, that it "constrained" its model to avoid assuming unannounced closures.

Second, abandoning (again, in response to comments) its initial assumption that a NOx emission rate of 0.075 pounds per million British thermal units ("lb/mmBtu") was widely achievable for EGUs that use selective catalytic reduction ("SCR"), EPA claimed it was assuming 0.10 lb/mmBtu is the lowest achievable rate for such EGUs—a "key input" to EPA's calculations. 81 Fed. Reg. at 74,543-44, JA___-___. Yet EPA included in its analysis several SCR-equipped EGUs using EPA-assumed rates *well below* 0.10, *see, e.g.*, EPA v.5.15 CSAPR Update Rule Base Cases Using IPM Incremental Documentation 7-8 (table), EPA-HQ-OAR-2015-0500-0556, JA___-___ (EPA assuming 0.075 for SCR-equipped EGUs sharing "common stacks" with non-SCR-equipped EGUs), thereby arbitrarily lowering

[16] *See* Parsed File 5.15 OS NOx AQM Base Case 2018, EPA-HQ-OAR-2015-0500-0452 (modeling coal-fired EGUs [column M—plant type] as co-firing biomass [column V—fuel type] and "idled" [columns X-Z—fuel use=0; columns AJ-AL—gigawatt-hours=0; column BB—fixed O&M cost]; *see, e.g.*, these columns for Clover (Virginia), Conesville (Ohio), Cooper (Kentucky)).

emission budgets. *See* 81 Fed. Reg. at 74,543, JA___ ("assuming a lower achievable EGU NO_x emission rate for SCRs yields a lower emission budget"). EPA neither explained these inconsistencies[17] nor documented any basis for them.

III. EPA's "Interference-With-Maintenance" Approach Produced Over-Control.

Although this Court concluded that CSAPR "complied with *North Carolina*'s requirement that EPA give the nonattainment and maintenance prongs 'independent significance,'" *EME Homer II*, 795 F.3d at 136 (quoting *North Carolina*, 531 F.3d at 910), it did not hold that EPA's application of its interference-with-maintenance approach fully satisfied the CAA and was otherwise lawful. Rather, the Court declined to address the merits of arguments that EPA's actions concerning "interference with maintenance" conflicted with the statute because petitioners there presented no "as-applied" challenges "contest[ing] instances of over-control." *Id.* at 137.

Here, the Rule requires the same degree of emission reductions to address interference with maintenance as it does for significant contribution to nonattainment. This requirement contravenes this Court's and the Supreme Court's holdings that "under the 'interfere with maintenance' prong, EPA may *only limit* emissions 'by *just enough* to permit an already-attaining State to maintain satisfactory air quality.'" *Id.*

[17] *Catawba Cty. v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009) ("inconsistent treatment is the hallmark of arbitrary agency action").

(quoting *EME Homer*, 134 S. Ct. at 1604 n.18) (emphases added). The CAA bars EPA from "forc[ing] [states] to reduce emissions beyond that point." *Id.; see id.* at 127 & n.4.

Accordingly, the CAA does not authorize EPA to compel states deemed only to interfere with maintenance—and not contributing significantly to nonattainment—to *reduce* their existing emission levels, as the Rule does. Compelling emission reductions below existing levels exceeds what this Court and the Supreme Court authorized: "limit[ing]" emissions "by just enough" to permit "already-attaining" areas to "maintain" attainment air quality. *Id.* (internal quotation marks omitted). Given that *existing* upwind-state emission levels were already compatible with downwind attainment, it might have been permissible for EPA to *limit emissions to existing levels* in states (Iowa, Kentucky, Tennessee, and Wisconsin) that EPA linked exclusively to maintenance-only receptors.[18] But EPA did not, and could not, demonstrate it was necessary to force additional emission reductions in those states, and to do so using the same emission-reduction calculation methodology applied to states linked to *nonattainment* receptors. The Rule thus reflects unlawful over-control.

IV. EPA's Assumption, in Its Emission-Budget Calculations, of Emission Reductions from New Combustion-Control Installations Was Arbitrary.

EPA based emission budgets on inadequately-supported, faulty assumptions regarding the time needed to plan for, construct, and install emission-control

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[18] *See also supra* 13-14.

equipment. The emission-reduction strategies EPA cited as available at its $1,400-per-ton budget-setting threshold included "installing state-of-the-art combustion controls." 81 Fed. Reg. at 74,541, JA___. Claiming those controls "can be installed quickly," *id.*, EPA cited a TSD, *id.* n.134 (citing EPA, EGU NO_x Mitigation Strategies Final Rule TSD ("Strategies TSD") 11, EPA-HQ-OAR-2015-0500-0554, JA___), which in turn relies on a 2010 TSD for EPA's CSAPR proposed rule that estimated installation in 11 months, a schedule EPA called "aggressive."[19] That 2010 TSD said EPA "*anticipates finalizing [CSAPR] by about June 2011*. [Low-NOx-burner] installations, burner modifications, or other NO_x reduction controls would likely *have to be installed during fall 2011 or spring 2012 outages* in order to achieve significant reductions *for [ozone season] 2012*,"[20] which began May 1, 2012—*11 months* after EPA's originally-estimated date for finalizing CSAPR.[21]

In reality, as commenters explained, the process typically requires 18 months or more. UARG 44-46, Attachment 2, 5-1—5-6, JA___-___, ___-___. But even if EPA had demonstrated that an "aggressive" 11-month timetable was feasible—which it did

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[19] EPA, Installation Timing for Low NO_x Burners (July 2010) ("2010 TSD") 2, EPA-HQ-OAR-2015-0500-0493, JA___.

[20] 2010 TSD 2 (emphases added), JA___.

[21] EPA's unexplained assertion elsewhere that 6 months was adequate, RTC 489, JA___, appears to rest exclusively on the 2010 TSD's characterization of only two EGUs' experiences, 2010 TSD 2-3, JA___-___, but EPA did not demonstrate—or even argue—that those two units were representative and not atypical, and EPA never refuted record evidence showing 11 or 8 months—let alone 6 months—was inadequate, UARG Attachment 2, 5-1—5-6, JA___-___.

not—the time that EPA, in the CSAPR Update, assumed for installations was even more compressed. EPA did not finalize the Rule until September 2016[22]—*less than 8 months* before the 2017 ozone season. And because EPA finalized the Rule just before fall 2016, installing controls during "fall … outages" was infeasible; the Rule's promulgation date left no time for essential advance work of planning, engineering, fabrication, and delivery of controls.

Thus, EPA's installation-timing assumption was unrealistic and unsupported. Consequently, EPA's failure to adjust state budgets upwards to account for the infeasibility of accomplishing new combustion-control installations by May 1, 2017,[23] was arbitrary.

V. Emission-Budget Determinations for Illinois, Indiana, Mississippi, and Oklahoma Were Arbitrary.

A. Illinois[24]

EPA's emission-budget calculation methodology unfairly penalizes PSGC and Illinois units without furthering EPA's intent to help "new" units displace older units. PSGC's new, highly-efficient coal-fired EGUs have redundant emission controls and experience low emissions. PSGC began normal operations in 2014, during the time CSAPR, with tolled deadlines, was litigated and revised. Two EPA decisions caused

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[22] 81 Fed. Reg. at 74,586, JA___.

[23] *See* RTC 490, JA___ (for budget calculations, state-by-state emission-reduction tonnages attributed by EPA to new combustion-control installations); Strategies TSD 14-16 & Table 5, JA___-___ (same; feasibility analysis).

[24] Prairie State Generating Company ("PSGC") presents Argument V.A.

inequities: Averaging heat input from PSGC's startup years to determine baseline emissions; and redefining PSGC as an existing unit for ozone-season NOx.

1. Improper Heat-Input Calculation

Averaging Illinois heat input—including heat input from PSGC's startup years—affected CSAPR-Update calculations, shorting PSGC and Illinois of critical baseline emissions. PSGC's three highest heat-input amounts in 2011-2015, *see* 81 Fed. Reg. at 74,564, JA___, were artificially low due to issues with its advanced technology. EPA averaged those three amounts to determine reductions needed to achieve the state budget and unit-level allocations, shorting the state and PSGC of allowances. In CSAPR, PSGC's heat input was its "planned" rate—far more representative of its current operations.

2. Improper Redefinition as "Existing" Unit

Redefining PSGC as an existing unit in the Rule does not follow CSAPR's logic and creates two unfair results. First, EPA's $1,400-per-ton threshold assumes existing units' cost to use idled SCRs and install state-of-the-art combustion controls also applies to new units constructed as fully-controlled. *See id.* at 74,541, JA___. PSGC, with its advanced technology and emission controls, should not be grouped with existing units and subject to the same level of uniform control stringency. This places on PSGC larger emission-reducing burdens than other existing units because it lacks control options besides buying allowances (from higher-emitting existing units) or limiting generation. These shortages unreasonably punish newer units like PSGC's.

Moreover, CSAPR's framework includes a process to enlarge new-unit set-aside allowance pools over time by shifting allowances from retired to newer, lower-emitting EGUs. *Id.* at 74,565-66, JA___-___. Tolling CSAPR deadlines without accounting for older units PSGC was designed to replace produced absurd results: Any existing unit that retired in 2010-2014 will keep its allowances through 2019 (for many retired units, this is extended well beyond the five years CSAPR permitted), and the new-unit set-aside will not grow until 2020. PSGC neither benefits from the new-unit set-aside as intended nor receives the benefit of retaining allowances from the fleet of retired units still treated as part of the existing allocation pool. PSGC must purchase allowances from the very units it is replacing.

This result disadvantages the newest and best coal-fired emission performers. PSGC is asked to bear a higher emission-reducing burden than *existing* units because it must operate at its low rates *and* purchase a disproportionate share of allowances, in comparison to *existing* units, to operate as intended. EPA should have defined PSGC as a new unit and transferred allowances from retired units to the new-unit set-aside starting in 2017. Alternatively, EPA should have used PSGC's 2015 heat input to determine Illinois's budget and PSGC's allocations and created a subcategory of existing units for PSGC and other newer units to properly account for existing emission-control levels.

B. Indiana[25]

IEA/IUG members identified problematic assumptions and incorrect information in EPA's proposed-rule calculations and modeling. *E.g.*, American Electric Power Comments 2-10, EPA-HQ-OAR-2015-0500-0256, JA___-___; Duke Energy Comments 1-2, 8-22, EPA-HQ-OAR-2015-0500-0274, JA___-___, ___-___. EPA's final-rule budget-calculation approach harmed Indiana, however, as evidenced by Indiana's budget and numerical values EPA selected to represent Indiana EGUs' operations.

EPA calculated Indiana's budget using EPA's "relative-reduction" methodology,[26] yielding a 23,303-ton budget, significantly below the 28,284-ton budget EPA proposed and the 25,325-ton level EPA determined was feasible. *Compare* 81 Fed. Reg. at 74,561-62 & Table VII.D-1, JA___-___, *with* 80 Fed. Reg. 75,706, 75,739 Table VI.E-1 (Dec. 3, 2015), JA___. EPA's use of 2015 (rather than the proposed rule's 2014[27]) heat-input data to determine Indiana's budget also hurt Indiana. Indiana's heat input was almost 8-percent lower in 2015 than 2014,[28] and using 2015 data led to a nearly 18-percent decrease in Indiana's budget. Year-to-year variation in

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[25] Indiana Energy Association and Indiana Utility Group ("IEA/IUG") present Argument V.B.

[26] *See also infra* Argument V.C. (discussing relative-reduction methodology).

[27] 80 Fed. Reg. at 75,739, JA___.

[28] *Compare* 80 Fed. Reg. at 75,739 Table VI.E-1, JA___ (Indiana's 2014 heat input at 447,417,615), *with* OTPA-TSD Appx. E, EPA-HQ-OAR-2015-0500-0516, Tab "2015 Historic Data for Final" (Indiana's 2015 heat input at 412,655,982).

statewide heat input is influenced by many factors utilities cannot control, including weather, short-term industrial-market conditions, and fuel prices. *See, e.g.*, 81 Fed. Reg. at 74,566, JA___.

Moreover, EPA assigned erroneous, unjustified emission rates to certain Indiana SCR-equipped EGUs, including Cayuga 1 and 2, Gibson 5, and Petersburg 3. For example, EPA assumed Cayuga would reduce emissions between 2015 and 2017.[29] SCR at Cayuga had not been continuously operated, and no basis existed to assume emissions would decline in 2017 under existing regulations.[30] No baseline adjustment was warranted for Cayuga's rates. EPA said it assumed 0.10 lb/mmBtu for SCR-equipped EGUs as a key input, *supra* Argument II.C., yet EPA assigned arbitrarily-derived customized rates (0.075 and 0.070 lb/mmBtu) to Indiana EGUs.

Using these EPA-adjusted rates and its relative-reduction methodology, EPA modified Indiana's 2015 historic emissions data to derive Indiana's budget. EPA's erroneous emission adjustments, including for Cayuga, produced an overall Indiana emission rate of 0.152 lb/mmBtu—significantly below the actual rate (0.176) and IPM Base Case Ozone Season Emission Rate (0.178).[31] EPA sought to justify its relative-

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[29] *See* NEEDS v.5.15 Final CSAPR Update, EPA-HQ-OAR-2015-0500-0552 (listing for Cayuga 1 and 2 (Mode 4 operation)).

[30] The 2015 and 2016 emission rates were 0.36 and 0.31 lb/mmBtu for Cayuga 1 and 0.30 and 0.30 for Cayuga 2, demonstrating that SCR installed in 2015 was not in use. *See* EPA Clean Air Markets Division data base (https://ampd.epa.gov/ampd/).

[31] OTPA-TSD Appx. E, Tab "Final Budget Calcs."

reduction methodology as helping certain states that were short on allowances[32]—but it created opposite effects for Indiana and other states. EPA arbitrarily assigned Indiana an emission rate substantially more stringent than EPA's modeling suggested would be achievable by 2017-2018, a clear indication of prohibited over-control.

C. Mississippi[33]

EPA's "relative-reduction" methodology also generated an overly stringent budget for Mississippi. As the Supreme Court recognized, EPA determined an upwind state "'contribute[s] significantly' to downwind nonattainment [or interferes with downwind maintenance] to the extent its exported pollution … could be eliminated cost-effectively." *EME Homer*, 134 S. Ct. at 1597 (citing 76 Fed. Reg. at 48,254). States are obligated to eliminate "only emissions meeting … [this] criteri[on]," *id.*, but Mississippi's budget is well below Mississippi's EPA-defined "significant contribution" level.

EPA's proposed rule used IPM to forecast each state's 2017 emission rate absent the rule—the "base case." EPA then used IPM to determine a reduced emission rate EPA believed would be cost-effective. EPA multiplied that "control-case" rate by each state's **actual** historic heat-input level to set a budget. If modeling

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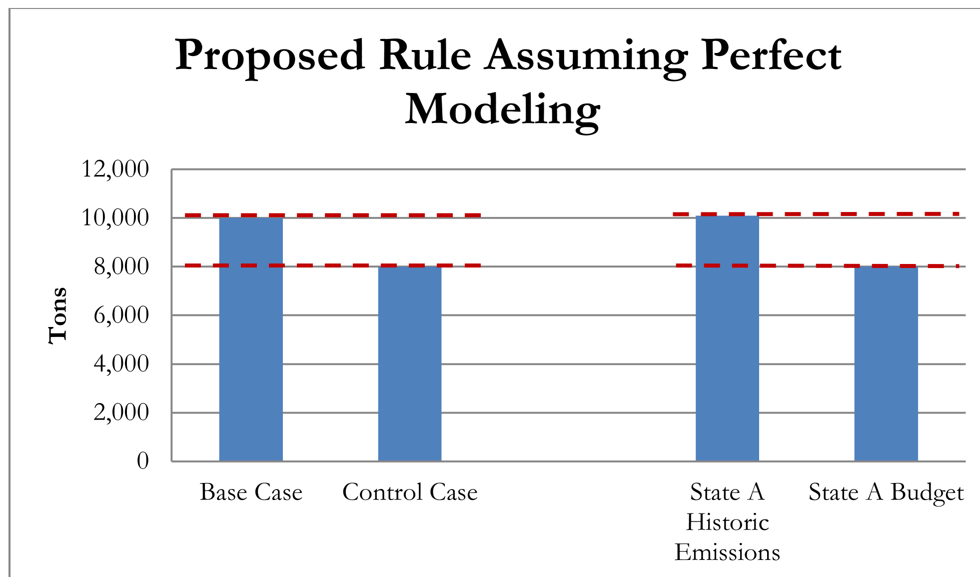
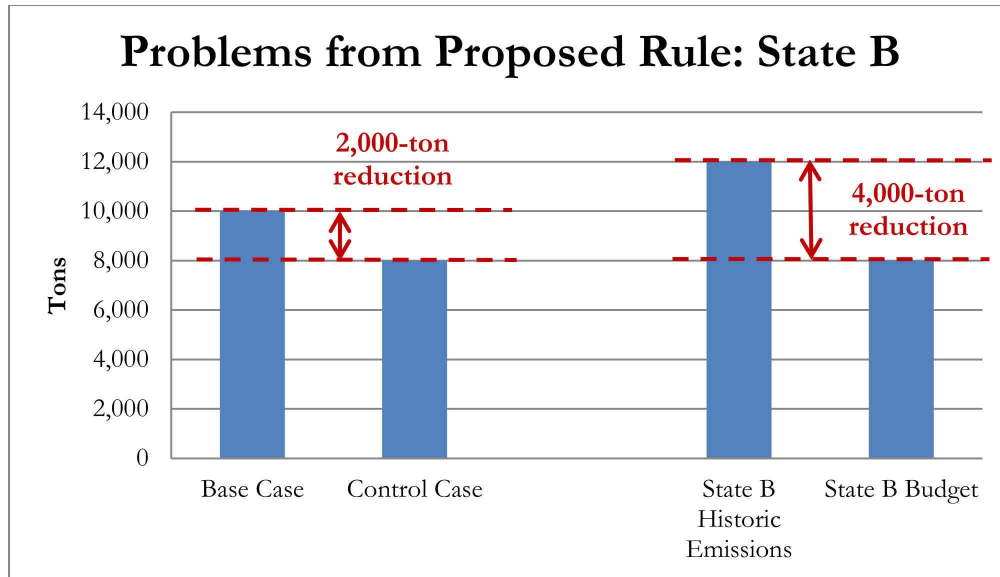
[32] OTPA-TSD 11, JA___.

[33] Mississippi Power Company presents Argument V.C.

perfectly matched reality, this method might produce results resembling those illustrated below for State A.

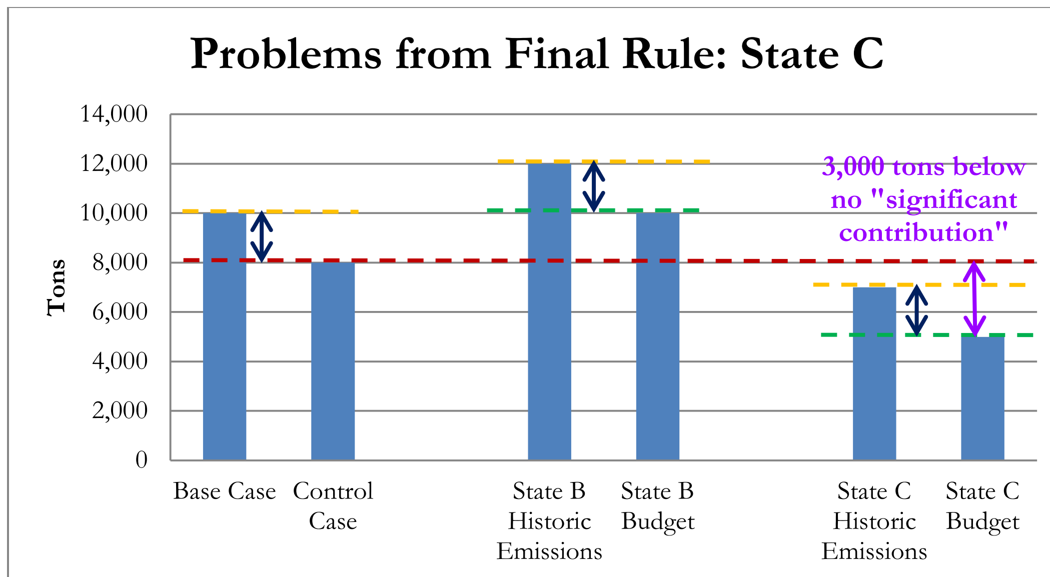


But EPA's modeling assumed coal-fired-EGU retirements that were not actually planned by 2017. Southern Company Comments 38-40, EPA-HQ-OAR-2015-0500-0290, JA___-___. Therefore, the modeling started with "base-case" emissions for many states that were significantly lower than reality. This created unrealistically-low "control cases" for those states, and the proposed rule called for reductions for those states that were far greater than modeled, as illustrated below for State B.



Trying to correct this error, EPA in the final Rule used its new relative-reduction methodology, first identifying the incremental change between each state's modeled "base-case" and "control-case" emission rates. EPA then identified each state's actual 2015 emissions and applied the "incremental change" to calculate an adjusted, lower emission rate and budget. Although this methodology corrected errors when the actual historic emission rate was higher than modeled,[34] it introduced new, equally problematic errors when—as with Mississippi—the actual historic rate was **already below** either the modeled "base case" or "control case."

[34] Petitioners support EPA's efforts to correct this error, but EPA's corrections must go further to address scenarios where actual historic emissions were lower than modeled.



As the purple arrow above shows, EPA's relative-reduction methodology produced a Mississippi budget below its no-significant-contribution level. EPA's modeling shows that—based on EPA's $1,400-per-ton threshold—Mississippi's "significant contribution" would be fully eliminated by limiting its emissions to 7,499 tons. OTPA-TSD Appx. E, Tab "Final Budget Calcs." But Mississippi's actual 2015 emissions were only 6,438 tons. Nonetheless, applying its relative-reduction methodology, EPA subtracted the increment between the modeled base case and control case from Mississippi's 2015 emission rate. This yielded a 6,315-ton budget—1,184 tons *below* the EPA-determined level at which Mississippi exhibited no "significant contribution" and well below the 7,366-ton budget at the most-stringent cost threshold ($6,400-per-ton) examined. *Id.*

EPA cannot ignore the level it defined as "significant contribution" for Mississippi. EPA's relative-reduction methodology may avoid over-control in other

circumstances where its model under-predicted baseline emissions, but it causes illegal over-control of Mississippi and punishes Mississippi sources for already-achieved emission reductions.

Further, EPA's flawed approach requires costly reductions in Mississippi for no ozone benefit—another form of over-control. Mississippi must further reduce NOx by 123 tons—at a cost of $172,200, using EPA's $1,400-per-ton threshold.[35] These reductions produce no more than a 0.0004-ppb improvement at any Mississippi-linked downwind receptor[36]—costing over $406 million per ppb. Although EPA may determine what is cost-effective for purposes of defining "significant contribution," the Supreme Court has been critical when EPA oversteps its rulemaking authority by imposing significant costs for essentially no benefit. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

Moreover, although this issue arises differently than in *EME Homer*'s "over-control" context, a comparable analysis applies. "EPA cannot require a State [to undertake significant costs] to reduce its output of pollution" by an amount virtually

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[35] Given the flaws discussed above, this cost is actually higher because Mississippi must reduce emissions to a level well below the EPA-identified $1,400-per-ton threshold for Mississippi.

[36] Final AQAT, EPA-HQ-OAR-2015-0500-0492 (compare Tab "0 eng EB withPA," Cell AE868, with Tab "1400 eng EB," Cell AE868).

irrelevant to downwind-state attainment. *EME Homer*, 134 S. Ct. at 1608. That approach imposes "costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment," *id.* at 1605, and constitutes over-control.

D. Oklahoma[37]

In calculating Oklahoma's budget, EPA relied on facially implausible IPM-generated values without any attempt to reconcile those model-driven numbers with common sense or even EPA's own calculations. These arbitrary values produced an unrealistically low budget because they grossly overestimated emission reductions available in Oklahoma.

EPA calculated Oklahoma's budget as:

> *(Historic Heat Input, 2015) x* [*(Adjusted 2015 Emission Rate)* - [***((IPM Emission Rate, 2017 Base Case) - (IPM Emission Rate, 2017 $1,400/ton Cost Case))***]].

81 Fed. Reg. at 74,548, JA___. The emission-rate "delta" (in boldface) equals the difference between the IPM 2017 base-case and IPM $1,400-per-ton cost-threshold-case emission rates. This delta reflects the "degree that [Oklahoma] is projected to improve its NOx rate when moving between" IPM base-case projections (a "business-as-usual" world, without the Rule) and IPM cost-threshold-case projections

[37] Western Farmers Electric Cooperative ("Western Farmers") and Oklahoma Gas and Electric Company present Argument V.D.

(a world with the Rule). *Id.* at 74,547, JA___. Thus, it reflects emission reductions projected to be available in Oklahoma between 2015 and 2017.

EPA used the following emission rates as inputs:[38]

2015 Historic	**0.109** lb/mmBtu
2015 Historic (Adjusted)	**0.107** lb/mmBtu
2017 IPM Base Case	**0.158** lb/mmBtu

Critically, the 2017 IPM base-case rate (0.158) is grossly unrealistic—nearly 50-percent above the 2015 historic and adjusted-historic rates. Thus, IPM predicts that without the Rule, Oklahoma's emission rate would increase by almost 50 percent in only two years. This prediction is arbitrary. EPA provided *no explanation* for such a drastically increasing rate. This outcome is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

Indeed, EPA's own data show *downward* pressure on emissions between 2015 and 2017, resulting from improved emission controls, coal-to-natural-gas conversions, and EGU retirements. Specifically, EPA calculated Oklahoma's 2015 adjusted-historic rate—a rate prospectively incorporating "known changes in the power sector occurring between 2015 and 2017"[39]—as 0.107, *lower* than the 2015 historic rate. Accordingly, EPA's own expectation undermines IPM's prediction of a massive

[38] OTPA-TSD Appx. E, Tab "Final Budget Calcs."

[39] 81 Fed. Reg. at 74,547, JA___.

emission increase between 2015 and 2017. Yet EPA insisted on using IPM's output without any explanation for how it jibes with EPA's own calculations or common sense. Agency use of models is arbitrary where it "bears no rational relationship to the reality it purports to represent." *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998).

IPM's flawed 2017 base-case rate projection carried through the entire budget-calculation formula, resulting in an unrealistically high emission-rate delta and an unrealistically low budget. EPA's model-generated conclusions as to Oklahoma are arbitrary and capricious because the agency has not "addressed what appear to be stark disparities between its projections and real world observations," including observations by the agency itself. *Appalachian Power*, 249 F.3d at 1054 (internal quotation marks omitted).

VI. EPA Arbitrarily Failed To Apply the Rule's Allowance-Allocation Methodology to Certain Oklahoma EGUs.[40]

EPA departed without explanation from the Rule's own methodology when it allocated allowances for certain Oklahoma units. The Rule's allowance-allocation methodology calls for EPA to use multiple years of historic baseline data—five years (2011-2015) of available heat-input data and eight years (2008-2015) of available emission data. 81 Fed. Reg. at 74,564, JA___; EPA, CSAPR Allowance Allocations Final Rule TSD ("Allocations TSD") 6-7, EPA-HQ-OAR-2015-0500-0396, JA___-

[40] Western Farmers presents Argument VI.

___. EPA chose multiyear baselines to "reduce[] the likelihood that any particular single year's operations (which might be negatively affected by outages or other unusual events) determine a unit's allocation." Allocations TSD 7, JA___. To ensure that multiple years' data are used, EPA mandates a back-up plan if a given year's data are unavailable from EPA's preferred source (EPA's Clean Air Markets Division). In that instance, the Rule calls for substituting equivalent Energy Information Administration data when calculating allowances. *See id.* at 6-7, JA___-___.

Departing from this methodology, EPA used only *a single year* of baseline data to determine allocations for certain Oklahoma EGUs, including Western Farmers' Anadarko units. *See* Unit Level Allocations and Underlying Data for the CSAPR for the 2008 Ozone NAAQS, EPA-HQ-OAR-2015-0500-0397, Tab "Underlying Data for 2017 FIP," Cells A1511-Z1603. EPA used exclusively 2015 data, the only year for which Clean Air Markets Division data were available for Anadarko's units. *See id.* Cells F1521-J1523, P1521-W1523. Energy Information Administration data, however, were available for those units for all the other years. Thus, the Rule required using a combination of 2015 Clean Air Markets Division and 2008-2014 Energy Information Administration data. EPA did not "adhere to its own rules," and "*[a]d hoc* departures from those rules … cannot be sanctioned." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (internal quotation marks and alterations omitted).

EPA's apparent oversight has real consequences. Western Farmers estimates it caused Anadarko units to receive *75-percent fewer* allowances than they should have

under the Rule's multiyear methodology. EPA's failure to follow its rules also treats Oklahoma units unequally: Some received allocations based on one year's operation; others based on multiple years. "Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld." *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (citation omitted).

CONCLUSION

Industry Petitioners' petitions should be granted and the Rule remanded.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(f) and (g) and Circuit Rule 32(e)(1), I hereby certify that this brief contains 8,901 words, excluding exempted parts, according to the count of Microsoft Word 2010. In addition, I certify that this brief contains 93 words in inserts that are not included in the aforementioned count, and therefore that the total number of non-exempted words in this brief is 8,994. The sum of the words of the Joint Opening Brief of Industry Petitioners and the words of the Opening Brief of State Petitioners, Cedar Falls Utilities, and City of Ames, Iowa, does not exceed 18,000, consistent with the Court's Order of September 6, 2017 (ECF No. 1691655). I further certify that the foregoing Joint Opening Brief of Industry Petitioners complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point proportionally spaced Garamond typeface.

/s/ Norman W. Fichthorn
Norman W. Fichthorn

Dated: September 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2017, the foregoing Joint Opening Briefing of Industry Petitioners was served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Norman W. Fichthorn
Norman W. Fichthorn

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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ing year, and inserted provisions insuring that Federal funds will in no event be used to supplant State or local government funds in maintaining air pollution control programs.

Subsec. (c). Pub. L. 89–675, § 3(b), substituted ''total of funds appropriated or allocated for the purposes of subsection (a) of this section shall be granted for air pollution control programs'' for ''grant funds available under subsection (a) of this section shall be expended'' and authorized the Secretary to determine the portion of grants to interstate agencies to be charged against the twelve and one-half percent limitation of grant funds to any one State.

1965—Subsec. (a). Pub. L. 89–272 substituted ''this title'' for ''this Act'', which for purposes of codification has been changed to ''this subchapter'', and ''section 302(b)(2) and (4)'' for ''section 9(b)(2) and (4)'', which for purposes of codification has been changed to ''section 7602(b)(2) and (4) of this title''.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7406. Interstate air quality agencies; program cost limitations

For the purpose of developing implementation plans for any interstate air quality control region designated pursuant to section 7407 of this title or of implementing section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution), the Administrator is authorized to pay, for two years, up to 100 per centum of the air quality planning program costs of any commission established under section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution) or any agency designated by the Governors of the affected States, which agency shall be capable of recommending to the Governors plans for implementation of national primary and secondary ambient air quality standards and shall include representation from the States and appropriate political subdivisions within the air quality control region. After the initial two-year period the Administrator is authorized to make grants to such agency or such commission in an amount up to three-fifths of the air quality implementation program costs of such agency or commission.

(July 14, 1955, ch. 360, title I, § 106, as added Pub. L. 90–148, § 2, Nov. 21, 1967, 81 Stat. 490; amended Pub. L. 91–604, § 3(c), Dec. 31, 1970, 84 Stat. 1677; Pub. L. 101–549, title I, § 102(f)(2), title VIII, § 802(f), Nov. 15, 1990, 104 Stat. 2420, 2688.)

CODIFICATION

Section was formerly classified to section 1857c–1 of this title.

PRIOR PROVISIONS

A prior section 106 of act July 14, 1955, was renumbered section 117 by Pub. L. 91–604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Pub. L. 101–549, § 102(f)(2)(A), inserted ''or of implementing section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution)'' after ''section 7407 of this title''.

Pub. L. 101–549, § 102(f)(2)(B), which directed insertion of ''any commission established under section 7506a of this title (relating to control of interstate air pollution) or section 7511c of this title (relating to control of interstate ozone pollution) or'' after ''program costs of'', was executed by making the insertion after that phrase the first place it appeared to reflect the probable intent of Congress.

Pub. L. 101–549, § 102(f)(2)(C), which directed insertion of ''or such commission'' after ''such agency'' in last sentence, was executed by making insertion after ''such agency'' the first place it appeared in the last sentence to reflect the probable intent of Congress.

Pub. L. 101–549, §§ 102(f)(2)(D), 802(f), substituted ''three-fifths of the air quality implementation program costs of such agency or commission'' for ''three-fourths of the air quality planning program costs of such agency''.

1970—Pub. L. 91–604 struck out designation ''(a)'', substituted provisions authorizing Federal grants for the purpose of developing implementation plans and provisions requiring the designated State agency to be capable of recommending plans for implementation of national primary and secondary ambient air quality standards, for provisions authorizing Federal grants for the purpose of expediting the establishment of air quality standards and provisions requiring the designated State agency to be capable of recommending standards of air quality and plans for implementation thereof, respectively, and struck out subsec. (b) which authorized establishment of air quality planning commissions.

§ 7407. Air quality control regions

CAA § 107

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

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

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

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

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

(d) Designations

(1) Designations generally

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

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

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

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

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

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

(B) Promulgation by EPA of designations

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

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

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

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

(C) Designations by operation of law

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

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

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

(2) Publication of designations and redesignations

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

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

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any

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other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

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

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

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

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

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

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

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

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

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

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

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

(A) Ozone and carbon monoxide

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

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

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

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the

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

(B) PM–10 designations

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

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

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

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

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

(5) Designations for lead

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

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 $PM_{2.5}$ national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 $PM_{2.5}$ national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as ''regional haze requirements'').

(B) No preclusion of other provisions

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

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within

such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5)[1] of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5)[1] of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

(July 14, 1955, ch. 360, title I, § 107, as added Pub. L. 91–604, § 4(a), Dec. 31, 1970, 84 Stat. 1678; amended Pub. L. 95–95, title I, § 103, Aug. 7, 1977, 91 Stat. 687; Pub. L. 101–549, title I, § 101(a), Nov. 15, 1990, 104 Stat. 2399; Pub. L. 108–199, div. G, title IV, § 425(a), Jan. 23, 2004, 118 Stat. 417.)

REFERENCES IN TEXT

Section 7413 of this title, referred to in subsec. (e)(3), was amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

CODIFICATION

Section was formerly classified to section 1857c–2 of this title.

PRIOR PROVISIONS

A prior section 107 of act July 14, 1955, as added Nov. 21, 1967, Pub. L. 90–148, § 2, 81 Stat. 490, related to air quality control regions and was classified to section 1857c–2 of this title, prior to repeal by Pub. L. 91–604.

Another prior section 107 of act July 14, 1955, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 399, was renumbered section 111 by Pub. L. 90–148 and is classified to section 7411 of this title.

AMENDMENTS

2004—Subsec. (d)(6), (7). Pub. L. 108–199 added pars. (6) and (7).

1990—Subsec. (d). Pub. L. 101–549 amended subsec. (d) generally, substituting present provisions for provisions which required States to submit lists of regions not in compliance on Aug. 7, 1977, with certain air quality standards to be submitted to the Administrator, and which authorized States to revise and resubmit such lists from time to time.

1977—Subsecs. (d), (e). Pub. L. 95–95 added subsecs. (d) and (e).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

OZONE AND PARTICULATE MATTER STANDARDS

Pub. L. 108–199, div. G, title IV, § 425(b), Jan. 23, 2004, 118 Stat. 417, provided that: ''Except as provided in paragraphs (6) and (7) of section 107(d) of the Clean Air Act [subsec. (d)(6), (7) of this section] (as added by subsection (a)), section 6101, subsections (a) and (b) of section 6102, and section 6103 of the Transportation Equity Act for the 21st Century [Pub. L. 105–178] (42 U.S.C. 7407 note; 112 Stat. 463), as in effect on the day before the date of enactment of this Act [Jan. 23, 2004], shall remain in effect.''

Pub. L. 105–178, title VI, June 9, 1998, 112 Stat. 463, as amended by Pub. L. 109–59, title VI, § 6012(a), Aug. 10, 2005, 119 Stat. 1882, provided that:

''SEC. 6101. FINDINGS AND PURPOSE.

''(a) The Congress finds that—

''(1) there is a lack of air quality monitoring data for fine particle levels, measured as $PM_{2.5}$, in the United States and the States should receive full funding for the monitoring efforts;

''(2) such data would provide a basis for designating areas as attainment or nonattainment for any $PM_{2.5}$ national ambient air quality standards pursuant to the standards promulgated in July 1997;

''(3) the President of the United States directed the Administrator of the Environmental Protection Agency (referred to in this title as the 'Administrator') in a memorandum dated July 16, 1997, to complete the next periodic review of the particulate matter national ambient air quality standards by July 2002 in order to determine 'whether to revise or maintain the standards';

''(4) the Administrator has stated that 3 years of air quality monitoring data for fine particle levels, measured as $PM_{2.5}$ and performed in accordance with any applicable Federal reference methods, is appropriate for designating areas as attainment or nonattainment pursuant to the July 1997 promulgated standards; and

''(5) the Administrator has acknowledged that in drawing boundaries for attainment and nonattainment areas for the July 1997 ozone national air quality standards, Governors would benefit from considering implementation guidance from EPA on drawing area boundaries.

''(b) The purposes of this title are—

''(1) to ensure that 3 years of air quality monitoring data regarding fine particle levels are gathered for use in the determination of area attainment or nonattainment designations respecting any $PM_{2.5}$ national ambient air quality standards;

''(2) to ensure that the Governors have adequate time to consider implementation guidance from EPA on drawing area boundaries prior to submitting area designations respecting the July 1997 ozone national ambient air quality standards;

''(3) to ensure that the schedule for implementation of the July 1997 revisions of the ambient air quality standards for particulate matter and the schedule for the Environmental Protection Agency's visibility regulations related to regional haze are consistent with the timetable for implementation of such particulate matter standards as set forth in the President's Implementation Memorandum dated July 16, 1997.

''SEC. 6102. PARTICULATE MATTER MONITORING PROGRAM.

''(a) Through grants under section 103 of the Clean Air Act [42 U.S.C. 7403] the Administrator of the Environmental Protection Agency shall use appropriated funds no later than fiscal year 2000 to fund 100 percent of the cost of the establishment, purchase, operation and maintenance of a $PM_{2.5}$ monitoring network necessary to implement the national ambient air quality standards for $PM_{2.5}$ under section 109 of the Clean Air Act [42 U.S.C. 7409]. This implementation shall not result in a diversion or reprogramming of funds from other Federal, State or local Clean Air Act activities. Any funds previously diverted or reprogrammed from section 105 Clean Air Act [42 U.S.C. 7405] grants for $PM_{2.5}$ monitors must be restored to State or local air programs in fiscal year 1999.

''(b) EPA and the States, consistent with their respective authorities under the Clean Air Act [42 U.S.C. 7401 et seq.], shall ensure that the national network (designated in subsection (a)) which consists of the $PM_{2.5}$ monitors necessary to implement the national ambient air quality standards is established by December 31, 1999.

''(c)(1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the Clean Air Act [42 U.S.C. 7407(d)(1)] for each area following promulgation of the July 1997 $PM_{2.5}$ national ambient air quality standard within 1 year after receipt of 3 years of air quality monitoring data performed in ac-

[1] See References in Text note below.

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PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91–604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95–95, § 106(b), added subsec. (c).

Subsec. (d). Pub. L. 95–95, § 106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101–549, title VIII, § 817, Nov. 15, 1990, 104 Stat. 2697, provided that:

"(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

"(1) include information on the effects on welfare and the environment which are caused by ambient concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

"(2) estimate welfare and environmental costs incurred as a result of such effects;

"(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

"(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

"(5) estimate the costs and other impacts of meeting secondary standards; and

"(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

"(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

"(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

"(3) There are authorized to be appropriated such sums as are necessary to carry out this section."

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

CAA § 110

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

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

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

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

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

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

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

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other

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type of emissions activity within the State from emitting any air pollutant in amounts which will—

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

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

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

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

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

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

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

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

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

(H) provide for revision of such plan—

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

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

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

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

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

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

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

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

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

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

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

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall ap-

prove or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)[1] of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)[1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

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

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

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

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

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

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

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

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

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

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

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

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

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

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

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

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

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

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

[1] See References in Text note below.

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

(D) For purposes of this paragraph—

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

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

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

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

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

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

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

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

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

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

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

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

(d), (e) Repealed. Pub. L. 101–549, title I, §101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

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(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10[2] of this title, as in effect before August 7, 1977, or section 7413(d)[2] of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10[2] of this title as in effect before August 7, 1977, or under section 7413(d)[2] of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)[2] of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

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

(B) Completeness finding

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

[2] See References in Text note below.

of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

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

(2) Deadline for action

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

(3) Full and partial approval and disapproval

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

(4) Conditional approval

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

(5) Calls for plan revisions

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

(6) Corrections

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

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

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

(n) Savings clauses

(1) Existing plan provisions

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

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mulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

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

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

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

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

(3) Retention of construction moratorium in certain areas

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

(*o*) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development[3] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

(July 14, 1955, ch. 360, title I, §110, as added Pub. L. 91–604, §4(a), Dec. 31, 1970, 84 Stat. 1680; amended Pub. L. 93–319, §4, June 22, 1974, 88 Stat. 256; Pub. L. 95–95, title I, §§107, 108, Aug. 7, 1977, 91 Stat. 691, 693; Pub. L. 95–190, §14(a)(1)–(6), Nov. 16, 1977, 91 Stat. 1399; Pub. L. 97–23, §3, July 17, 1981, 95 Stat. 142; Pub. L. 101–549, title I, §§101(b)–(d), 102(h), 107(c), 108(d), title IV, §412, Nov. 15, 1990, 104 Stat. 2404–2408, 2422, 2464, 2466, 2634.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a)(3)(B), is Pub. L. 93–319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsecs. (a)(3)(C), (6), (f)(5), (g)(3), and (i), was amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsecs. (d) and (e) of section 7413 no longer relates to final compliance orders and steel industry compliance extension, respectively.

Section 1857c–10 of this title, as in effect before August 7, 1977, referred to in subsecs. (f)(5) and (g)(3), was in the original ''section 119, as in effect before the date of the enactment of this paragraph'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, §3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of subsecs. (f)(5) and (g)(3) of this section by Pub. L. 95–95, §107, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to section 7413(d)(5) of this title. Section 7413 of this title was subsequently amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, see note above. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

CODIFICATION

Section was formerly classified to section 1857c–5 of this title.

PRIOR PROVISIONS

A prior section 110 of act July 14, 1955, was renumbered section 117 by Pub. L. 91–604 and is classified to section 7417 of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101–549, §101(d)(8), substituted ''3 years (or such shorter period as the Administrator may prescribe)'' for ''nine months'' in two places.

Subsec. (a)(2). Pub. L. 101–549, §101(b), amended par. (2) generally, substituting present provisions for provisions setting the time within which the Administrator was to approve or disapprove a plan or portion thereof

[3] So in original. Probably should be followed by a comma.

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CAA § 179B

§ 7509a. International border areas

(a) Implementation plans and revisions

Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if—

(1) such plan or revision meets all the requirements applicable to it under the [1] chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and

(2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.

(b) Attainment of ozone levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to an ozone nonattainment area in such State, such State would have attained the national ambient air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7511(a)(2) or (5) of this title or section 7511d of this title.

(c) Attainment of carbon monoxide levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator, with respect to a carbon monoxide nonattainment area in such State, that such State has attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7512(b)(2) or (9) [2] of this title.

(d) Attainment of PM–10 levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to a PM–10 nonattainment area in such State, such State would have attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside the United States, shall not be subject to the provisions of section 7513(b)(2) of this title.

(July 14, 1955, ch. 360, title I, §179B, as added Pub. L. 101–549, title VIII, §818, Nov. 15, 1990, 104 Stat. 2697.)

ESTABLISHMENT OF PROGRAM TO MONITOR AND IMPROVE AIR QUALITY IN REGIONS ALONG BORDER BETWEEN UNITED STATES AND MEXICO

Pub. L. 101–549, title VIII, §815, Nov. 15, 1990, 104 Stat. 2693, provided that:

''(a) IN GENERAL.—The Administrator of the Environmental Protection Agency (hereinafter referred to as the 'Administrator') is authorized, in cooperation with the Department of State and the affected States, to negotiate with representatives of Mexico to authorize a program to monitor and improve air quality in regions along the border between the United States and Mexico. The program established under this section shall not extend beyond July 1, 1995.

''(b) MONITORING AND REMEDIATION.—

''(1) MONITORING.—The monitoring component of the program conducted under this section shall identify and determine sources of pollutants for which national ambient air quality standards (hereinafter referred to as 'NAAQS') and other air quality goals have been established in regions along the border between the United States and Mexico. Any such monitoring component of the program shall include, but not be limited to, the collection of meteorological data, the measurement of air quality, the compilation of an emissions inventory, and shall be sufficient to the extent necessary to successfully support the use of a state-of-the-art mathematical air modeling analysis. Any such monitoring component of the program shall collect and produce data projecting the level of emission reductions necessary in both Mexico and the United States to bring about attainment of both primary and secondary NAAQS, and other air quality goals, in regions along the border in the United States. Any such monitoring component of the program shall include to the extent possible, data from monitoring programs undertaken by other parties.

''(2) REMEDIATION.—The Administrator is authorized to negotiate with appropriate representatives of Mexico to develop joint remediation measures to reduce the level of airborne pollutants to achieve and maintain primary and secondary NAAQS, and other air quality goals, in regions along the border between the United States and Mexico. Such joint remediation measures may include, but not be limited to measures included in the Environmental Protection Agency's Control Techniques and Control Technology documents. Any such remediation program shall also identify those control measures implementation of which in Mexico would be expedited by the use of material and financial assistance of the United States.

''(c) ANNUAL REPORTS.—The Administrator shall, each year the program authorized in this section is in operation, report to Congress on the progress of the program in bringing nonattainment areas along the border of the United States into attainment with primary and secondary NAAQS. The report issued by the Administrator under this paragraph shall include recommendations on funding mechanisms to assist in implementation of monitoring and remediation efforts.

''(d) FUNDING AND PERSONNEL.—The Administrator may, where appropriate, make available, subject to the appropriations, such funds, personnel, and equipment as may be necessary to implement the provisions of this section. In those cases where direct financial assistance of the United States is provided to implement monitoring and remediation programs in Mexico, the Administrator shall develop grant agreements with appropriate representatives of Mexico to assure the accuracy and completeness of monitoring data and the performance of remediation measures which are financed by the United States. With respect to any control measures within Mexico funded by the United States, the Administrator shall, to the maximum extent prac-

[1] So in original. Probably should be ''this''.

[2] So in original. Section 7512(b) of this title does not contain a par. (9).

ticable, utilize resources of Mexico where such utilization would reduce costs to the United States. Such funding agreements shall include authorization for the Administrator to—

"(1) review and agree to plans for monitoring and remediation;

"(2) inspect premises, equipment and records to insure compliance with the agreements established under and the purposes set forth in this section; and

"(3) where necessary, develop grant agreements with affected States to carry out the provisions of this section."

SUBPART 2—ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS

§ 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 nonattainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value*	Primary standard attainment date**
Marginal ..	0.121 up to 0.138 ...	3 years after November 15, 1990
Moderate ..	0.138 up to 0.160 ...	6 years after November 15, 1990
Serious	0.160 up to 0.180 ...	9 years after November 15, 1990
Severe	0.180 up to 0.280 ...	15 years after November 15, 1990
Extreme ...	0.280 and above ...	20 years after November 15, 1990

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from November 15, 1990.

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if—

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) of this section to the higher of—

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

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(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

(3) Voluntary reclassification

The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 7511a(g) of this title, the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term[1] ''major source'' and ''major stationary source'' shall have the same meaning as in Extreme Areas.

(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

(D) If, after November 15, 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

(c) References to terms

(1) Any reference in this subpart to a ''Marginal Area'', a ''Moderate Area'', a ''Serious Area'', a ''Severe Area'', or an ''Extreme Area'' shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

(2) Any reference in this subpart to ''next higher classification'' or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

(July 14, 1955, ch. 360, title I, § 181, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2423.)

EXEMPTIONS FOR STRIPPER WELLS

Pub. L. 101–549, title VIII, § 819, Nov. 15, 1990, 104 Stat. 2698, provided that: ''Notwithstanding any other provision of law, the amendments to the Clean Air Act made by section 103 of the Clean Air Act Amendments of 1990 [enacting this section and sections 7511a to 7511f of this title] (relating to additional provisions for ozone nonattainment areas), by section 104 of such amendments [enacting sections 7512 and 7512a of this title] (relating to additional provisions for carbon monoxide nonattainment areas), by section 105 of such amendments [enacting sections 7513 to 7513b of this title and amending section 7476 of this title] (relating to additional provisions for PM–10 nonattainment areas), and by section 106 of such amendments [enacting sections 7514 and 7514a of this title] (relating to additional provisions for areas designated as nonattainment for sulfur oxides, nitrogen dioxide, and lead) shall not apply with respect to the production of and equipment used in the exploration, production, development, storage or processing of—

''(1) oil from a stripper well property, within the meaning of the June 1979 energy regulations (within the meaning of section 4996(b)(7) of the Internal Revenue Code of 1986 [26 U.S.C. 4996(b)(7)], as in effect before the repeal of such section); and

''(2) stripper well natural gas, as defined in section 108(b) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3318(b)).[,]

except to the extent that provisions of such amendments cover areas designated as Serious pursuant to part D of title I of the Clean Air Act [this part] and having a population of 350,000 or more, or areas designated as Severe or Extreme pursuant to such part D.''

§ 7511a. Plan submissions and requirements CAA § 182

(a) Marginal Areas

Each State in which all or part of a Marginal Area is located shall, with respect to the Marginal Area (or portion thereof, to the extent specified in this subsection), submit to the Administrator the State implementation plan revisions (including the plan items) described under this subsection except to the extent the State has made such submissions as of November 15, 1990.

(1) Inventory

Within 2 years after November 15, 1990, the State shall submit a comprehensive, accurate, current inventory of actual emissions from all sources, as described in section 7502(c)(3) of this title, in accordance with guidance provided by the Administrator.

(2) Corrections to the State implementation plan

Within the periods prescribed in this paragraph, the State shall submit a revision to the State implementation plan that meets the following requirements—

[1] So in original. Probably should be ''terms''.

(A) Reasonably available control technology corrections

For any Marginal Area (or, within the Administrator's discretion, portion thereof) the State shall submit, within 6 months of the date of classification under section 7511(a) of this title, a revision that includes such provisions to correct requirements in (or add requirements to) the plan concerning reasonably available control technology as were required under section 7502(b) of this title (as in effect immediately before November 15, 1990), as interpreted in guidance issued by the Administrator under section 7408 of this title before November 15, 1990.

(B) Savings clause for vehicle inspection and maintenance

(i) For any Marginal Area (or, within the Administrator's discretion, portion thereof), the plan for which already includes, or was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included, a specific schedule for implementation of a vehicle emission control inspection and maintenance program, the State shall submit, immediately after November 15, 1990, a revision that includes any provisions necessary to provide for a vehicle inspection and maintenance program of no less stringency than that of either the program defined in House Report Numbered 95–294, 95th Congress, 1st Session, 281–291 (1977) as interpreted in guidance of the Administrator issued pursuant to section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) or the program already included in the plan, whichever is more stringent.

(ii) Within 12 months after November 15, 1990, the Administrator shall review, revise, update, and republish in the Federal Register the guidance for the States for motor vehicle inspection and maintenance programs required by this chapter, taking into consideration the Administrator's investigations and audits of such program. The guidance shall, at a minimum, cover the frequency of inspections, the types of vehicles to be inspected (which shall include leased vehicles that are registered in the nonattainment area), vehicle maintenance by owners and operators, audits by the State, the test method and measures, including whether centralized or decentralized, inspection methods and procedures, quality of inspection, components covered, assurance that a vehicle subject to a recall notice from a manufacturer has complied with that notice, and effective implementation and enforcement, including ensuring that any retesting of a vehicle after a failure shall include proof of corrective action and providing for denial of vehicle registration in the case of tampering or misfueling. The guidance which shall be incorporated in the applicable State implementation plans by the States shall provide the States with continued reasonable flexibility to fashion effective, reasonable, and fair programs for the affected consumer. No later than 2 years after the Administrator promulgates regulations under section 7521(m)(3) of this title (relating to emission control diagnostics), the State shall submit a revision to such program to meet any requirements that the Administrator may prescribe under that section.

(C) Permit programs

Within 2 years after November 15, 1990, the State shall submit a revision that includes each of the following:

(i) Provisions to require permits, in accordance with sections 7502(c)(5) and 7503 of this title, for the construction and operation of each new or modified major stationary source (with respect to ozone) to be located in the area.

(ii) Provisions to correct requirements in (or add requirements to) the plan concerning permit programs as were required under section 7502(b)(6) of this title (as in effect immediately before November 15, 1990), as interpreted in regulations of the Administrator promulgated as of November 15, 1990.

(3) Periodic inventory

(A) General requirement

No later than the end of each 3-year period after submission of the inventory under paragraph (1) until the area is redesignated to attainment, the State shall submit a revised inventory meeting the requirements of subsection (a)(1) of this section.

(B) Emissions statements

(i) Within 2 years after November 15, 1990, the State shall submit a revision to the State implementation plan to require that the owner or operator of each stationary source of oxides of nitrogen or volatile organic compounds provide the State with a statement, in such form as the Administrator may prescribe (or accept an equivalent alternative developed by the State), for classes or categories of sources, showing the actual emissions of oxides of nitrogen and volatile organic compounds from that source. The first such statement shall be submitted within 3 years after November 15, 1990. Subsequent statements shall be submitted at least every year thereafter. The statement shall contain a certification that the information contained in the statement is accurate to the best knowledge of the individual certifying the statement.

(ii) The State may waive the application of clause (i) to any class or category of stationary sources which emit less than 25 tons per year of volatile organic compounds or oxides of nitrogen if the State, in its submissions under subparagraphs[1] (1) or (3)(A), provides an inventory of emissions from such class or category of sources, based on the use of the emission factors established by the Administrator or other methods acceptable to the Administrator.

(4) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total

[1] So in original. Probably should be "subparagraph".

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emission reductions of volatile organic compounds to total increased emissions of such air pollutant shall be at least 1.1 to 1.

The Administrator may, in the Administrator's discretion, require States to submit a schedule for submitting any of the revisions or other items required under this subsection. The requirements of this subsection shall apply in lieu of any requirement that the State submit a demonstration that the applicable implementation plan provides for attainment of the ozone standard by the applicable attainment date in any Marginal Area. Section 7502(c)(9) of this title (relating to contingency measures) shall not apply to Marginal Areas.

(b) Moderate Areas

Each State in which all or part of a Moderate Area is located shall, with respect to the Moderate Area, make the submissions described under subsection (a) of this section (relating to Marginal Areas), and shall also submit the revisions to the applicable implementation plan described under this subsection.

(1) Plan provisions for reasonable further progress

(A) General rule

(i) By no later than 3 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for volatile organic compound emission reductions, within 6 years after November 15, 1990, of at least 15 percent from baseline emissions, accounting for any growth in emissions after 1990. Such plan shall provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter. This subparagraph shall not apply in the case of oxides of nitrogen for those areas for which the Administrator determines (when the Administrator approves the plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment.

(ii) A percentage less than 15 percent may be used for purposes of clause (i) in the case of any State which demonstrates to the satisfaction of the Administrator that—

(I) new source review provisions are applicable in the nonattainment areas in the same manner and to the same extent as required under subsection (e) of this section in the case of Extreme Areas (with the exception that, in applying such provisions, the terms ''major source'' and ''major stationary source'' shall include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 5 tons per year of volatile organic compounds);

(II) reasonably available control technology is required for all existing major sources (as defined in subclause (I)); and

(III) the plan reflecting a lesser percentage than 15 percent includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To qualify for a lesser percentage under this clause, a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher category.

(B) Baseline emissions

For purposes of subparagraph (A), the term ''baseline emissions'' means the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the calendar year 1990, excluding emissions that would be eliminated under the regulations described in clauses (i) and (ii) of subparagraph (D).

(C) General rule for creditability of reductions

Except as provided under subparagraph (D), emissions reductions are creditable toward the 15 percent required under subparagraph (A) to the extent they have actually occurred, as of 6 years after November 15, 1990, 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.

(D) Limits on creditability of reductions

Emission reductions from the following measures are not creditable toward the 15 percent reductions required under subparagraph (A):

(i) Any measure relating to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990.

(ii) Regulations concerning Reid Vapor Pressure promulgated by the Administrator by November 15, 1990, or required to be promulgated under section 7545(h) of this title.

(iii) Measures required under subsection (a)(2)(A) of this section (concerning corrections to implementation plans prescribed under guidance by the Administrator).

(iv) Measures required under subsection (a)(2)(B) of this section to be submitted immediately after November 15, 1990 (concerning corrections to motor vehicle inspection and maintenance programs).

(2) Reasonably available control technology

The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology under section 7502(c)(1) of this title with respect to each of the following:

(A) Each category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990, and the date of attainment.

(B) All VOC sources in the area covered by any CTG issued before November 15, 1990.

(C) All other major stationary sources of VOCs that are located in the area.

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Each revision described in subparagraph (A) shall be submitted within the period set forth by the Administrator in issuing the relevant CTG document. The revisions with respect to sources described in subparagraphs (B) and (C) shall be submitted by 2 years after November 15, 1990, and shall provide for the implementation of the required measures as expeditiously as practicable but no later than May 31, 1995.

(3) Gasoline vapor recovery

(A) General rule

Not later than 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to require all owners or operators of gasoline dispensing systems to install and operate, by the date prescribed under subparagraph (B), a system for gasoline vapor recovery of emissions from the fueling of motor vehicles. The Administrator shall issue guidance as appropriate as to the effectiveness of such system. This subparagraph shall apply only to facilities which sell more than 10,000 gallons of gasoline per month (50,000 gallons per month in the case of an independent small business marketer of gasoline as defined in section 7625–1[2] of this title).

(B) Effective date

The date required under subparagraph (A) shall be—

(i) 6 months after the adoption date, in the case of gasoline dispensing facilities for which construction commenced after November 15, 1990;

(ii) one year after the adoption date, in the case of gasoline dispensing facilities which dispense at least 100,000 gallons of gasoline per month, based on average monthly sales for the 2-year period before the adoption date; or

(iii) 2 years after the adoption date, in the case of all other gasoline dispensing facilities.

Any gasoline dispensing facility described under both clause (i) and clause (ii) shall meet the requirements of clause (i).

(C) Reference to terms

For purposes of this paragraph, any reference to the term ''adoption date'' shall be considered a reference to the date of adoption by the State of requirements for the installation and operation of a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.

(4) Motor vehicle inspection and maintenance

For all Moderate Areas, the State shall submit, immediately after November 15, 1990, a revision to the applicable implementation plan that includes provisions necessary to provide for a vehicle inspection and maintenance program as described in subsection (a)(2)(B) of this section (without regard to whether or not the area was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included a specific schedule for implementation of such a program).

(5) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase[3] emissions of such air pollutant shall be at least 1.15 to 1.

(c) Serious Areas

Except as otherwise specified in paragraph (4), each State in which all or part of a Serious Area is located shall, with respect to the Serious Area (or portion thereof, to the extent specified in this subsection), make the submissions described under subsection (b) of this section (relating to Moderate Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Serious Area, the terms ''major source'' and ''major stationary source'' include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds.

(1) Enhanced monitoring

In order to obtain more comprehensive and representative data on ozone air pollution, not later than 18 months after November 15, 1990, the Administrator shall promulgate rules, after notice and public comment, for enhanced monitoring of ozone, oxides of nitrogen, and volatile organic compounds. The rules shall, among other things, cover the location and maintenance of monitors. Immediately following the promulgation of rules by the Administrator relating to enhanced monitoring, the State shall commence such actions as may be necessary to adopt and implement a program based on such rules, to improve monitoring for ambient concentrations of ozone, oxides of nitrogen and volatile organic compounds and to improve monitoring of emissions of oxides of nitrogen and volatile organic compounds. Each State implementation plan for the area shall contain measures to improve the ambient monitoring of such air pollutants.

(2) Attainment and reasonable further progress demonstrations

Within 4 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan that includes each of the following:

(A) Attainment demonstration

A demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date. 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.

[2] So in original. Probably should be section ''7625''.

[3] So in original. Probably should be ''increased''.

(B) Reasonable further progress demonstration

A demonstration that the plan, as revised, will result in VOC emissions reductions from the baseline emissions described in subsection (b)(1)(B) of this section equal to the following amount averaged over each consecutive 3-year period beginning 6 years after November 15, 1990, until the attainment date:

(i) at least 3 percent of baseline emissions each year; or

(ii) an amount less than 3 percent of such baseline emissions each year, if the State demonstrates to the satisfaction of the Administrator that the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To lessen the 3 percent requirement under clause (ii), a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification. Any determination to lessen the 3 percent requirement shall be reviewed at each milestone under subsection (g) of this section and revised to reflect such new measures (if any) achieved in practice by sources in the same category in any State, allowing a reasonable time to implement such measures. The emission reductions described in this subparagraph shall be calculated in accordance with subsection (b)(1)(C) and (D) of this section (concerning creditability of reductions). The reductions creditable for the period beginning 6 years after November 15, 1990, shall include reductions that occurred before such period, computed in accordance with subsection (b)(1) of this section, that exceed the 15-percent amount of reductions required under subsection (b)(1)(A) of this section.

(C) NO_x control

The revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of emissions of VOC's and oxides of nitrogen (calculated according to the creditability provisions of subsection (b)(1)(C) and (D) of this section), that would result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required under subparagraph (B). Within 1 year after November 15, 1990, the Administrator shall issue guidance concerning the conditions under which NO_x control may be substituted for VOC control or may be combined with VOC control in order to maximize the reduction in ozone air pollution. In accord with such guidance, a lesser percentage of VOCs may be accepted as an adequate demonstration for purposes of this subsection.

(3) Enhanced vehicle inspection and maintenance program

(A) Requirement for submission

Within 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for an enhanced program to reduce hydrocarbon emissions and NO_x emissions from in-use motor vehicles registered in each urbanized area (in the nonattainment area), as defined by the Bureau of the Census, with a 1980 population of 200,000 or more.

(B) Effective date of State programs; guidance

The State program required under subparagraph (A) shall take effect no later than 2 years from November 15, 1990, and shall comply in all respects with guidance published in the Federal Register (and from time to time revised) by the Administrator for enhanced vehicle inspection and maintenance programs. Such guidance shall include—

(i) a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling for all light-duty vehicles and all light-duty trucks subject to standards under section 7521 of this title; and

(ii) program administration features necessary to reasonably assure that adequate management resources, tools, and practices are in place to attain and maintain the performance standard.

Compliance with the performance standard under clause (i) shall be determined using a method to be established by the Administrator.

(C) State program

The State program required under subparagraph (A) shall include, at a minimum, each of the following elements—

(i) Computerized emission analyzers, including on-road testing devices.

(ii) No waivers for vehicles and parts covered by the emission control performance warranty as provided for in section 7541(b) of this title unless a warranty remedy has been denied in writing, or for tampering-related repairs.

(iii) In view of the air quality purpose of the program, if, for any vehicle, waivers are permitted for emissions-related repairs not covered by warranty, an expenditure to qualify for the waiver of an amount of $450 or more for such repairs (adjusted annually as determined by the Administrator on the basis of the Consumer Price Index in the same manner as provided in subchapter V of this chapter).

(iv) Enforcement through denial of vehicle registration (except for any program in operation before November 15, 1990, whose enforcement mechanism is demonstrated to the Administrator to be more effective than the applicable vehicle registration program in assuring that noncomplying vehicles are not operated on public roads).

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(v) Annual emission testing and necessary adjustment, repair, and maintenance, unless the State demonstrates to the satisfaction of the Administrator that a biennial inspection, in combination with other features of the program which exceed the requirements of this chapter, will result in emission reductions which equal or exceed the reductions which can be obtained through such annual inspections.

(vi) Operation of the program on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective. An electronically connected testing system, a licensing system, or other measures (or any combination thereof) may be considered, in accordance with criteria established by the Administrator, as equally effective for such purposes.

(vii) Inspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.

Each State shall biennially prepare a report to the Administrator which assesses the emission reductions achieved by the program required under this paragraph based on data collected during inspection and repair of vehicles. The methods used to assess the emission reductions shall be those established by the Administrator.

(4) Clean-fuel vehicle programs

(A) Except to the extent that substitute provisions have been approved by the Administrator under subparagraph (B), the State shall submit to the Administrator, within 42 months of November 15, 1990, a revision to the applicable implementation plan for each area described under part C of subchapter II of this chapter to include such measures as may be necessary to ensure the effectiveness of the applicable provisions of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, including all measures necessary to make the use of clean alternative fuels in clean-fuel vehicles (as defined in part C of subchapter II of this chapter) economic from the standpoint of vehicle owners. Such a revision shall also be submitted for each area that opts into the clean fuel-vehicle program as provided in part C of subchapter II of this chapter.

(B) The Administrator shall approve, as a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, any revision to the relevant applicable implementation plan that in the Administrator's judgment will achieve long-term reductions in ozone-producing and toxic air emissions equal to those achieved under part C of subchapter II of this chapter, or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute. The Administrator may approve such revision only if it consists exclusively of provisions other than those required under this chapter for the area. Any State seeking approval of such revision must submit the revision to the Administrator within 24 months of November 15, 1990. The Administrator shall approve or disapprove any such revision within 30 months of November 15, 1990. The Administrator shall publish the revision submitted by a State in the Federal Register upon receipt. Such notice shall constitute a notice of proposed rulemaking on whether or not to approve such revision and shall be deemed to comply with the requirements concerning notices of proposed rulemaking contained in sections 553 through 557 of title 5 (related to notice and comment). Where the Administrator approves such revision for any area, the State need not submit the revision required by subparagraph (A) for the area with respect to the portions of the Federal clean-fuel vehicle program for which the Administrator has approved the revision as a substitute.

(C) If the Administrator determines, under section 7509 of this title, that the State has failed to submit any portion of the program required under subparagraph (A), then, in addition to any sanctions available under section 7509 of this title, the State may not receive credit, in any demonstration of attainment or reasonable further progress for the area, for any emission reductions from implementation of the corresponding aspects of the Federal clean-fuel vehicle requirements established in part C of subchapter II of this chapter.

(5) Transportation control

(A)[4] Beginning 6 years after November 15, 1990, and each third year thereafter, the State shall submit a demonstration as to whether current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant parameters are consistent with those used for the area's demonstration of attainment. Where such parameters and emissions levels exceed the levels projected for purposes of the area's attainment demonstration, the State shall within 18 months develop and submit a revision of the applicable implementation plan that includes a transportation control measures program consisting of measures from, but not limited to, section 7408(f) of this title that will reduce emissions to levels that are consistent with emission levels projected in such demonstration. In considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(e) of this title and with the requirements of section 7504(b) of this title and shall include implementation and funding schedules that achieve expeditious emissions reductions in accordance with implementation plan projections.

(6) De minimis rule

The new source review provisions under this part shall ensure that increased emissions of

[4] So in original. No subpar. (B) has been enacted.

volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the area shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

(7) Special rule for modifications of sources emitting less than 100 tons

In the case of any major stationary source of volatile organic compounds located in the area (other than a source which emits or has the potential to emit 100 tons or more of volatile organic compounds per year), whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that such increase shall not be considered a modification for such purposes if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds concerned from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not make such election, such change shall be considered a modification for such purposes, but in applying section 7503(a)(2) of this title in the case of any such modification, the best available control technology (BACT), as defined in section 7479 of this title, shall be substituted for the lowest achievable emission rate (LAER). The Administrator shall establish and publish policies and procedures for implementing the provisions of this paragraph.

(8) Special rule for modifications of sources emitting 100 tons or more

In the case of any major stationary source of volatile organic compounds located in the area which emits or has the potential to emit 100 tons or more of volatile organic compounds per year, whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1, the requirements of section 7503(a)(2) of this title (concerning the lowest achievable emission rate (LAER)) shall not apply.

(9) Contingency provisions

In addition to the contingency provisions required under section 7502(c)(9) of this title, the plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.

(10) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase emissions of such air pollutant shall be at least 1.2 to 1.

Any reference to ''attainment date'' in subsection (b) of this section, which is incorporated by reference into this subsection, shall refer to the attainment date for serious areas.

(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms ''major source'' and ''major stationary source'' include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) 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 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[5] (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles

[5] So in original. Probably should be ''subsections''.

travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the Administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title.

Any reference to the term ''attainment date'' in subsection (b) or (c) of this section, which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) of this section (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. The provisions of clause (ii) of subsection (c)(2)(B) of this section (relating to reductions of less than 3 percent), the provisions of paragraphs[6] (6), (7) and (8) of subsection (c) of this section (relating to de minimus[7] rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) of this section (relating to reductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms ''major source'' and ''major stationary source'' includes[8] (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen—

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen.

For purposes of this subsection, the term ''primary fuel'' means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 [15 U.S.C. 3361 et seq.]).

[6] So in original. Probably should be ''paragraphs''.

[7] So in original. Probably should be ''de minimis''.

[8] So in original. Probably should be ''include''.

(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that—

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions.

Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2) of this section, and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2) of this section.

Any reference to the term ''attainment date'' in subsection (b), (c), or (d) of this section which is incorporated by reference into this subsection, shall refer to the attainment date for Extreme Areas.

(f) NO_x requirements

(1) The plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in section 7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen. This subsection shall not apply in the case of oxides of nitrogen for those sources for which the Administrator determines (when the Administrator approves a plan or plan revision) that net air quality benefits are greater in the absence of reductions of oxides of nitrogen from the sources concerned. This subsection shall also not apply in the case of oxides of nitrogen for—

(A) nonattainment areas not within an ozone transport region under section 7511c of this title, if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(B) nonattainment areas within such an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not produce net ozone air quality benefits in such region.

The Administrator shall, in the Administrator's determinations, consider the study required under section 7511f of this title.

(2)(A) If the Administrator determines that excess reductions in emissions of NO_x would be achieved under paragraph (1), the Administrator may limit the application of paragraph (1) to the extent necessary to avoid achieving such excess reductions.

(B) For purposes of this paragraph, excess reductions in emissions of NO_x are emission reductions for which the Administrator determines that net air quality benefits are greater in the absence of such reductions. Alternatively, for purposes of this paragraph, excess reductions in emissions of NO_x are, for—

(i) nonattainment areas not within an ozone transport region under section 7511c of this title, emission reductions that the Administrator determines would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(ii) nonattainment areas within such ozone transport region, emission reductions that the Administrator determines would not produce net ozone air quality benefits in such region.

(3) At any time after the final report under section 7511f of this title is submitted to Congress, a person may petition the Administrator for a determination under paragraph (1) or (2) with respect to any nonattainment area or any ozone transport region under section 7511c of this title. The Administrator shall grant or deny such petition within 6 months after its filing with the Administrator.

(g) Milestones

(1) Reductions in emissions

6 years after November 15, 1990, and at intervals of every 3 years thereafter, the State shall determine whether each nonattainment area (other than an area classified as Marginal or Moderate) has achieved a reduction in emissions during the preceding intervals equivalent to the total emission reductions required to be achieved by the end of such interval pursuant to subsection (b)(1) of this section and the corresponding requirements of subsections (c)(2)(B) and (C), (d), and (e) of this section. Such reduction shall be referred to in this section as an applicable milestone.

(2) Compliance demonstration

For each nonattainment area referred to in paragraph (1), not later than 90 days after the

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date on which an applicable milestone occurs (not including an attainment date on which a milestone occurs in cases where the standard has been attained), each State in which all or part of such area is located shall submit to the Administrator a demonstration that the milestone has been met. A demonstration under this paragraph shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require, by rule. The Administrator shall determine whether or not a State's demonstration is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) Serious and Severe Areas; State election

If a State fails to submit a demonstration under paragraph (2) for any Serious or Severe Area within the required period or if the Administrator determines that the area has not met any applicable milestone, the State shall elect, within 90 days after such failure or determination—

(A) to have the area reclassified to the next higher classification,

(B) to implement specific additional measures adequate, as determined by the Administrator, to meet the next milestone as provided in the applicable contingency plan, or

(C) to adopt an economic incentive program as described in paragraph (4).

If the State makes an election under subparagraph (B), the Administrator shall, within 90 days after the election, review such plan and shall, if the Administrator finds the contingency plan inadequate, require further measures necessary to meet such milestone. Once the State makes an election, it shall be deemed accepted by the Administrator as meeting the election requirement. If the State fails to make an election required under this paragraph within the required 90-day period or within 6 months thereafter, the area shall be reclassified to the next higher classification by operation of law at the expiration of such 6-month period. Within 12 months after the date required for the State to make an election, the State shall submit a revision of the applicable implementation plan for the area that meets the requirements of this paragraph. The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(4) Economic incentive program

(A) An economic incentive program under this paragraph shall be consistent with rules published by the Administrator and sufficient, in combination with other elements of the State plan, to achieve the next milestone. The State program may include a nondiscriminatory system, consistent with applicable law regarding interstate commerce, of State established emissions fees or a system of marketable permits, or a system of State fees on sale or manufacture of products the use of which contributes to ozone formation, or any combination of the foregoing or other similar measures. The program may also include incentives and requirements to reduce vehicle emissions and vehicle miles traveled in the area, including any of the transportation control measures identified in section 7408(f) of this title.

(B) Within 2 years after November 15, 1990, the Administrator shall publish rules for the programs to be adopted pursuant to subparagraph (A). Such rules shall include model plan provisions which may be adopted for reducing emissions from permitted stationary sources, area sources, and mobile sources. The guidelines shall require that any revenues generated by the plan provisions adopted pursuant to subparagraph (A) shall be used by the State for any of the following:

(i) Providing incentives for achieving emission reductions.

(ii) Providing assistance for the development of innovative technologies for the control of ozone air pollution and for the development of lower-polluting solvents and surface coatings. Such assistance shall not provide for the payment of more than 75 percent of either the costs of any project to develop such a technology or the costs of development of a lower-polluting solvent or surface coating.

(iii) Funding the administrative costs of State programs under this chapter. Not more than 50 percent of such revenues may be used for purposes of this clause.

(5) Extreme Areas

If a State fails to submit a demonstration under paragraph (2) for any Extreme Area within the required period, or if the Administrator determines that the area has not met any applicable milestone, the State shall, within 9 months after such failure or determination, submit a plan revision to implement an economic incentive program which meets the requirements of paragraph (4). The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(h) Rural transport areas

(1) Notwithstanding any other provision of section 7511 of this title or this section, a State containing an ozone nonattainment area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area (as defined by the United States Bureau of the Census), which area is treated by the Administrator, in the Administrator's discretion, as a rural transport area within the meaning of paragraph (2), shall be treated by operation of law as satisfying the requirements of this section if it makes the submissions required under subsection (a) of this section (relating to marginal areas).

(2) The Administrator may treat an ozone nonattainment area as a rural transport area if the Administrator finds that sources of VOC (and, where the Administrator determines relevant, NO_x) emissions within the area do not make a significant contribution to the ozone concentrations measured in the area or in other areas.

(i) Reclassified areas

Each State containing an ozone nonattainment area reclassified under section 7511(b)(2) of

this title shall meet such requirements of subsections (b) through (d) of this section as may be applicable to the area as reclassified, according to the schedules prescribed in connection with such requirements, except that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions.

(j) Multi-State ozone nonattainment areas

(1) Coordination among States

Each State in which there is located a portion of a single ozone nonattainment area which covers more than one State (hereinafter in this section referred to as a ''multi-State ozone nonattainment area'') shall—

(A) take all reasonable steps to coordinate, substantively and procedurally, the revisions and implementation of State implementation plans applicable to the nonattainment area concerned; and

(B) use photochemical grid modeling or any other analytical method determined by the Administrator, in his discretion, to be at least as effective.

The Administrator may not approve any revision of a State implementation plan submitted under this part for a State in which part of a multi-State ozone nonattainment area is located if the plan revision for that State fails to comply with the requirements of this subsection.

(2) Failure to demonstrate attainment

If any State in which there is located a portion of a multi-State ozone nonattainment area fails to provide a demonstration of attainment of the national ambient air quality standard for ozone in that portion within the required period, the State may petition the Administrator to make a finding that the State would have been able to make such demonstration but for the failure of one or more other States in which other portions of the area are located to commit to the implementation of all measures required under this section (relating to plan submissions and requirements for ozone nonattainment areas). If the Administrator makes such finding, the provisions of section 7509 of this title (relating to sanctions) shall not apply, by reason of the failure to make such demonstration, in the portion of the multi-State ozone nonattainment area within the State submitting such petition.

(July 14, 1955, ch. 360, title I, §182, as added Pub. L. 101–549, title I, §103, Nov. 15, 1990, 104 Stat. 2426; amended Pub. L. 104–70, §1, Dec. 23, 1995, 109 Stat. 773.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (e)(3), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended. Title III of the Act is classified generally to subchapter III (§3361 et seq.) of chapter 60 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of Title 15 and Tables.

AMENDMENTS

1995—Subsec. (d)(1)(B). Pub. L. 104–70 amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ''Within 2 years after November 15, 1990, the State shall submit a revision requiring employers in such area to implement programs to reduce work-related vehicle trips and miles traveled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and shall, at a minimum, require that each employer of 100 or more persons in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods by not less than 25 percent above the average vehicle occupancy for all such trips in the area at the time the revision is submitted. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. The revision shall provide that each employer subject to a vehicle occupancy requirement shall submit a compliance plan within 2 years after the date the revision is submitted which shall convincingly demonstrate compliance with the requirements of this paragraph not later than 4 years after such date.''

MORATORIUM ON CERTAIN EMISSIONS TESTING REQUIREMENTS

Pub. L. 104–59, title III, §348, Nov. 28, 1995, 109 Stat. 617, provided that:

''(a) IN GENERAL.—The Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') shall not require adoption or implementation by a State of a test-only I/M240 enhanced vehicle inspection and maintenance program as a means of compliance with section 182 or 187 of the Clean Air Act (42 U.S.C. 7511a; 7512a), but the Administrator may approve such a program if a State chooses to adopt the program as a means of compliance with such section.

''(b) LIMITATION ON PLAN DISAPPROVAL.—The Administrator shall not disapprove or apply an automatic discount to a State implementation plan revision under section 182 or 187 of the Clean Air Act (42 U.S.C. 7511a; 7512a) on the basis of a policy, regulation, or guidance providing for a discount of emissions credits because the inspection and maintenance program in such plan revision is decentralized or a test-and-repair program.

''(c) EMISSIONS REDUCTION CREDITS.—

''(1) STATE PLAN REVISION; APPROVAL.—Within 120 days of the date of the enactment of this subsection [Nov. 28, 1995], a State may submit an implementation plan revision proposing an interim inspection and maintenance program under section 182 or 187 of the Clean Air Act (42 U.S.C. 7511a; 7512a). The Administrator shall approve the program based on the full amount of credits proposed by the State for each element of the program if the proposed credits reflect good faith estimates by the State and the revision is otherwise in compliance with such Act. If, within such 120-day period, the State submits to the Administrator proposed revisions to the implementation plan, has all of the statutory authority necessary to implement the revisions, and has proposed a regulation to make the revisions, the Administrator may approve the revisions without regard to whether or not such regulation has been issued as a final regulation by the State.

''(2) EXPIRATION OF INTERIM APPROVAL.—The interim approval shall expire on the earlier of (A) the last day of the 18-month period beginning on the date of the interim approval, or (B) the date of final approval. The interim approval may not be extended.

''(3) FINAL APPROVAL.—The Administrator shall grant final approval of the revision based on the credits proposed by the State during or after the period of interim approval if data collected on the operation of the State program demonstrates that the credits are appropriate and the revision is otherwise in compliance with the Clean Air Act [42 U.S.C. 7401 et seq.].

''(4) BASIS OF APPROVAL; NO AUTOMATIC DISCOUNT.—Any determination with respect to interim or full ap-

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(B) Applicability

Subparagraph (A) shall not apply if the operator presents documentation at the United States border entry point establishing that the vehicle has complied with such inspection and maintenance requirements as are in effect and are applicable to motor vehicles of the same type and model year.

(2) Sanctions for violations

The President may impose and collect from the operator of any motor vehicle who violates, or attempts to violate, paragraph (1) a civil penalty of not more than $200 for the second violation or attempted violation and $400 for the third and each subsequent violation or attempted violation.

(3) State election

The prohibition set forth in paragraph (1) shall not apply in any State that elects to be exempt from the prohibition. Such an election shall take effect upon the President's receipt of written notice from the Governor of the State notifying the President of such election.

(4) Alternative approach

The prohibition set forth in paragraph (1) shall not apply in a State, and the President may implement an alternative approach, if—

(A) the Governor of the State submits to the President a written description of an alternative approach to facilitate the compliance, by some or all foreign-registered motor vehicles, with the motor vehicle inspection and maintenance requirements that are—

(i) related to emissions of air pollutants;

(ii) in effect under the applicable implementation plan in the covered ozone nonattainment area; and

(iii) applicable to motor vehicles of the same types and model years as the foreign-registered motor vehicles; and

(B) the President approves the alternative approach as facilitating compliance with the motor vehicle inspection and maintenance requirements referred to in subparagraph (A).

(5) Definition of covered ozone nonattainment area

In this section, the term "covered ozone nonattainment area" means a Serious Area, as classified under section 7511 of this title as of October 27, 1998.

(July 14, 1955, ch. 360, title I, § 183, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2443; amended Pub. L. 105–286, § 2, Oct. 27, 1998, 112 Stat. 2773.)

References in Text

The Solid Waste Disposal Act, referred to in subsec. (b)(2), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795. Subtitle C of the Act is classified generally to subchapter III (§ 6921 et seq.) of chapter 82 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

Amendments

1998—Subsec. (h). Pub. L. 105–286 added subsec. (h).

Effective Date of 1998 Amendment; Publication of Prohibition

Pub. L. 105–286, § 3, Oct. 27, 1998, 112 Stat. 2774, provided that:

"(a) In General.—The amendment made by section 2 [amending this section] takes effect 180 days after the date of the enactment of this Act [Oct. 27, 1998]. Nothing in that amendment shall require action that is inconsistent with the obligations of the United States under any international agreement.

"(b) Information.—As soon as practicable after the date of the enactment of this Act, the appropriate agency of the United States shall distribute information to publicize the prohibition set forth in the amendment made by section 2."

Transfer of Functions

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

§ 7511c. Control of interstate ozone air pollution CAA § 184

(a) Ozone transport regions

A single transport region for ozone (within the meaning of section 7506a(a) of this title), comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia, is hereby established by operation of law. The provisions of section 7506a(a)(1) and (2) of this title shall apply with respect to the transport region established under this section and any other transport region established for ozone, except to the extent inconsistent with the provisions of this section. The Administrator shall convene the commission required (under section 7506a(b) of this title) as a result of the establishment of such region within 6 months of November 15, 1990.

(b) Plan provisions for States in ozone transport regions

(1) In accordance with section 7410 of this title, not later than 2 years after November 15, 1990 (or 9 months after the subsequent inclusion of a State in a transport region established for ozone), each State included within a transport region established for ozone shall submit a State implementation plan or revision thereof to the Administrator which requires the following—

(A) that each area in such State that is in an ozone transport region, and that is a metropolitan statistical area or part thereof with a population of 100,000 or more comply with the provisions of section 7511a(c)(2)(A) of this title (pertaining to enhanced vehicle inspection and maintenance programs); and

(B) implementation of reasonably available control technology with respect to all sources of volatile organic compounds in the State covered by a control techniques guideline issued before or after November 15, 1990.

(2) Within 3 years after November 15, 1990, the Administrator shall complete a study identify-

ing control measures capable of achieving emission reductions comparable to those achievable through vehicle refueling controls contained in section 7511a(b)(3) of this title, and such measures or such vehicle refueling controls shall be implemented in accordance with the provisions of this section. Notwithstanding other deadlines in this section, the applicable implementation plan shall be revised to reflect such measures within 1 year of completion of the study. For purposes of this section any stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall be considered a major stationary source and subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate nonattainment area.

(c) Additional control measures

(1) Recommendations

Upon petition of any State within a transport region established for ozone, and based on a majority vote of the Governors on the Commission[1] (or their designees), the Commission[1] may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by this subpart. The commission shall transmit such recommendations to the Administrator.

(2) Notice and review

Whenever the Administrator receives recommendations prepared by a commission pursuant to paragraph (1) (the date of receipt of which shall hereinafter in this section be referred to as the "receipt date"), the Administrator shall—

(A) immediately publish in the Federal Register a notice stating that the recommendations are available and provide an opportunity for public hearing within 90 days beginning on the receipt date; and

(B) commence a review of the recommendations to determine whether the control measures in the recommendations are necessary to bring any area in such region into attainment by the dates provided by this subpart and are otherwise consistent with this chapter.

(3) Consultation

In undertaking the review required under paragraph (2)(B), the Administrator shall consult with members of the commission of the affected States and shall take into account the data, views, and comments received pursuant to paragraph (2)(A).

(4) Approval and disapproval

Within 9 months after the receipt date, the Administrator shall (A) determine whether to approve, disapprove, or partially disapprove and partially approve the recommendations; (B) notify the commission in writing of such approval, disapproval, or partial disapproval; and (C) publish such determination in the Federal Register. If the Administrator disapproves or partially disapproves the recommendations, the Administrator shall specify—

(i) why any disapproved additional control measures are not necessary to bring any area in such region into attainment by the dates provided by this subpart or are otherwise not consistent with the[2] chapter; and

(ii) recommendations concerning equal or more effective actions that could be taken by the commission to conform the disapproved portion of the recommendations to the requirements of this section.

(5) Finding

Upon approval or partial approval of recommendations submitted by a commission, the Administrator shall issue to each State which is included in the transport region and to which a requirement of the approved plan applies, a finding under section 7410(k)(5) of this title that the implementation plan for such State is inadequate to meet the requirements of section 7410(a)(2)(D) of this title. Such finding shall require each such State to revise its implementation plan to include the approved additional control measures within one year after the finding is issued.

(d) Best available air quality monitoring and modeling

For purposes of this section, not later than 6 months after November 15, 1990, the Administrator shall promulgate criteria for purposes of determining the contribution of sources in one area to concentrations of ozone in another area which is a nonattainment area for ozone. Such criteria shall require that the best available air quality monitoring and modeling techniques be used for purposes of making such determinations.

(July 14, 1955, ch. 360, title I, § 184, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2448.)

§ 7511d. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain

(a) General rule

Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c) of this section, pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b) of this section, for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

[1] So in original. Probably should not be capitalized.

[2] So in original. Probably should be "this".

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emption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions*. The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability*. This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity*. Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded*. Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

CAA § 307

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)[1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[4] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

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

[1] See References in Text note below.

[2] So in original. Probably should be "this".

[3] So in original.

[4] So in original. Probably should be "subsection,".

lishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

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

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

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

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

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

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

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

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

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

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

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

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

[5] So in original. The word "to" probably should not appear.

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(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

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

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

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

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

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

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

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

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

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

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

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

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

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

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(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

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

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

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

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

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

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

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

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, § 307, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92–157, title III, § 302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93–319, § 6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95–95, title III, §§ 303(d), 305(a), (c), (f)–(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95–190, § 14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§ 108(p), 110(5), title III, § 302(g), (h), title VII, §§ 702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681–2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, § 230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, § 230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original ''section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, § 3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original ''subtitle C of title I'', and was translated as reading ''part C of title I'' to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), ''subchapter II of chapter 5 of title 5'' was substituted for ''the Administrative Procedures Act'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly § 14, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

[6] So in original. Probably should be ''sections''.