No. _____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

SIERRA CLUB,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Nos. 12-3169/3182/3420

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents,

STATE OF OHIO, et al.

Intervenors.

ORDER

Filed: September 3, 2015

BEFORE: GIBBONS and KETHLEDGE, Circuit Judges; and DOW, District Judge.*

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

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* The Honorable Robert M. Dow, Jr., United States District Judge for the Northern District of Illinois, sitting by designation.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt, Clerk

APPENDIX B

793 F.3d 656

United States Court of Appeals,
Sixth Circuit.

Sierra CLUB, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Gina McCarthy, Administrator of the United States Environmental Protection Agency, Respondents,
State of Ohio; Ohio Utility Group, et al., Intervenors.

No. 12–3169/3182/3420. | Argued: Oct. 9, 2014. | Decided and Filed: July 14, 2015. | Rehearing En Banc Denied Sept. 3, 2015.

Synopsis

Background: Environmental advocacy group filed petition pursuant to Clean Air Act (CAA) for review of Environmental Protection Agency's (EPA) determination that metropolitan area had attained national air quality standards for fine particulate matter and redesignation of area as attainment area.

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

[1] as matter of first impression, organization had to present, by affidavit or other evidence, specific facts supporting each element of standing;

[2] organization satisfied injury-in-fact requirement for standing;

[3] organization satisfied causation and redressability requirements for standing;

[4] EPA's interpretation of CAA section regarding redesignation of nonattainment area to allow showing of improvement because of cap-and-trade program was reasonable; and

[5] EPA could not redesignate metropolitan area as attainment area without implementing reasonably available control measures or technology (RACM/RACT) in state implementation plans (SIP).

Petitions granted in part and denied in part.

Attorneys and Law Firms

*658 ARGUED: Robert Ukeiley, Berea, Kentucky, for Petitioner. Amy J. Dona, United States Department of Justice, Washington, DC, for Respondents. Aaron S. Farmer, Office of the Ohio Attorney General, Columbus, Ohio, for Intervenor. **ON BRIEF:** Robert Ukeiley, Berea, Kentucky, David C. Bender, McGillivray Westerberg & Bender LLC, Madison, Wisconsin, for Petitioner. Amy J. Dona, for Respondents. Aaron S. Farmer, Elizabeth R. Ewing, Office of the Ohio Attorney General, Columbus, Ohio, for Intervenor ***659** State of Ohio. Louis E. Tosi, Michael E. Born, Cheri A. Budzynsky, Shumaker, Loop & Kendrick, LLP, Columbus, Ohio, for Ohio Utility Intervenors. Thomas M. Fisher, Office of the Indiana Attorney General, Indianapolis, Indiana, for Amicus Curiae.

Before: GIBBONS and KETHLEDGE, Circuit Judges. DOW, District Judge.*

AMENDED OPINION

JULIA SMITH GIBBONS, Circuit Judge.

In 2011, the Environmental Protection Agency ("EPA") determined that the Cincinnati-Hamilton metropolitan area had attained national air quality standards for particulate matter, thanks in no small part to regional cap-and-trade programs that had reduced the flow of interstate pollution. EPA also redesignated the area to "attainment" status even though the three States that administer its pollution controls had never implemented particular provisions, known as "reasonably available control measures," applicable to nonattainment areas. Sierra Club thought the agency had acted illegally with respect to both actions, and it filed a petition for direct appellate review in this court. The parties dispute both Sierra Club's standing to challenge the agency action and the correct interpretation of the relevant statute, the Clean Air Act.

We find that the Club has standing, and we agree with its claim that "reasonably available control measures" are a prerequisite to redesignation. Therefore, we vacate EPA's redesignation of the Ohio and Indiana portions of the Cincinnati area.

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* The Honorable Robert M. Dow, Jr., United States District Judge for the Northern District of Illinois, sitting by designation.

I.

A.

The Clean Air Act ("CAA") authorizes EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for various types of emissions deemed injurious to public health and welfare. 42 U.S.C. § 7409(a)-(b). Once the agency has promulgated a particular NAAQS, the Governor of each State must submit a "state implementation plan" ("SIP") with particular methods for achieving the NAAQS. *Id.* § 7410. EPA will then designate portions of each State as "attainment areas" (that attain the standard), "nonattainment areas" (that do not), or as "unclassifiable." *Id.* § 7407(d)(1)(B). If an area is designated as nonattainment, the State or States containing that area must revise their SIPs to meet additional requirements located in Part D of Subchapter 1, Chapter 85 of Title 42. *See e.g.*, *id.* § 7502. One such requirement, which we will refer to as "RACM" or "RACT," is that the state SIP "provide for the implementation of all reasonably available control measures ["RACM"] as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology ["RACT"]) and shall provide for attainment of the national primary ambient air quality standards." *Id.* § 7502(c)(1). Another such provision, termed "New Source Review" or "NSR," forces the State to set up a permit regime "for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of [Title 42]." *Id.* § 7502(c)(5).

***660** When a State asks EPA to redesignate a nonattainment area to attainment status (and thus remove these additional requirements from its SIP), the agency may do so only if five conditions are satisfied:

> (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 [Title 42];
>
> (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 [Title 42]; 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 [Subchapter 1].

Id. § 7407(d)(3)(E).

In 1997, EPA promulgated a NAAQS concerning fine particulate matter (referred to as $PM_{2.5}$ to distinguish it from coarse particulate matter, PM_{10}), motivated largely by concerns of health impacts. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed.Reg. 38,652, 38,652 (July 18, 1997).

B.

To combat the flow of air pollutants across state lines, EPA has also created so-called "cap-and-trade"

programs. In this sort of scheme, the agency first "caps" the total emissions allowable from a particular facility, state, or region, and then requires any source that pollutes too much either to invest in cleaner technology or to purchase emission reduction credits from other, more environmentally friendly sources (the "trade" part). Three cap-and-trade programs are pertinent to this case.

The first is the NO_x SIP Call, which covered 22 States plus the District of Columbia and targeted known precursor emissions to ozone and particulate matter. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed.Reg. 57,356, 57,477 (Oct. 27, 1998). EPA promulgated another cap-and-trade program with the Clean Air Interstate Rule ("CAIR") in 2005; this was also partly aimed at reducing fine particulate matter in the atmosphere. *See* Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed.Reg. 25,162, 25,162 (May 12, 2005). After the D.C. Circuit ruled CAIR illegal, *see North Carolina v. EPA,* 531 F.3d 896, 901 (D.C.Cir. 2008) (per curiam), EPA promulgated a third program called the Cross–State Air Pollution Rule ("CSAPR"), *see* Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed.Reg. 48,208, 48,208 (Aug. 8, 2011). The Supreme Court recently upheld this program. *See EPA v. EME Homer City Generation, L.P.,* —— U.S. ——, 134 S.Ct. 1584, 188 L.Ed.2d 775 (2014).

C.

In 2011, EPA issued Direct Final Rules approving requests from Ohio, Indiana, and Kentucky to redesignate each of their respective portions of the ***661** Cincinnati–Hamilton area from nonattainment to attainment status under the 1997 fine particulate matter NAAQS. *See* 76 Fed.Reg. 64,825, 64,825 (Oct. 19, 2011) [hereinafter "Direct Final Rule (Ohio/Indiana)"] (approving the redesignation requests of Ohio and Indiana); 76 Fed.Reg. 77,903, 77,903 (Dec. 15, 2011) (approving Kentucky's redesignation request). Notably, the agency determined that the local atmosphere had reached attainment status in significant part thanks to EPA's three cap-and-trade programs, which had reduced inflows of particulate matter from regional sources. *See* Direct Final Rule (Ohio/Indiana), 76 Fed.Reg. at 64,830–32. Sierra Club submitted several comments to EPA claiming that redesignation was improper.

In those comments Sierra Club made two arguments of particular relevance to this appeal. First, it contended that improvements in the area's air quality attributable to the cap-and-trade programs were not "permanent and enforcement reductions in emissions" required under 42 U.S.C. § 7407(d)(3)(E)(iii), and that the Cincinnati area could therefore not be redesignated. Second, Sierra Club argued that the existing nonattainment SIPs had never implemented RACM/RACT rules under § 7502(c)(1), and that therefore EPA could not have "fully approved the applicable implementation plan" for purposes of § 7407(d)(3)(E)(ii). EPA rejected these comments in its Final Rule and redesignated the area to attainment status. *See* 76 Fed.Reg. 80,253, 80,255–56, 80,258 (Dec. 23, 2011) [hereinafter "Final Rule

(Ohio/Indiana)"]. Sierra Club then filed timely petitions asking this court to vacate the redesignation. The State of Ohio and a group of utilities operating in the Cincinnati area (the "Utilities Group") intervened in support of EPA's position.

II.

A.

[1] [2] [3] [4] At the outset, we must address a jurisdictional question. "Before bringing a case in federal court, a plaintiff must establish standing to do so." *Klein v. Dep't of Energy,* 753 F.3d 576, 579 (6th Cir. 2014). An organization like Sierra Club can establish standing through two routes: on behalf of its members, in what we have called "representational standing," or on its own behalf if directly injured. *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n,* 389 F.3d 536, 540, 544 (6th Cir. 2004). For this case, we need address only the former. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). No one disputes that the second and third requirements are met here.[1] A

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[1] Sierra Club's organizational purposes are germane to air pollution regulation, *see* Kanfer Decl. ¶ 2 ("The Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; ... and to use all lawful means to carry out these objectives."), and there is no reason to

Sierra Club member has standing to sue in her own right if she can demonstrate three things: "(1) 'an injury in fact'; (2) 'a causal connection' between the alleged injury and the defendants' conduct—that 'the injury ... [is] fairly traceable to the challenged action ... and not the result of the independent action of ***662** some third party not before the court'; and (3) redressability—that the injury will 'likely ... be redressed by a favorable decision.' " *Klein,* 753 F.3d at 579 (6th Cir. 2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[5] [6] [7] [8] "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (alteration in original) (internal quotation marks omitted). But upon a motion for summary judgment, "the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judg-

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think that its members need to participate individually in the claim or relief requested.

ment motion will be taken to be true." *Id.* (citations and internal quotation marks omitted).

[9] Here, we have a form of litigation not directly addressed by the Supreme Court in *Lujan* or subsequent cases: a petition for direct appellate review of final agency action. Surprisingly, more than two decades after *Lujan,* our circuit has not decided the "manner and degree of evidence" necessary to prove standing upon direct review, *id.,* so we must consider an issue of first impression. We now hold, like several of our sister circuits, that the petitioner carries a burden of production similar to that required at summary judgment.

The D.C. Circuit first took up the question of a petitioner's burden in, fittingly, *Sierra Club v. Environmental Protection Agency*, 292 F.3d 895 (D.C.Cir. 2002). The D.C. Circuit thought a direct petition more analogous to summary judgment than a motion to dismiss. *Id.* at 899. Because "a petitioner seeking review in the court of appeals does not ask the court merely to assess the sufficiency of its legal theory[,]" but instead seeks "a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record[,]" that party "must either identify in that record evidence sufficient to support its standing ... [or] submit additional evidence to the court of appeals." *Id.* The D.C. Circuit also thought this requirement "the most fair and orderly" means to adjudicate standing because petitioners are often best situated to produce evidence of their injuries. *Id.* at 901. The court therefore required the petitioner to present specific facts supporting standing through citations to the administrative record or "affidavits or other evidence" attached

to its opening brief, unless standing is self-evident. *Id.* at 900.

The Seventh, Eighth, and Tenth Circuits each found this reasoning persuasive. *N. Laramie Range Alliance v. FERC,* 733 F.3d 1030, 1034 (10th Cir. 2013); *Iowa League of Cities v. EPA,* 711 F.3d 844, 869–70 (8th Cir. 2013); *Citizens Against Ruining The Env't v. EPA,* 535 F.3d 670, 675 (7th Cir. 2008). We agree with the view of our sister circuits and see no reason why a petitioner should not be able to establish, by affidavit or other evidence, specific facts supporting each element of standing. And in fact Sierra Club has anticipated this burden and appended declarations to its opening brief from Nachy Kanfer, its Deputy Director for the Beyond ***663** Coal Campaign in the Midwest region, and Marilyn Wall, a Sierra Club member who lives and recreates in the Cincinnati area. *See* Kanfer Decl. ¶ 1; Wall Decl. ¶¶ 3–4. We therefore turn to the sufficiency of those declarations with respect to injury, causation, and redressability. We ultimately hold that the Club has demonstrated Article III standing.

B.

[10] [11] An injury in fact must be "concrete and particularized" to the petitioner, and also "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). The Club's petitions and opening brief claim virtually every type of injury the Supreme Court has recognized, but we need only address two. The Wall Declaration asserts aesthetic and recreational injury from "regional haze" and reduced "outdoor activities[,]" Wall Decl. ¶¶ 11, 13, and potential physical injury in the form of "respiratory symptoms"

caused by increased particulate matter, *id.* ¶ 7. Each of these is a judicially cognizable form of injury.[2] *See, e.g., Friends of the Earth, Inc.,* 528 U.S. at 183, 120 S.Ct. 693 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972))); *Sierra Club v. EPA,* 762 F.3d 971, 977 (9th Cir. 2014) ("In addition, evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants may establish an injury in fact.") (internal quotation marks omitted). The closer question in this case is just how the EPA's redesignation will affect the members' exposure to fine particulate matter-that is, whether the claimed injuries are sufficiently actual or imminent, even if concrete and particular.[3] *Cf. Sierra Club v. EPA,* 774

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[2] The parties do not meaningfully dispute that additional particulate matter in the atmosphere presents a greater risk to human health and may reduce visibility. *See Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512, 515 (D.C.Cir.2009) ("Studies have demonstrated that both fine and coarse PM can have negative effects on public health and welfare. For example, each is associated with increased mortality (premature death) rates and morbidity (illness) effects such as cardiovascular disease and decreased lung function.... [H]igh levels of fine PM in the air can impair visibility...."). *See also* Clean Air Fine Particle Implementation Rule, 72 Fed.Reg. 20,586, 20,586 (Apr. 25, 2007) (codified at 40 C.F.R. pt. 51) ("The EPA established air quality standards for $PM_{2.5}$ based on evidence from numerous health studies demonstrating that serious health effects are associated with exposures to elevated levels of $PM_{2.5}$.").

[3] We note that our characterization of the petitioner's injury in this case might overlap with the causation element of standing. Under either label, our essential task is to determine how

F.3d 383, 392 (7th Cir. 2014) ("[T]he rules that apply to areas in 'attainment[ ]' ".... are less stringent than those governing areas in nonattainment, so Sierra Club's standing is tied to the likely effects that this new set of rules may have on polluters in the areas at issue.").

We first note that many courts have apparently found it so obvious that redesignation would lead to higher emissions that they did not even need to discuss the standing of environmental litigants, *see, e.g., BCCA Appeal Grp. v. EPA,* 355 F.3d 817, 847–48 (5th Cir. 2003) (assuming Sierra Club's standing to force implementation of RACM/RACT), and we ourselves have done so in a challenge by the Club concerning some of these very same rules, *see Wall v. EPA,* 265 F.3d 426 (6th Cir. 2001). ***664** Yet the Clean Air Act addresses $PM_{2.5}$ pollution through a wide variety of mechanisms, some of which might not present an "actual or imminent" threat of increased exposure if relaxed after redesignation. The Kanfer Declaration primarily addresses the structure and purposes of the Club and is entirely unhelpful on this issue. And while the Wall Declaration broadly asserts that redesignation will increase fine particulate matter in the area, it does not explain precisely how. *See* Wall Decl. ¶ 12 ("I understand that areas designated nonattainment ... must take certain steps to remedy that pollution. If an area is improperly redesignated, that results in more air pollution emitted and breathed by nonattainment area residents such as myself."). The Club's standing therefore turns on what reasonable

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the redesignation influences the air quality of the Cincinnati area.

inferences we can draw about redesignation's impact on $PM_{2.5}$. *Cf. Klein,* 753 F.3d at 579–80 (finding standing based on reasonable inferences taken from an otherwise sparse record); *Natural Res. Def. Council v. EPA,* 542 F.3d 1235, 1248 (9th Cir. 2008) ("Where Congress has expressed the need for specific regulations relating to the environment, that expression supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects.").

Sierra Club more clearly identifies an impact on $PM_{2.5}$ emissions through the RACM/RACT requirements under § 7502(c)(1), which, again, state that SIPs for nonattainment areas "shall provide for the implementation of all reasonably available control measures ... including such reductions from *existing sources* in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology[.]" 42 U.S.C. § 7502(c)(1) (emphasis added). Taking as true its claim that Ohio and Indiana did not have legally sufficient RACM/RACT measures for fine particulate matter at the time of redesignation, we find it highly likely that imposition of RACM/RACT would have some marginal effect on area emissions. Or at least as likely as an environmental litigant could ever hope to establish. *See Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 n. 3, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010) (finding an injury in fact where "deregulation ... pose [d] a significant risk of contamination to respondents' crops"); *Sierra Club v. EPA,* 754 F.3d 995, 1001 (D.C.Cir. 2014) (noting that "[b]ecause '[e]nvironmental and health injuries often are purely probabilistic,' " petitioners must ordinarily show only a " 'substantial probability' " or " 'nontrivial risk' " of

injury in fact); *accord Sierra Club,* 774 F.3d at 391. The RACM/RACT rules, as interpreted by the Club, would directly reduce emissions at sources already known to exist and to influence Cincinnati's air quality. Indeed, the Utilities Group suggests as much in justifying its intervention in the case. *See* Intervenor Utils. Grp. Mot. to Intervene 7 ("Implementation of RACT standards *would require additional reductions of PM 2.5,* which could again require [the group's] members to install additional pollution controls. Each of these issues would have real and substantial impacts upon [the group] and its members.") (emphasis added). Our conclusion comports with a significant number of explicit or implicit holdings by our sister circuits. *See, e.g., Sierra Club v. EPA,* 762 F.3d 971, 977–978 (9th Cir. 2014) (finding "credible, concrete, and ... imminent" injuries to organization members from EPA's waiver of BACT rules, a stricter version of the RACM/RACT provision); *Sierra Club v. EPA,* 294 F.3d 155, 162–63 (D.C.Cir. 2002) (implicitly finding standing for Sierra Club where it challenged the application of RACT rules). We therefore find it reasonable to infer actual and imminent ***665** aesthetic and physical injuries to an identified member of the Club from redesignation of the Cincinnati area.

[12] Having found injury in fact, we can easily dispose of the redressability and causation requirements, which often run together. *See Allen v. Wright,* 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). We have already traced a cognizable injury from EPA's actions through the RACM/RACT provisions to the alleged injuries of the Club's members; we therefore see a clear causal connection. Since the alleged injuries flow from EPA's redesignations, and

since the Club asks us to vacate these redesignations, granting the Club's petitions would redress its injuries. Thus, we conclude that Sierra Club has constitutional standing to challenge the EPA's redesignations.

III.

A reviewing court will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Where a petitioner challenges an agency's interpretation of a statute promulgated after notice-and-comment rulemaking, we assess the lawfulness of the interpretation under the familiar two-step *Chevron* framework. *See United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). The court will first ask if "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If the intent of Congress is clear, that is the end of the matter"; no other interpretations may be permitted. *Id.* at 842–43, 104 S.Ct. 2778. "When conducting the inquiry required by *Chevron's* first step, [the court's] primary goal is to effectuate legislative intent using traditional tools of statutory interpretation." *Alliance for Cmty. Media v. FCC,* 529 F.3d 763, 777 (6th Cir.2008) (internal quotation marks omitted). These traditional tools include analysis of the statutory text, the structure of the statute, and its legislative history. *See Fullenkamp v. Veneman,* 383 F.3d 478, 481–84 (6th Cir.2004).

But "[i]f the intent of Congress on a matter of statutory meaning is ambiguous, however, the court is to

proceed to 'step two' of the *Chevron* inquiry: whether the agency's interpretation is a 'permissible construction of the statute.' " *Mid–America Care Found. v. NLRB,* 148 F.3d 638, 642 (6th Cir. 1998) (quoting *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron,* 467 U.S. at 843 n. 11, 104 S.Ct. 2778. Rather, the court need only find that "EPA's understanding of this very complex statute is a sufficiently rational one to preclude a court from substituting its judgment from that of EPA." *Greenbaum v. EPA,* 370 F.3d 527, 534 (6th Cir. 2004) (internal quotation marks omitted).

A.

Sierra Club aims its first challenge at EPA's compliance with 42 U.S.C. § 7407(d)(3)(E)(iii), which bars redesignation to attainment unless "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[.]" More specifically, Sierra Club claims that EPA improperly included emissions reductions ***666** from cap-and-trade programs (including the NO_x SIP Call, CAIR, and CSAPR) as "permanent and enforceable." The plain meaning of this phrase, in the Club's view, cannot accommodate a situation in which an individual emissions source can reduce its emissions one year but *increase* emissions in the next year through pur-

chase of credits from other sources or from "spending" stored reduction credits from previous years.

The heart of this dispute is really where the sources that reduce their emissions must be located. Sierra Club implicitly asks this court to read § 7407(d)(3)(E)(iii) as requiring "permanent and enforceable reductions in emissions *from sources in the nonattainment area.*" Under this interpretation, EPA would need to determine that the Cincinnati area has achieved attainment status *solely* because sources within the confines of the nonattainment area have sufficiently reduced their emissions; improvements in Cincinnati air quality due to emissions reductions from anywhere else would be ignored. EPA and the Intervenors respond that the statutory text is silent on the location of the reductions and that a regional focus is necessary to address a fundamentally regional pollution problem. In other words, the States can show an improvement in Cincinnati air quality due to less inflow of particulate matter from sources outside the nonattainment area.

We think that the statutory context alone is sufficiently ambiguous for EPA to clear the first step of *Chevron. Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (finding a "fundamental ambiguity" from potential inferences across statutory sections). At least three times, appellate courts have vacated EPA rules that ignored explicit, area-specific mandates in assessing emission reductions under other sections of the CAA. *See Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1256 (D.C.Cir. 2009) (holding that the phrase "reductions in emission from existing sources in the area," § 7502(c)(1), excluded

regional source reductions attributable to NO_x SIP Call); *North Carolina v. EPA,* 531 F.3d 896, 907 (D.C.Cir. 2008) (rejecting a "regionwide approach to CAIR" where § 7410(a)(2)(D)(i) required a focus on sources "within the State"); *La. Envtl. Action Network v. EPA,* 382 F.3d 575, 585–87 (5th Cir. 2004) (holding that EPA violated the mandate of § 7511a(b)(1)(B), which requires calculation of "baseline emissions ... from all anthropogenic sources in the area"). But, unlike the statutory sections in those cases, the plain language of § 7407(d)(3)(E)(iii) contains no explicit geographical limitation, so there is at least a plausible conclusion that Congress did not intend redesignation to hinge on reductions from sources in the nonattainment area. Sierra Club points to no other statutory provisions, legislative history, or other "traditional tools of statutory construction" that would totally foreclose EPA's reading. *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778. Thus, we turn to the second step of the *Chevron* analysis.

[13] Here, EPA's interpretation seems eminently reasonable. In its direct final rule, the agency indicated that emissions from other "upwind" States significantly influence particulate matter concentrations in the Cincinnati area. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,256 (noting the "regional nature of particulate matter"); Direct Final Rule (Ohio/Indiana), 76 Fed.Reg. at 64,831–32 tbl. 4. It might well be the case that regional source reductions would be *necessary* to attainment under any scenario, but we need not examine that question in full. The existence of a regional problem is enough to conclude ***667** that EPA's regional focus on emissions reductions is "sufficiently rational" and within the statutory ambit to warrant deference to its technical

expertise. *Greenbaum,* 370 F.3d at 534 (internal quotation marks omitted).

Moreover, even if EPA can count improvements in air quality attributable to reductions from extra-area sources, Sierra Club contends that these reductions are not "permanent and enforceable." 42 U.S.C. § 7407(d)(3)(E)(iii). In its view, the plain meaning of "permanent" requires that each and every source reducing its emissions "will never increase [its] emissions" again. We, however, do not think it so obvious from this one word alone that the statute forecloses inclusion of cap-and-trade programs. For one thing, Sierra Club assumes that emissions "reductions" must be evaluated at the level of individual sources. But the statute does not explicitly state whether the net "reductions" may be calculated for a wider area (like the state or region). And for substantially the same reasons that § 7407(d)(3)(E)(iii) does not necessarily limit the inquiry to reductions in the nonattainment area, EPA can plausibly and rationally interpret the statute to allow a wider purview than individual sources. Under such an interpretation, the "cap" in each of the cap-and-trade programs would ensure that the relevant "reductions" are not foreseeably reversed, at least at the level of the entire cap-and-trade region. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,255 (discussing the "strict emission ceiling in each state" under CSAPR, which, cumulatively, create a regional ceiling). With a sufficiently broad level of analysis, then, EPA would simply meet Sierra Club's interpretation of "permanent." In other words, since we do not believe EPA must be limited to reductions within the nonattainment area, the agency can reasonably stretch the geographic scope to guarantee "permanence."

And we cannot say that this interpretation of "permanent" is impermissible. Sierra Club asserts that anything other than an interpretation forbidding even temporary upticks in emissions could, in the aggregate, completely undermine the NAAQS, but it overlooks that § 7407(d)(3)(E)(i) independently requires attainment of the standard as a condition of redesignation. Furthermore, the threat of future designations of nonattainment (perhaps under future particulate matter NAAQS) helps to mitigate any runaway increases in emissions after this initial redesignation. *See* 42 U.S.C. § 7407(d)(1)(B). Attainment status aside, the net benefits of forbidding *any* source to *ever* increase emissions post-redesignation, a patently harsh standard, is a policy judgment best left to the agency. *See Chevron,* 467 U.S. at 865, 104 S.Ct. 2778.

This leaves Sierra Club with only one remaining argument: that reductions attributable to cap-and-trade programs are not "enforceable." 42 U.S.C. § 7407(d)(3)(E)(iii). Congress did not directly define "enforceable" in the Clean Air Act. *See id.* § 7602. Nor does Sierra Club attempt to provide a fully inclusive definition of the term. Instead, it proffers other uses of the term "enforceable" as evidence that Congress did not think cap-and-trade programs create enforceable reductions. As noted earlier, § 7410(a)(2)(A) requires SIPs to "include *enforceable* emission limitations and *other control measures,* means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights)...." (emphasis added). Sierra Club argues that Congress set "enforceable emission limitations" apart from "other control measures" (including tradeable permits) because the latter were not

"enforceable." But it seems at least as plausible ***668** that "other control measures" shares some meaning with the earlier phrase. At the very least, this possible inference from § 7410(a)(2)(A) leaves some doubt that Congress meant to exclude cap-and-trade reductions by inserting the word "enforceable." Nor is there any reason to think an interpretation of reductions attributable to regional cap-and-trade schemes as "enforceable" any less rational than considering such reductions as "permanent."

Ultimately, then, EPA has permissibly interpreted § 7407(d)(3)(E)(iii) to allow for a showing of "improvement in air quality" at least partially due to regional cap-and-trade schemes.

B.

Sierra Club next challenges EPA's approval of the States' respective SIPs without RACM/RACT provisions specifically tailored towards fine particulate matter. Here, Sierra Club alleges non-compliance with 42 U.S.C. § 7407(d)(3)(E)(ii), which prevents redesignation unless "the Administrator has fully approved the applicable implementation plan for the area under section 7410(k)." The Club argues that this section mandates implementation of the Clean Air Act's general RACM/RACT provision, which states that all SIPs for nonattainment areas "shall provide for the implementation of all reasonably available control measures [RACM] as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT])...." 42 U.S.C. § 7502(c)(1). In approving the redesignation requests of Ohio and Indiana despite their lack of

RACM/RACT,[4] EPA interpreted these provisions to mandate these measures only if needed to attain the air quality standard for $PM_{2.5}$. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,258 ("[A] determination that an area that has attained the $PM_{2.5}$ standard suspends the requirements to submit RACT and RACM requirements."). Sierra Club responds that the text of § 7502(c)(1) cannot support this interpretation.

We have already addressed, and accepted, a similar challenge by the Club in *Wall v. EPA,* 265 F.3d 426 (6th Cir.2001). There, EPA granted requests from Kentucky and Ohio to redesignate the Cincinnati area to attainment status under the ozone NAAQS, despite the fact that the States' SIPs had not fully adopted ozone-specific RACT measures as required under a distinct, but similar, part of the statute, 42 U.S.C. § 7511a(b)(2). *See id.* at 433–34. We vacated the redesignations, holding that the agency received no *Chevron* deference because "the statutory language regarding the implementation of RACT rules is not ambiguous....By this language, it is clear that Congress intended for SIPs submitted in redesignation requests to include provisions to require the implementation of RACT measures." *Id.* at 440 (internal quotation marks omitted). And we held thus

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[4] Like those of Ohio and Indiana, Kentucky's redesignation request did not contain provisions for the implementation of RACM/RACT for fine particulate matter. But as Sierra Club candidly acknowledges, the petitioner has waived any objection to redesignation of the Kentucky area because it failed to comment on this oversight during the rulemaking process. *See, e.g., Natural Res. Def. Council v. Thomas,* 805 F.2d 410, 427 (D.C.Cir.1986) (citing 42 U.S.C. § 7607(d)(7)(B)).

even though EPA had interpreted the ozone RACT provision as operative only if "needed to bring about the attainment of the [air quality] standard in Cincinnati." *Id.* at 433 (internal quotation marks omitted).

***669** **[14]** Sierra Club leans heavily on this court's opinion in *Wall* for the proposition that the phrase "shall provide" in § 7502(c)(1) unambiguously means that RACM and RACT provisions "must be contained be contained in SIPs submitted with respect to redesignation requests" under the $PM_{2.5}$ NAAQS. We agree with the Club, despite the fact that *Wall* interpreted RACT requirements for ozone nonattainment areas, *see* 42 U.S.C. § 7511a(b)(2) ("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*....") (emphasis added), because the statutory language at issue in that case is functionally identical to—and directly references—§ 7502(c)(1). We therefore reject EPA's attempt to distinguish *Wall* on the grounds that that case is confined to the particulars of the ozone provisions. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,258 ("The *Wall* decision addressed entirely different statutory provisions for ozone RACT under CAA Part D subpart 2, which do not apply or pertain to the subpart 1 RACT requirements for [$PM_{2.5}$].").

EPA raises two final arguments that we also find unconvincing. Relying mostly on a decision from the Seventh Circuit, *Sierra Club v. EPA,* 375 F.3d 537, 540 (7th Cir.2004), the agency contends that we are looking at the wrong "implementation plan." In its view (and that of the Seventh Circuit), the phrase "applicable implementation plan" in

§ 7407(d)(3)(E)(ii) could conceivably refer to something other than the pre-attainment SIP; perhaps the "applicable" modifier "implies that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period." *Id.* at 541. As a consequence, EPA arguably needs only to "fully approve" those parts of the SIP that "proved to be necessary to achieve compliance" with the NAAQS, not all statutory provisions imposed on nonattainment areas. *Id.* at 540–41. Similarly, EPA claims that it need only approve a SIP to the extent that the plan satisfies all of the Act's "applicable requirements"; the agency considers statutory requirements for nonattainment areas, including RACM/RACT, as "applicable" only if they were necessary to attain the $PM_{2.5}$ standard. *See* Direct Final Rule (Ohio/Indiana), 76 Fed.Reg. at 64,828.

But *Wall* forecloses either of these readings. Again, we held in that case that the Act unambiguously requires RACT in the area's SIP as a prerequisite to redesignation-despite use of the phrase "applicable implementation plan" in the ozone RACT provision. *See Wall,* 265 F.3d at 440. Clearly, we did not read this phrase as an implicit delegation to the EPA to require ozone RACT only if necessary to attainment, and we do not now read that phrase in § 7407(d)(3)(E)(ii) as a similar delegation with respect to the general RACM/RACT provisions for all types of emissions. So we must respectfully disagree with the Seventh Circuit that "applicable implementation plan" is sufficiently vague to trigger *Chevron* deference.

As to EPA's "applicable requirements" argument, we did note in *Wall* that this language could be read to

"limit[ ] the number of actual requirements within [§ 7410] and Part D that apply to a given area." 265 F.3d at 439. In *Wall,* in fact, we deferred to the agency's view that separate nonattainment provisions, transportation conformity requirements, were not "requirements applicable to the area" for the purposes of a *separate* redesignation requirement located in § 7407(d)(3)(e)(v). *Id.* at 438–39. But EPA cannot rely on that language to avoid implementation of RACT provisions under the statutory sections at issue in this case—a ***670** § 7407(d)(3)(E)(ii) or in § 7502(c)(1)—which do not contain similar language. So our past deference to the agency on the meaning of § 7407(d)(3)(E)(v) does not dispose of the Club's petition. Instead, as noted above, we look to *Wall's* teachings on the type of language that does occur in the provisions directly under review, and that type of language unambiguously requires implementation of RACM/RACT prior to redesignation. Congress did not remain silent on this issue. *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778.

In sum, a State seeking redesignation "shall provide for the implementation" of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. *See* 42 U.S.C. § 7502(c)(1). If the State has not done so, EPA cannot "fully approve[ ]" the area's SIP, and redesignation to attainment status is improper. *See id.* § 7407(d)(3)(E)(ii). Because the Ohio and Indiana SIPs for their respective portions of the Cincinnati–Hamilton area did not provide for RACM/RACT,[5] the

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[5] Intervenor Utilities Group argues that Ohio's SIP in fact includes RACT for $PM_{2.5}$ because it has general RACT provisions covering all types of emissions. This is not, however, the inter-

EPA acted in violation of the Clean Air Act when it approved those redesignation requests.

IV.

The petitions are granted in part and denied in part. We vacate the redesignations of the Ohio and Indiana portions of the Cincinnati–Hamilton area but leave the redesignation of the Kentucky portion undisturbed.

All Citations

793 F.3d 656

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pretation advocated by EPA as the justification for its rulemaking on redesignation. Recall that EPA took the position when approving redesignation that RACT requirements as a category only apply if needed to reach attainment. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,255 ("[N]o RACT is required because the areas is attaining the standard."); *see id.* at 80,258 ("[A] determination that an area has attained the $PM_{2.5}$ standard suspends the requirements to submit RACT and RACM requirements.").

APPENDIX C

781 F.3d 299
United States Court of Appeals,
Sixth Circuit.

SIERRA CLUB, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Gina McCarthy, Administrator of the United States Environmental Protection Agency, Respondents,
State of Ohio; Ohio Utility Group, et al., Intervenors.

No. 12–3169, 3182, 3420. | Argued: Oct. 9, 2014. | Decided and Filed: March 18, 2015.

Synopsis

Background: Environmental advocacy group filed petition for direct appellate review of Environmental Protection Agency's (EPA) determination under the Clean Air Act (CAA) that metropolitan area, covering portions of Indiana, Ohio, and Kentucky, had attained national air quality standards for fine particulate matter (PM2.5) and redesignation of area as an attainment area with respect to PM2.5, due in part to cap-and-trade program, but without the requirement of reasonably available control methods and technologies (RACM/RACT).

Holdings: The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that:

[1] as a matter of first impression, on a petition for direct appellate review of a final agency action, the petitioner must present, by affidavit or other evi-

dence, specific facts supporting each element of standing;

[2] actual and imminent aesthetic and physical injuries would be sustained by an identified member of group from EPA's redesignation;

[3] there was a causal connection between EPA's redesignation and group member's alleged injuries and such injuries were redressable by granting group's petition;

[4] EPA's interpretation of CAA section regarding redesignation of nonattainment area to allow a showing of improvement in PM2.5 pollution due in part to cap-and-trade program was reasonable; and

[5] EPA could not fully approve a state implementation plan that did not provide for implementation of RACM/RACT, and thus EPA's redesignation of area as an attainment area was a violation of CAA section regarding redesignation.

Petition granted in part and denied in part, redesignations in Ohio and Indiana vacated.

Attorneys and Law Firms

***301 ARGUED:** Robert Ukeiley, Berea, Kentucky, for Petitioner. Amy J. Dona, United States Department of Justice, Washington, D.C., for Respondents. Aaron S. Farmer, Office of the Ohio Attorney General, Columbus, Ohio, for Intervenor State ***302** of Ohio. **ON BRIEF:** Robert Ukeiley, Berea, Kentucky, David C. Bender, McGillivray Westerberg & Bender LLC, Madison, Wisconsin, for Petitioner. Amy J. Dona, United States Department of Justice, Washington, D.C., for Respondents. Aaron S. Farmer, Elizabeth R. Ewing, Office of the Ohio At-

torney General, Columbus, Ohio, for Intervenor State of Ohio. Louis E. Tosi, Michael E. Born, Cheri A. Budzynski, Shumaker, Loop & Kendrick, LLP, Columbus, Ohio, for Ohio Utility Intervenors.

Before: GIBBONS and KETHLEDGE, Circuit Judges; DOW, District Judge.*

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

In 2011, the Environmental Protection Agency ("EPA") determined that the Cincinnati–Hamilton metropolitan area had attained national air quality standards for particulate matter, thanks in no small part to regional cap-and-trade programs that had reduced the flow of interstate pollution. EPA also redesignated the area to "attainment" status even though the three States that administer its pollution controls had never implemented particular provisions, known as "reasonably available control measures," applicable to nonattainment areas. Sierra Club thought the agency had acted illegally with respect to both actions, and it filed a petition for direct appellate review in this court. The parties dispute both Sierra Club's standing to challenge the agency action and the correct interpretation of the relevant statute, the Clean Air Act.

We find that the Club has standing, and we agree with its claim that "reasonably available control measures" are a prerequisite to redesignation.

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*The Honorable Robert M. Dow, Jr., United States District Judge for the Northern District of Illinois, sitting by designation.

Therefore, we vacate EPA's redesignation of the Ohio and Indiana portions of the Cincinnati area.

I.

A.

The Clean Air Act ("CAA") authorizes EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for various types of emissions deemed injurious to public health and welfare. 42 U.S.C. § 7409(a)-(b). Once the agency has promulgated a particular NAAQS, the Governor of each State must submit a "state implementation plan" ("SIP") with particular methods for achieving the NAAQS. *Id.* § 7410. EPA will then designate portions of each State as "attainment areas" (that attain the standard), "nonattainment areas" (that do not), or as "unclassifiable." *Id.* § 7407(d)(1)(B). If an area is designated as nonattainment, the State or States containing that area must revise their SIPs to meet additional requirements located in Part D of Subchapter 1, Chapter 85 of Title 42. *See, e.g., id.* § 7502. One such requirement, which we will refer to as "RACM" or "RACT," is that the state SIP "provide for the implementation of all reasonably available control measures ["RACM"] as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology ["RACT"]) and shall provide for attainment of the national primary ambient air quality standards." *Id.* § 7502(c)(1). Another such provision, termed "New Source Review" or "NSR," forces the State to set up a permit regime ***303** "for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area,

in accordance with section 7503 of [Title 42]." *Id.* § 7502(c)(5).

When a State asks EPA to redesignate a nonattainment area to attainment status (and thus remove these additional requirements from its SIP), the agency may do so only if five conditions are satisfied:

> (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 [Title 42];
>
> (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 [Title 42]; 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 [Subchapter 1].

Id. § 7407(d)(3)(E).

In 1997, EPA promulgated a NAAQS concerning fine particulate matter (referred to as $PM_{2.5}$ to distinguish it from coarse particulate matter, PM_{10}), motivated largely by concerns of health impacts. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed.Reg. 38,652, 38,652 (July 18, 1997).

B.

To combat the flow of air pollutants across state lines, EPA has also created so-called "cap-and-trade" programs. In this sort of scheme, the agency first "caps" the total emissions allowable from a particular facility, state, or region, and then requires any source that pollutes too much either to invest in cleaner technology or to purchase emission reduction credits from other, more environmentally friendly sources (the "trade" part). Three cap-and-trade programs are pertinent to this case.

The first is the NO_x SIP Call, which covered 22 States plus the District of Columbia and targeted known precursor emissions to ozone and particulate matter. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed.Reg. 57,356, 57,477 (Oct. 27, 1998). EPA promulgated another cap-and-trade program with the Clean Air Interstate Rule ("CAIR") in 2005; this was also partly aimed at reducing fine particulate matter in the atmosphere. *See* Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed.Reg. 25,162, 25,162 (May 12, 2005). After the D.C. Circuit ruled CAIR illegal, *see North Carolina v. EPA,* 531 F.3d 896, 901 (D.C.Cir. 2008) (per curiam), EPA promulgated a third program called the Cross–State Air Pollution Rule ("CSAPR"), *see* Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed.Reg. 48,208, 48,208 (Aug. 8, 2011). The Supreme Court recently upheld this program. *See EPA v.*

EME Homer City Generation, L.P., —— U.S. ——, 134 S.Ct. 1584, 188 L.Ed.2d 775 (2014).

***304 C.**

In 2011, EPA issued Direct Final Rules approving requests from Ohio, Indiana, and Kentucky to redesignate each of their respective portions of the Cincinnati–Hamilton area from nonattainment to attainment status under the 1997 fine particulate matter NAAQS. *See* 76 Fed.Reg. 64,825, 64,825 (Oct. 19, 2011) [hereinafter "Direct Final Rule (Ohio/Indiana)"] (approving the redesignation requests of Ohio and Indiana); 76 Fed.Reg. 77,903, 77,903 (Dec. 15, 2011) (approving Kentucky's redesignation request). Notably, the agency determined that the local atmosphere had reached attainment status in significant part thanks to EPA's three cap-and-trade programs, which had reduced inflows of particulate matter from regional sources. *See* Direct Final Rule (Ohio/Indiana), 76 Fed.Reg. at 64,830–32. Sierra Club submitted several comments to EPA claiming that redesignation was improper.

In those comments Sierra Club made two arguments of particular relevance to this appeal. First, it contended that improvements in the area's air quality attributable to the cap-and-trade programs were not "permanent and enforcement reductions in emissions" required under 42 U.S.C. § 7407(d)(3)(E)(iii), and that the Cincinnati area could therefore not be redesignated. Second, Sierra Club argued that the existing nonattainment SIPs had never implemented RACM/RACT rules under § 7502(c)(1), and that therefore EPA could not have "fully approved the applicable implementation plan" for purposes of § 7407(d)(3)(E)(ii). EPA rejected these comments in

its Final Rule and redesignated the area to attainment status. *See* 76 Fed.Reg. 80,253, 80,255–56, 80,258 (Dec. 23, 2011) [hereinafter "Final Rule (Ohio/Indiana)"]. Sierra Club then filed timely petitions asking this court to vacate the redesignation. The State of Ohio and a group of utilities operating in the Cincinnati area (the "Utilities Group") intervened in support of EPA's position.

II.

A.

[1] [2] [3] [4] At the outset, we must address a jurisdictional question. "Before bringing a case in federal court, a plaintiff must establish standing to do so." *Klein v. Dep't of Energy,* 753 F.3d 576, 579 (6th Cir. 2014). An organization like Sierra Club can establish standing through two routes: on behalf of its members, in what we have called "representational standing," or on its own behalf if directly injured. *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n,* 389 F.3d 536, 540, 544 (6th Cir. 2004). For this case, we need address only the former. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). No one disputes that the second and third requirements are met here.[1] A

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[1] Sierra Club's organizational purposes are germane to air pollution regulation, *see* Kanfer Decl. ¶ 2 ("The Sierra Club's

Sierra Club member has standing to sue in her own right if she can ***305** demonstrate three things: "(1) 'an injury in fact'; (2) 'a causal connection' between the alleged injury and the defendants' conduct—that 'the injury ... [is] fairly traceable to the challenged action ... and not the result of the independent action of some third party not before the court'; and (3) redressability—that the injury will 'likely ... be redressed by a favorable decision.' " *Klein,* 753 F.3d at 579 (6th Cir. 2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[5] [6] [7] [8] "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (alteration in original) (internal quotation marks omitted). But upon a motion for summary judgment, "the plaintiff can no longer rest on such mere allegations,

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purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; ... and to use all lawful means to carry out these objectives."), and there is no reason to think that its members need to participate individually in the claim or relief requested.

but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (citations and internal quotation marks omitted).

[9] Here, we have a form of litigation not directly addressed by the Supreme Court in *Lujan* or subsequent cases: a petition for direct appellate review of final agency action. Surprisingly, more than two decades after *Lujan,* our circuit has not decided the "manner and degree of evidence" necessary to prove standing upon direct review, *id.,* so we must consider an issue of first impression. We now hold, like several of our sister circuits, that the petitioner carries a burden of production similar to that required at summary judgment.

The D.C. Circuit first took up the question of a petitioner's burden in, fittingly, *Sierra Club v. Environmental Protection Agency,* 292 F.3d 895 (D.C.Cir. 2002). The D.C. Circuit thought a direct petition more analogous to summary judgment than a motion to dismiss. *Id.* at 899. Because "a petitioner seeking review in the court of appeals does not ask the court merely to assess the sufficiency of its legal theory[,]" but instead seeks "a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record[,]" that party "must either identify in that record evidence sufficient to support its standing ... [or] submit additional evidence to the court of appeals." *Id.* The D.C. Circuit also thought this requirement "the most fair and orderly" means to adjudicate standing because petitioners are often best situated to produce evidence of their injuries. *Id.* at 901. The court therefore required the petitioner to present specific facts supporting standing through citations to the administra-

tive record or "affidavits or other evidence" attached to its opening brief, unless standing is self-evident. *Id.* at 900.

The Seventh, Eighth, and Tenth Circuits each found this reasoning persuasive. *N. Laramie Range Alliance v. FERC,* 733 F.3d 1030, 1034 (10th Cir. 2013); *Iowa League of Cities v. EPA,* 711 F.3d 844, 869–70 (8th Cir. 2013); *Citizens Against Ruining The Env't v. EPA,* 535 F.3d 670, 675 (7th Cir. 2008). We agree with the view of our sister circuits and see no reason why a petitioner should not be able to establish, by affidavit or other evidence, ***306** specific facts supporting each element of standing. And in fact Sierra Club has anticipated this burden and appended declarations to its opening brief from Nachy Kanfer, its Deputy Director for the Beyond Coal Campaign in the Midwest region, and Marilyn Wall, a Sierra Club member who lives and recreates in the Cincinnati area. *See* Kanfer Decl. ¶ 1; Wall Decl. ¶¶ 3–4. We therefore turn to the sufficiency of those declarations with respect to injury, causation, and redressability. We ultimately hold that the Club has demonstrated Article III standing.

B.

[10] [11] An injury in fact must be "concrete and particularized" to the petitioner, and also "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). The Club's petitions and opening brief claim virtually every type of injury the Supreme Court has recognized, but we need only address two. The Wall Declaration asserts aesthetic and recreational injury from "regional haze" and reduced "outdoor activities[,]" Wall Decl. ¶¶ 11, 13, and potential

physical injury in the form of "respiratory symptoms" caused by increased particulate matter, *id.* ¶ 7. Each of these is a judicially cognizable form of injury.[2] *See, e.g., Friends of the Earth, Inc.,* 528 U.S. at 183, 120 S.Ct. 693 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.") (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)); *Sierra Club v. EPA,* 762 F.3d 971, 977 (9th Cir. 2014) ("In addition, evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants may establish an injury in fact.") (internal quotation marks omitted). The closer question in this case is just how the EPA's redesignation will affect the members' exposure to fine particulate matter—that is, whether the claimed injuries are sufficiently actual or imminent, even if

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[2] The parties do not meaningfully dispute that additional particulate matter in the atmosphere presents a greater risk to human health and may reduce visibility. *See Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512, 515 (D.C.Cir.2009) ("Studies have demonstrated that both fine and coarse PM can have negative effects on public health and welfare. For example, each is associated with increased mortality (premature death) rates and morbidity (illness) effects such as cardiovascular disease and decreased lung can impair visibility...."). [H]igh levels of fine PM in the air can impair visibility...."). *See also* Clean Air Fine Particle Implementation Rule, 72 Fed.Reg. 20,586, 20,586 (Apr. 25, 2007) (codified at 40 C.F.R. pt. 51) ("The EPA established air quality standards for $PM_{2.5}$ based on evidence from numerous health studies demonstrating that serious health effects are associated with exposures to elevated levels of PM2.5.").

concrete and particular.[3] *Cf. Sierra Club v. EPA,* 774 F.3d 383, 392 (7th Cir. 2014) ("[T]he rules that apply to areas in 'attainment[ ]" .... are less stringent than those governing areas in nonattainment, so Sierra Club's standing is tied to the likely effects that this new set of rules may have on polluters in the areas at issue.").

We first note that many courts have apparently found it so obvious that redesignation would lead to higher emissions that they did not even need to discuss the standing of environmental litigants, *see, e.g.,* ***307** *BCCA Appeal Grp. v. EPA,* 355 F.3d 817, 847–48 (5th Cir. 2003) (assuming Sierra Club's standing to force implementation of RACM/RACT), and we ourselves have done so in a challenge by the Club concerning some of these very same rules, *see Wall v. EPA,* 265 F.3d 426 (6th Cir. 2001). Yet the Clean Air Act addresses $PM_{2.5}$ pollution through a wide variety of mechanisms, some of which might not present an "actual or imminent" threat of increased exposure if relaxed after redesignation. The Kanfer Declaration primarily addresses the structure and purposes of the Club and is entirely unhelpful on this issue. And while the Wall Declaration broadly asserts that redesignation will increase fine particulate matter in the area, it does not explain precisely how. *See* Wall Decl. ¶ 12 ("I understand that areas designated nonattainment ... must take certain steps to remedy that pollution. If an area is improperly redesignated, that

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[3] We note that our characterization of the petitioner's injury in this case might overlap with the causation element of standing. Under either label, our essential task is to determine how the redesignation influences the air quality of the Cincinnati area.

results in more air pollution emitted and breathed by nonattainment area residents such as myself."). The Club's standing therefore turns on what reasonable inferences we can draw about redesignation's impact on $PM_{2.5}$. *Cf. Klein,* 753 F.3d at 579–80 (finding standing based on reasonable inferences taken from an otherwise sparse record); *Natural Res. Def. Council v. EPA,* 542 F.3d 1235, 1248 (9th Cir. 2008) ("Where Congress has expressed the need for specific regulations relating to the environment, that expression supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects.").

Sierra Club more clearly identifies an impact on $PM_{2.5}$ emissions through the RACM/RACT requirements under § 7502(c)(1), which, again, state that SIPs for nonattainment areas "shall provide for the implementation of all reasonably available control measures ... including such reductions from *existing sources* in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology[.]" 42 U.S.C. § 7502(c)(1) (emphasis added). Taking as true its claim that Ohio and Indiana did not have legally sufficient RACM/RACT measures for fine particulate matter at the time of redesignation, we find it highly likely that imposition of RACM/RACT would have some marginal effect on area emissions. Or at least as likely as an environmental litigant could ever hope to establish. *See Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153 n. 3, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010) (finding an injury in fact where "deregulation ... pose [d] a significant risk of contamination to respondents' crops"); *Sierra Club v. EPA,* 754 F.3d 995, 1001 (D.C.Cir. 2014) (noting that "[b]ecause

'[e]nvironmental and health injuries often are purely probabilistic,' " petitioners must ordinarily show only a " 'substantial probability' " or " 'nontrivial risk' " of injury in fact); *accord Sierra Club,* 774 F.3d at 391. The RACM/RACT rules, as interpreted by the Club, would directly reduce emissions at sources already known to exist and to influence Cincinnati's air quality. Indeed, the Utilities Group suggests as much in justifying its intervention in the case. *See* Intervenor Utils. Grp. Mot. to Intervene 7 ("Implementation of RACT standards *would require additional reductions of PM 2.5,* which could again require [the group's] members to install additional pollution controls. Each of these issues would have real and substantial impacts upon [the group] and its members.") (emphasis added). Our conclusion comports with a significant number of explicit or implicit holdings by our sister circuits. *See, e.g., Sierra Club v. EPA,* 762 F.3d 971, 977–978 (9th Cir. 2014) (finding "credible, concrete, and ... imminent" injuries to organization members from EPA's waiver of BACT rules, a stricter version of ***308** the RACM/RACT provision); *Sierra Club v. EPA,* 294 F.3d 155, 162–63 (D.C. Cir. 2002) (implicitly finding standing for Sierra Club where it challenged the application of RACT rules). We therefore find it reasonable to infer actual and imminent aesthetic and physical injuries to an identified member of the Club from redesignation of the Cincinnati area.

[12] Having found injury in fact, we can easily dispose of the redressability and causation requirements, which often run together. *See Allen v. Wright,* 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). We have already traced a cognizable injury from EPA's actions through the RACM/RACT provi-

sions to the alleged injuries of the Club's members; we therefore see a clear causal connection. Since the alleged injuries flow from EPA's redesignations, and since the Club asks us to vacate these redesignations, granting the Club's petitions would redress its injuries. Thus, we conclude that Sierra Club has constitutional standing to challenge the EPA's redesignations.

III.

A reviewing court will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Where a petitioner challenges an agency's interpretation of a statute promulgated after notice-and-comment rulemaking, we assess the lawfulness of the interpretation under the familiar two-step *Chevron* framework. *See United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). The court will first ask if "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If the intent of Congress is clear, that is the end of the matter"; no other interpretations may be permitted. *Id.* at 842–43, 104 S.Ct. 2778. "When conducting the inquiry required by *Chevron's* first step, [the court's] primary goal is to effectuate legislative intent using traditional tools of statutory interpretation." *Alliance for Cmty. Media v. FCC,* 529 F.3d 763, 777 (6th Cir. 2008) (internal quotation marks omitted). These traditional tools include analysis of the statutory text, the structure of the statute, and its legislative history. *See Fullenkamp v. Veneman,* 383 F.3d 478, 481–84 (6th Cir. 2004).

But "[i]f the intent of Congress on a matter of statutory meaning is ambiguous, however, the court is to proceed to 'step two' of the *Chevron* inquiry: whether the agency's interpretation is a 'permissible construction of the statute.' " *Mid–America Care Found. v. NLRB,* 148 F.3d 638, 642 (6th Cir. 1998) (quoting *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron,* 467 U.S. at 843 n. 11, 104 S.Ct. 2778. Rather, the court need only find that "EPA's understanding of this very complex statute is a sufficiently rational one to preclude a court from substituting its judgment from that of EPA." *Greenbaum v. EPA,* 370 F.3d 527, 534 (6th Cir. 2004) (internal quotation marks omitted).

A.

Sierra Club aims its first challenge at EPA's compliance with 42 U.S.C. § 7407(d)(3)(E)(iii), which bars redesignation to attainment unless "the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting ***309** from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions [.]" More specifically, Sierra Club claims that EPA improperly included emissions reductions from cap-and-trade programs (including the NO_x SIP Call, CAIR, and CSAPR) as "permanent and enforceable." The plain meaning of this phrase, in the Club's view, cannot accommodate a situation in which an individual emissions source can reduce its emissions one year

but *increase* emissions in the next year through purchase of credits from other sources or from "spending" stored reduction credits from previous years.

The heart of this dispute is really where the sources that reduce their emissions must be located. Sierra Club implicitly asks this court to read § 7407(d)(3)(E)(iii) as requiring "permanent and enforceable reductions in emissions *from sources in the nonattainment area.*" Under this interpretation, EPA would need to determine that the Cincinnati area has achieved attainment status *solely* because sources within the confines of the nonattainment area have sufficiently reduced their emissions; improvements in Cincinnati air quality due to emissions reductions from anywhere else would be ignored. EPA and the Intervenors respond that the statutory text is silent on the location of the reductions and that a regional focus is necessary to address a fundamentally regional pollution problem. In other words, the States can show an improvement in Cincinnati air quality due to less inflow of particulate matter from sources outside the nonattainment area.

We think that the statutory context alone is sufficiently ambiguous for EPA to clear the first step of *Chevron*. *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (finding a "fundamental ambiguity" from potential inferences across statutory sections). At least three times, appellate courts have vacated EPA rules that ignored explicit, area-specific mandates in assessing emission reductions under other sections of the CAA. *See Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1256 (D.C.Cir.2009) (holding that the phrase "reductions in emission from

existing sources in the area," § 7502(c)(1), excluded regional source reductions attributable to NO_x SIP Call); *North Carolina v. EPA,* 531 F.3d 896, 907 (D.C.Cir.2008) (rejecting a "regionwide approach to CAIR" where § 7410(a)(2)(D)(i) required a focus on sources "within the State"); *La. Envtl. Action Network v. EPA,* 382 F.3d 575, 585–87 (5th Cir. 2004) (holding that EPA violated the mandate of § 7511a(b)(1)(B), which requires calculation of "baseline emissions ... from all anthropogenic sources in the area"). But, unlike the statutory sections in those cases, the plain language of § 7407(d)(3)(E)(iii) contains no explicit geographical limitation, so there is at least a plausible conclusion that Congress did not intend redesignation to hinge on reductions from sources in the nonattainment area. Sierra Club points to no other statutory provisions, legislative history, or other "traditional tools of statutory construction" that would totally foreclose EPA's reading. *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778. Thus, we turn to the second step of the *Chevron* analysis.

[13] Here, EPA's interpretation seems eminently reasonable. In its direct final rule, the agency indicated that emissions from other "upwind" States significantly influence particulate matter concentrations in the Cincinnati area. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,256 (noting the "regional nature of particulate matter"); Direct Final Rule (***310** Ohio/Indiana), 76 Fed.Reg. at 64,831–32 tbl. 4. It might well be the case that regional source reductions would be *necessary* to attainment under any scenario, but we need not examine that question in full. The existence of a regional problem is enough to conclude that EPA's regional focus on emissions reductions is "sufficiently rational" and within the

statutory ambit to warrant deference to its technical expertise. *Greenbaum,* 370 F.3d at 534 (internal quotation marks omitted).

Moreover, even if EPA can count improvements in air quality attributable to reductions from extra-area sources, Sierra Club contends that these reductions are not "permanent and enforceable." 42 U.S.C. § 7407(d)(3)(E)(iii). In its view, the plain meaning of "permanent" requires that each and every source reducing its emissions "will never increase [its] emissions" again. We, however, do not think it so obvious from this one word alone that the statute forecloses inclusion of cap-and-trade programs. For one thing, Sierra Club assumes that emissions "reductions" must be evaluated at the level of individual sources. But the statute does not explicitly state whether the net "reductions" may be calculated for a wider area (like the state or region). And for substantially the same reasons that § 7407(d)(3)(E)(iii) does not necessarily limit the inquiry to reductions in the nonattainment area, EPA can plausibly and rationally interpret the statute to allow a wider purview than individual sources. Under such an interpretation, the "cap" in each of the cap-and-trade programs would ensure that the relevant "reductions" are not foreseeably reversed, at least at the level of the entire cap-and-trade region. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,255 (discussing the "strict emission ceiling in each state" under CSAPR, which, cumulatively, create a regional ceiling). With a sufficiently broad level of analysis, then, EPA would simply meet Sierra Club's interpretation of "permanent." In other words, since we do not believe EPA must be limited to reductions within the nonattainment area, the

agency can reasonably stretch the geographic scope to guarantee "permanence."

And we cannot say that this interpretation of "permanent" is impermissible. Sierra Club asserts that anything other than an interpretation forbidding even temporary upticks in emissions could, in the aggregate, completely undermine the NAAQS, but it overlooks that § 7407(d)(3)(E)(i) independently requires attainment of the standard as a condition of redesignation. Furthermore, the threat of future designations of nonattainment (perhaps under future particulate matter NAAQS) helps to mitigate any runaway increases in emissions after this initial redesignation. *See* 42 U.S.C. § 7407(d)(1)(B). Attainment status aside, the net benefits of forbidding *any* source to *ever* increase emissions post-redesignation, a patently harsh standard, is a policy judgment best left to the agency. *See Chevron,* 467 U.S. at 865, 104 S.Ct. 2778.

This leaves Sierra Club with only one remaining argument: that reductions attributable to cap-and-trade programs are not "enforceable." 42 U.S.C. § 7407(d)(3)(E)(iii). Congress did not directly define "enforceable" in the Clean Air Act. *See id.* § 7602. Nor does Sierra Club attempt to provide a fully inclusive definition of the term. Instead, it proffers other uses of the term "enforceable" as evidence that Congress did not think cap-and-trade programs create enforceable reductions. As noted earlier, § 7410(a)(2)(A) requires SIPs to "include *enforceable* emission limitations and *other control measures,* means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions ***311** rights)...." (emphasis added). Sierra Club argues that Congress set "enforceable emission

limitations" apart from "other control measures" (including tradeable permits) because the latter were not "enforceable." But it seems at least as plausible that "other control measures" shares some meaning with the earlier phrase. At the very least, this possible inference from § 7410(a)(2)(A) leaves some doubt that Congress meant to exclude cap-and-trade reductions by inserting the word "enforceable." Nor is there any reason to think an interpretation of reductions attributable to regional cap-and-trade schemes as "enforceable" any less rational than considering such reductions as "permanent."

Ultimately, then, EPA has permissibly interpreted § 7407(d)(3)(E)(iii) to allow for a showing of "improvement in air quality" at least partially due to regional cap-and-trade schemes.

B.

Sierra Club next challenges EPA's approval of the States' respective SIPs without RACM/RACT provisions specifically tailored towards fine particulate matter. Here, Sierra Club alleges non-compliance with 42 U.S.C. § 7407(d)(3)(E)(ii), which prevents redesignation unless "the Administrator has fully approved the applicable implementation plan for the area under section 7410(k)." Subsection (3) of § 7410(k), titled "Full and partial approval and disapproval[,]" provides that a plan is approved "as a whole" (*i.e.,* fully), if it meets all "applicable requirements" of Chapter 85, Title 42. *See Latino Issues Forum v. EPA,* 558 F.3d 936, 938 (9th Cir. 2009). One such requirement comes from the general RACM/RACT provision, which states that all SIPs for nonattainment areas "shall provide for the implementation of all reasonably available control

measures [RACM] as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT])...." 42 U.S.C. § 7502(c)(1). In approving the redesignation requests of Ohio and Indiana despite their lack of RACM/RACT,[4] EPA interpreted this provision to mandate these measures only if needed to attain the air quality standard for $PM_{2.5}$. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,258 ("[A] determination that an area that has attained the PM 2.5 standard suspends the requirements to submit RACT and RACM requirements."). Sierra Club responds that the text of § 7502(c)(1) cannot support this interpretation.

We have already addressed, and accepted, a similar challenge by the Club in *Wall v. EPA,* 265 F.3d 426 (2001). There, EPA granted requests from Kentucky and Ohio to redesignate the Cincinnati area to attainment status under the ozone NAAQS, despite the fact that the States' SIPs had not fully adopted ozone-specific RACT measures as required under a distinct, but similar, part of the statute, 42 U.S.C. § 7511a(b)(2). *See id.* at 433–34. We vacated the redesignations, holding that the agency received no *Chevron* deference because "the statutory language

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[4] Like those of Ohio and Indiana, Kentucky's redesignation request did not contain provisions for the implementation of RACM/RACT for fine particulate matter. But as Sierra Club candidly acknowledges, the petitioner has waived any objection to redesignation of the Kentucky area because it failed to comment on this oversight during the rulemaking process. *See, e.g., Natural Res. Def. Council v. Thomas,* 805 F.2d 410, 427 (D.C.Cir.1986) (citing 42 U.S.C. § 7607(d)(7)(B)).

regarding the implementation of RACT rules is not ambiguous.... By this language, it is clear that Congress intended for SIPs submitted ***312** in redesignation requests to include provisions to require the implementation of RACT measures." *Id.* at 440 (internal quotation marks omitted). And we held thus even though EPA had interpreted the ozone RACT provision as operative only if "needed to bring about the attainment of the [air quality] standard in Cincinnati." *Id.* at 433 (internal quotation marks omitted).

[14] Sierra Club leans heavily on this court's opinion in *Wall* for the proposition that the phrase "shall provide" in § 7502(c)(1) unambiguously means that RACM and RACT provisions "must be contained be contained in SIPs submitted with respect to redesignation requests" under the $PM_{2.5}$ NAAQS. We agree with the Club, despite the fact that *Wall* interpreted RACT requirements for ozone nonattainment areas, *see* 42 U.S.C. § 7511a(b)(2) ("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*...") (emphasis added), because the statutory language at issue in that case is functionally identical to—and directly references— § 7502(c)(1). We therefore reject EPA's attempt to distinguish *Wall* on the grounds that that case is confined to the particulars of the ozone provisions. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,258 ("The *Wall* decision addressed entirely different statutory provisions for ozone RACT under CAA Part D subpart 2, which do not apply or pertain to the subpart 1 RACT requirements for [$PM_{2.5}$].").

EPA raises two final arguments that we also find unconvincing. Relying mostly on a decision from the

Seventh Circuit, *Sierra Club v. EPA,* 375 F.3d 537, 540 (7th Cir. 2004), the agency contends that we are looking at the wrong "implementation plan." In its view (and that of the Seventh Circuit), the phrase "applicable implementation plan" in § 7407(d)(3)(E)(ii) could conceivably refer to something other than the pre-attainment SIP; perhaps the "applicable" modifier "implies that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period." *Id.* at 541. As a consequence, EPA arguably needs only to "fully approve" those parts of the SIP that "proved to be necessary to achieve compliance" with the NAAQS, not all statutory provisions imposed on nonattainment areas. *Id.* at 540–41. Similarly, EPA claims that it need only approve a SIP to the extent that the plan satisfies all of the Act's "applicable requirements" (presumably as used in § 7410(k)(3)); the agency considers statutory requirements for nonattainment areas, including RACM/RACT, as "applicable" only if they were necessary to attain the $PM_{2.5}$ standard. *See* Direct Final Rule (Ohio/Indiana), 76 Fed.Reg. at 64,828.

But *Wall* forecloses either of these readings. Again, we held in that case that the Act unambiguously requires RACT in the area's SIP as a prerequisite to redesignation—despite use of the phrase "applicable implementation plan" in the ozone RACT provision. *See Wall,* 265 F.3d at 440. Clearly, we did not read this phrase as an implicit delegation to the EPA to require ozone RACT only if necessary to attainment, and we do not now read that phrase in § 7407(d)(3)(E)(ii) as a similar delegation with respect to the general RACM/RACT provisions for all types of emissions. So we must respectfully disagree

with the Seventh Circuit that "applicable implementation plan" is sufficiently vague to trigger *Chevron* deference.

As to the phrase "applicable requirements," we did note in *Wall* that this could be read to "limit[ ] the number of actual requirements within [§ 7410] and ***313** Part D that apply to a given area." 265 F.3d at 439. But EPA cannot rely on that language to avoid implementation of RACT provisions because we limited any ambiguity in that phrase to provisions *not* "linked to the nonattainment status of an area." *Id.* at 438–39. The *Wall* court quite clearly thought the ozone RACT provisions to be "linked" to nonattainment status; this explains its declaration that the Act *unambiguously* requires that ozone RACT rules be included in a redesignation request-without any qualification regarding their necessity to attainment or other condition. 265 F.3d at 440. And *Wall* reached this conclusion based solely on the text of the ozone RACT provision itself, which, like § 7502(c)(1), says that a State " 'shall' " include RACT in the area's SIP. *See id.* (quoting 42 U.S.C. § 7511a(b)(2)); *see also BCCA Appeal Grp.,* 355 F.3d at 847 ("*All* nonattainment area SIPs must provide for implementation of 'all reasonably available control measures as expeditiously as practicable.' 42 U.S.C. § 7502(c)(1).") (emphasis added). We apparently took this mandatory language to preclude any conceivable inferences from other statutory sections, even those that use the phrase "applicable requirements," that RACT could be implemented at the agency's discretion. So too here we give the same construction to the general RACM/RACT provisions.

In sum, a State seeking redesignation "shall provide for the implementation" of RACM/RACT, even if

those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. *See* 42 U.S.C. § 7502(c)(1). If the State has not done so, EPA cannot "fully approve[ ]" the area's SIP, and redesignation to attainment status is improper. *See id.* § 7407(d)(3)(E)(ii). Because the Ohio and Indiana SIPs for their respective portions of the Cincinnati–Hamilton area did not provide for RACM/RACT,[5] the EPA acted in violation of the Clean Air Act when it approved those redesignation requests.

IV.

The petitions are granted in part and denied in part. We vacate the redesignations of the Ohio and Indiana portions of the Cincinnati–Hamilton area but

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[5] Intervenor Utilities Group argues that Ohio's SIP in fact includes RACT for $PM_{2.5}$ because it has general RACT provisions covering all types of emissions. This is not, however, the interpretation advocated by EPA as the justification for its rulemaking on redesignation. Recall that EPA took the position when approving redesignation that RACT requirements as a category only apply if needed to reach attainment. *See* Final Rule (Ohio/Indiana), 76 Fed.Reg. at 80,255 ("[N]o RACT is required because the areas is attaining the standard."); *see id.* at 80,258 ("[A] determination that an area has attained the $PM_{2.5}$ standard suspends the requirements to submit RACT and RACM requirements."). And because EPA has not attempted, through procedures carrying the force of law, to identify *individual* control measures that qualify as RACM/RACT, we need not fully address the Utilities Group's argument. It may be the case that we will defer, as our sister circuits have done, to a view that individual measures are not RACM/RACT if they do not meaningfully advance the date of attainment, *see Sierra Club v. EPA,* 314 F.3d 735, 743–45 (5th Cir. 2002); *Sierra Club v. EPA,* 294 F.3d at 162–63, but we leave that question for another day. We hold only that EPA cannot categorically exclude the Ohio and Indiana regions from the mandates of § 7502(c)(1). *Cf. Sierra Club,* 294 F.3d at 163.

leave the redesignation of the Kentucky portion undisturbed.

All Citations

781 F.3d 299, 80 ERC 1121

APPENDIX D

76 FR 80253-01
RULES and REGULATIONS
ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 52 and 81
[EPA-R05-OAR-2011-0017; EPA-R05-OAR-2011-0106; FRL-9610-3]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio and Indiana; Redesignation of the Ohio and Indiana Portions of the Cincinnati-Hamilton 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment

Friday, December 23, 2011

AGENCY: Environmental protection Agency (EPA).

***80253** ACTION: Final rule.

SUMMARY: EPA is approving, under the Clean Air Act (CAA), Ohio's and Indiana's requests to redesignate their respective portions of the Cincinnati-Hamilton nonattainment area (for Ohio: Butler, Clermont, Hamilton, and Warren ***80254** Counties, Ohio; for Indiana: a portion of Dearborn County) to attainment for the 1997 annual National Ambient Air Quality Standard (NAAQS or standard) for fine particulate matter ($PM_{2.5}$). The Ohio Environmental Protection Agency (Ohio EPA) submitted its request on December 9, 2010, and the Indiana Department of Environmental Management (IDEM) submitted its request on January 25, 2011. EPA's approvals here involve several additional related actions. EPA has

determined that the entire Cincinnati-Hamilton area has attained the 1997 annual $PM_{2.5}$ standard. EPA is approving, as revisions to the Ohio and Indiana State Implementation Plans (SIPs), the states' plans for maintaining the 1997 annual $PM_{2.5}$ NAAQS through 2021 in the area. EPA is approving the 2005 emissions inventories for the Ohio and Indiana portions of the Cincinnati-Hamilton area as meeting the comprehensive emissions inventory requirement of the CAA. Finally, EPA finds adequate and is approving Ohio and Indiana's Nitrogen Oxides (NO_x) and $PM_{2.5}$ Motor Vehicle Emission Budgets (MVEBs) for 2015 and 2021 for the Cincinnati-Hamilton area.

DATES: Effective Date: This rule will be effective December 23, 2011.

ADDRESSES: EPA has established two dockets for this action under Docket Identification EPA-R05-OAR-2011-0017 and EPA-R05-OAR-2011-0106, containing identical material but nominally addressing Ohio's and Indiana's submittals, respectively. All documents in these dockets are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone

Carolyn Persoon at (312) 353-8290 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-8290, persoon.carolyn@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for the actions?

The Ohio EPA submitted its request on December 9, 2010, and IDEM submitted its request on January 25, 2011, to redesignate their respective portions of the Cincinnati-Hamilton nonattainment area to attainment for the 1997 annual $PM_{2.5}$ NAAQS, and for EPA approval of both states' SIP revisions containing maintenance plans for the area. In an action published on October 19, 2011 (76 FR 64825), EPA proposed approval of Ohio and Indiana's plans for maintaining the 1997 annual $PM_{2.5}$ NAAQS, including the emissions inventories submitted pursuant to CAA

section 172(c)(3); and the NO_X and $PM_{2.5}$ MVEBs for the Ohio and Indiana portions of the Cincinnati-Hamilton area as contained in the maintenance plan. Additional background for today's action is set forth in EPA's October 19, 2011, notice of direct final rulemaking, which EPA withdrew on December 6, 2011, following receipt of adverse comments.

II. What are the actions EPA is taking?

EPA has determined that the entire Cincinnati-Hamilton area is attaining the 1997 annual $PM_{2.5}$ standard (76 FR 60373) and that the Ohio and Indiana portions of the area have met the requirements for redesignation under section 107(d)(3)(E) of the CAA. Thus, EPA is approving the requests from the states of Ohio and Indiana to change the legal designation of their portions of the Cincinnati-Hamilton area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. This action does not address the Kentucky portion of the Cincinnati-Hamilton area. EPA is also taking several additional actions related to Ohio's and Indiana's $PM_{2.5}$ redesignation requests, as discussed below.

EPA is approving Indiana's and Ohio's $PM_{2.5}$ maintenance plans for the Cincinnati-Hamilton area as revisions to the Ohio and Indiana SIP (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plans are designed to keep the Cincinnati-Hamilton area in attainment of the 1997 annual $PM_{2.5}$ NAAQS through 2021.

EPA is approving 2005 emissions inventories for primary $PM_{2.5}$,[FN[1]] NO_X, and sulfur dioxide (SO_2),[FN[2]] documented in Ohio's and Indiana's $PM_{2.5}$ redesignation request submittals. These emissions inventories satisfy the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory.

Finally, EPA finds adequate and is approving Ohio's and Indiana's 2015 and 2021 primary $PM_{2.5}$ and NO_X MVEBs for the Cincinnati-Hamilton area. These MVEBs will be used in future transportation conformity analyses for the area. Further discussion of the basis for these actions is provided below.

III. What is EPA's response to comments?

EPA received two sets of comments submitted by Robert Ukeiley on behalf of Sierra Club: The first set, dated October 19, 2011, and the second set dated November 18, 2011. A summary of the comments and EPA's responses are provided below.

Comment 1a: The comment contends that it is inappropriate for EPA to redesignate these areas to attainment at this time, claiming that EPA is illegally delaying issuing a final rule to revise the annual $PM_{2.5}$ NAAQS, and that EPA's Clean Air Science Advisory Committee (CASAC) has recommended adoption of a lower NAAQS. The Commenter alleges that

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[1] Fine particulates directly emitted by sources and not formed in a secondary manner through chemical reactions or other processes in the atmosphere.

[2] NO—T2X and SO—T22 are precursors for fine particulates through chemical reactions and other related processes in the atmosphere.

EPA is removing the protection of a scientifically inadequate NAAQS, while not adopting a more protective standard.

Response 1a: This redesignation does not remove the protection of the 1997 annual $PM_{2.5}$ NAAQS. This redesignation does not concern the new NAAQS, addresses only the 1997 annual $PM_{2.5}$ NAAQS, and has no impact on EPA's actions with respect to a revised NAAQS.

Comment 1b: The Commenter claims that "EPA has failed to conduct an adequate analysis under Clean Air Act Section 110(l) on what effect redesignation will have on the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_x NAAQS, the 1-hour SO_2 NAAQS and the 1997 and 2008 75 parts per billion ozone NAAQS." In subsequent comments, the Commenter also states, ***80255** "EPA has not conducted an adequate analysis of the effect redesignation will have on other National Ambient Air Quality Standards".

Response 1b: Section 110(l) provides in part: "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 * * *, or any other applicable requirement of this chapter." As a general matter, EPA must and does consider section 110(l) requirements for every SIP revision, including whether the revision would "interfere with" any applicable requirement. See, e.g., 70 FR 53, 57 (January 3, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 28429, 28431 (May 18, 2005); and 70 FR 58119, 58134 (October 5, 2005). Neither Ohio's nor Indiana's redesignation request and maintenance plan for the 1997 annual $PM_{2.5}$ NAAQS revises or removes any existing emis-

sions limit for any NAAQS, nor does it alter any existing control requirements. On that basis, EPA concludes that the redesignations will not interfere with attainment or maintenance of any of these air quality standards. The Commenter does not provide any information in its comment to indicate that approval of these redesignations would have any impact on the Area's ability to comply with on the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_2 NAAQS, the 1-hour SO_2 NAAQS or the 1997 8-hour ozone NAAQS and 2008 75 parts per billion ozone NAAQS. In fact, the maintenance plans provided with both states' submissions demonstrate a decline in the direct $PM_{2.5}$ and $PM_{2.5}$ precursor emissions over the timeframe of the initial maintenance period. As a result, the redesignations do not relax any existing rules or limits, nor will the redesignation alter the status quo air quality.[FN[3]] The Commenter has not explained why the redesignation might interfere with attainment of any standard or with satisfaction of any other requirement, and EPA finds no basis under section 110(l) for EPA to disapprove the SIP revision at issue or to redesignate the area as requested.

Comment 1c: The Commenter elaborates on the first comment in the second set of comments submitted, claiming "For example, but this is only one example, as explained below the Ohio and Indiana SIPs do not

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[3] EPA notes that the Cincinnati/Northern Kentucky Area does not have violating monitors for the 2006 24-hour PM—T22.5 NAAQS, the 1-hour NO—T2X NAAQS, or the 1-hour SO—T22 NAAQS, the 1-hour and 8-hour ozone NAAQS, and that this Area has never been designated nonattainment for 2006 24-hour PM—T22.5 NAAQS, the 1-hour NO—T2X NAAQS, or the 1-hour SO—T22 NAAQS.

currently have Reasonable Available Control Technology (RACT) standards in place for $PM_{2.5}$. Implementing these RACT standards would have reduced NO_X and SO_2 which would have a co-benefit of helping with the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_X NAAQS, the 1-hour SO_2 NAAQS, and the 1997 and 2008 ozone NAAQS as well as visibility. EPA needs to demonstrate that removing this co-benefit will not interfere with attainment, reasonable further progress and any other applicable requirement."

Response 1c: This example is fallacious, for reason given in response 6(b) below—no RACT is required because the area is attaining the standard.

Comment 2a: The Commenter argues that EPA has not established that any of the emission reductions did not come from the NO_X SIP Call, CAIR (the Clean Air Interstate Rule), and CSAPR (the Cross-State Air Pollution Rule, also known as the Transport Rule).

Response 2a: EPA disagrees with the Commenter's assertion. EPA and the states have shown that emission reductions arose both from the transport regulations listed above and from other regulatory requirements. The Cincinnati-Hamilton area contains various sources of emissions (point source, area, and mobile), and emission reductions from the nonattainment year of 2005 to the attainment year of 2008 are attributed to many permanent and enforceable measures. The NO_X SIP Call, CAIR, and CSAPR are all measures that have resulted in emission reductions from point source Electric Generating Units (EGUs). In addition, emission reduction from mobile sources, which account for 53% of NO_X emissions and 58% of direct $PM_{2.5}$ for the nonattainment year of 2005, are attributed to permanent and enforceable

engine and fuel standards. Due to these permanent and enforceable measures, mobile sources reduced their emissions by 9,367 tons of NO_x, and 792 tons of direct $PM_{2.5}$ between the years of 2005 to 2008.

Comment 2b. The Commenter asserts that emission reductions pursuant to NO_x SIP Call, CAIR and CSAPR programs are not permanent and enforceable because these programs are cap and trade programs. The Commenter further opines that any source which reduced its actual emissions pursuant to one of these programs could at any time in the future choose to increase their emissions by purchasing emission credits.

Response 2b. Contrary to the Commenter's statement, EPA did establish in the proposal notice that at least part of the emission reductions that helped the area achieve attainment came from programs other than the NO_x SIP Call, CAIR and CSAPR. The notice lists several permanent and enforceable reductions in emissions resulting from implementation of the Ohio and Indiana SIPs, applicable Federal air pollution control regulations, and other reductions that are not "cap and trade" programs. Those programs include Tier 2 vehicle standards, heavy-duty gasoline and diesel highway vehicle standards, nonroad spark-ignition engines and recreational engines standards, large nonroad diesel engine standards, open burning bans, and fugitive emissions standards. See 76 FR 65465.

Further, EPA disagrees with the Commenter's conclusion that emission reductions associated with trading programs such as the NO_x SIP Call, CAIR, and CSAPR are not permanent and enforceable simply because the underlying program is an emis-

sions trading program. The Commenter appears to be arguing that these reductions cannot be considered permanent and enforceable within the meaning of section 107(d)(3)(E)(iii) of the CAA. This section 107(d)(3)(E)(iii) requires that, in order to redesignate an area to attainment, the Administrator must determine that "the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable federal air pollutant control regulations and other permanent and enforceable reductions." EPA disagrees with the Commenter's conclusion that reductions from trading programs can't be considered permanent and enforceable because these programs allow individual sources to choose between purchasing emission credits and reducing emissions.

The final CSAPR allows sources to trade allowances with other sources in the same or different states while firmly constraining any emissions shifting that may occur by requiring a strict emission ceiling in each state (the budget plus variability limit). As explained in EPA's proposed redesignation notice for the Ohio and Indiana portions of the Cincinnati-Hamilton area, the emission reduction requirements of CAIR are enforceable through the 2011 control period, and because CSAPR has now been promulgated to address the requirements previously addressed by CAIR and gets similar or greater reductions in the relevant areas in 2012 and beyond, EPA considers the emission reductions that led to attainment in the Cincinnati-Hamilton area to be permanent and enforceable. ***80256** The emission ceilings within each state are a permanent requirement of the CSAPR

and are made enforceable through the associated Federal Implementation Plans.

EPA responded to a similar comment in its "Approval and Promulgation of Air Quality Implementation Plans; Redesignation of the Evansville area to attainment of the Fine Particulate Matter Standard" 76 FR 59527, 59529/1, September 27, 2011. In that notice, EPA discusses several factors which support EPA's determination that the SO_2 reductions in the Evansville area are permanent and enforceable, and which also apply to the Cincinnati area. First, given the mandates under CSAPR, any utility that has already spent the hundreds of millions of dollars to install scrubbers will find continued effective operation of those controls to be far more cost-effective than disregarding this investment and either expending similar capital installing replacement scrubbers elsewhere or purchasing credits at a price equivalent to that capital already spent. In short, any utility in a state covered by CSAPR provisions related to $PM_{2.5}$ that has installed scrubbers is almost certain under CSAPR to retain the scrubbers and operate them effectively. Second, any action by a utility that increases its emissions, requiring the purchase of allowances, necessitates a corresponding reduction by the utility that sells the allowances. Given the regional nature of particulate matter, this corresponding emission reduction will have an air quality benefit that will compensate at least in part for the impact of any emission increase from utility companies outside but near the Cincinnati-Hamilton area. In accordance with the opinion of the Court of Appeals for the District of Columbia Circuit, CSAPR includes assurance provisions to ensure that the necessary emission reductions occur within each covered state.

The recent proposed rule revision referenced by the Commenter would amend the CSAPR assurance penalty provisions for all states within the program so they start in 2014 instead of 2012. 76 FR 63860, October 14, 2011. As explained in the proposal, which was subject to public review and comment, this revision would promote the development of allowance market liquidity, thereby smoothing the transition from the CAIR programs to the CSAPR programs in 2012.

Further, Ohio's and Indiana's maintenance plans provide for verification of continued attainment by performing future reviews of triennial emissions inventories and also for contingency measures to ensure that the NAAQS is maintained into the future if monitored increases in ambient $PM_{2.5}$ concentrations occur. 76 FR 64825. For this and the above reasons, EPA disagrees that the Commenter has identified a basis on which EPA should disapprove this SIP revision.

Comment 3: The Commenter asserts that "Emissions calculations for on-road mobile sources fail to consider 15% ethanol in gasoline."

Response 3: Ethanol 15 (E15) is not mandated by EPA. EPA granted a partial waiver for vehicles model years 2001 and newer, light duty vehicles (76 FR 4662) to be able to use E15. To receive a waiver under CAA section 211(f)(4), a fuel or fuel additive manufacturer must demonstrate that a new fuel or fuel additive will not cause or contribute to the failure of engines or vehicles to achieve compliance with the emission standards to which they have been certified over their useful life. Data used to act upon the approval of the E15 partial waiver showed that mod-

el year 2001 and newer vehicles would still meet their certified engine standards for emissions for both short and long term use, and use of E15 would not significantly increase the emission from these engines. EPA's partial waiver for E15 is based on extensive studies done by the Department of Energy, as well as the Agency's engineering assessment to determine the effects of exhaust and evaporative emissions for the fleet prior to the partial waiver. The criteria for granting the waiver was not that there are no emission impacts of E15, but rather that vehicles operating on it would not be expected to violate their emission standards in-use. As discussed in the waiver decision, there are expected to be some small emission impacts. E15 is expected to cause a small immediate emission increase in NO_x emissions. However, due to its lower volatility than the E10 currently in-use, its use is also expected to result in lower evaporative VOC emissions. Any other emissions impacts related to E15 would be a result of misfueling of E15 in model year 2000 and older vehicles, and recreational or small engines. EPA has approved regulations dealing specifically with the mitigation of misfueling and reducing the potential increase in emissions from misfueling (76 FR 44406).

The partial waivers that EPA has granted to E15 do not require that E15 be made or sold. The waivers merely allow fuel or fuel additive manufacturers to introduce E15 into commerce if they meet the waivers' conditions. Other Federal, state and local requirements must also be addressed before E15 may be sold. The granting of the partial waivers is only one of several requirements for registration and distribution of E15.

Since E15 may never be used in Ohio and Indiana, and even if it is, due to the small and opposite direction of emission impacts of E15, the limited vehicle fleet which can use it, and the measures required to avoid mitigating misfueling, EPA believes that any potential emission impacts of E15 will be less than the maintenance plan safety margin by which Ohio and Indiana show maintenance.

Comment 4a: The Commenter contends that the "Ohio and Indiana maintenance plans will not provide for maintenance for ten years after the redesignation," based on the Commenter's belief that EPA will be unable to finalize its approval of the requests for redesignation by the end of 2011.

Response 4a: Since EPA has promulgated its approvals of the redesignation requests of Ohio and Indiana by the end of 2011, and the maintenance plans provide for maintenance through the end of 2021, it is evident that the Commenter's concern was misplaced, and that the maintenance plans do provide for a ten-year maintenance period in accordance with CAA section 175A.

Commment 4b: The Commenter asserts that the Ohio and Indiana maintenance plans are deficient in part because the contingency measures they include provide for their implementation within 18 months of a monitored violation, if one occurs. The Commenter claims that as a consequence, the "contingency measures do not provide for prompt correction of violations."

Response 4b: The Commenter overlooks the provisions of the CAA applicable to contingency measures. Section 175A(d) provides that "[e]ach plan revision submitted under this section shall contain such con-

tingency provisions as the Administrator deems necessary to assure that the state will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area." (emphasis added). Thus Congress gave EPA discretion to evaluate and determine the contingency measures EPA "deems necessary" to assure that the state will promptly correct any subsequent violation. EPA has long exercised this discretion in its rulemakings on section 175A contingency measures in redesignation maintenance plans, allowing as contingency measures commitments to adopt and implement in lieu of fully ***80257** adopted contingency measures, and finding that implementation within 18 months of a violation complies with the requirements of section 175A. See recent redesignations, e.g. Indianapolis $PM_{2.5}$ annual standard (76 FR 59512), Lake and Porter 8-hour ozone standard (75 FR 12090), and Northwest Indiana $PM_{2.5}$ annual standard (76 FR 59600). Section 175A does not establish any deadlines for implementation of contingency measures after redesignation to attainment. It also provides far more latitude than does section 172(c)(9), which applies to a different set of contingency measures applicable to nonattainment areas. Section 172(c)(9) contingency measures must "take effect * * * without further action by the State or [EPA]." By contrast, section 175A confers upon EPA the discretion to determine what constitutes adequate assurance, and thus permits EPA to take into account the need of a state to assess, adopt implement contingency measures if and when a violation occurs after an area's redesignation to attainment. Therefore, in accordance with the discretion accorded it by statute, EPA may allow reasonable time for

states to analyze data and address the causes and appropriate means of remedying a violation. In assessing what "promptly" means in this context, EPA also may take into account time for adopting and implementation of the appropriate measure. In the case of the Cincinnati-Hamilton area, EPA reasonably concluded that, 18 months constitutes a timeline consistent with prompt correction of a potential monitored violation. This timeframe also conforms with EPA's many prior rulemakings on acceptable schedules for implementing section 175A contingency measures.

Comment 4c: The Commenter asserts that the contingency measures contained in the maintenance plans are "too vague".

Response 4c: As discussed above in response to comment 4(b), the CAA does not specify the requisite nature, scope, specificity, or number of contingency measures to be included in a maintenance plan under section 175A. It is for EPA to determine whether the state has given adequate assurance that it can promptly correct a violation. Both Ohio and Indiana have submitted contingency measures that EPA deems adequate. They have committed to remedy a future violation, and have included measures to address potential violations from a range of sources and a timeline for promptly completing adoption and implementation. The states have identified measures that are sufficiently specific but which allow for latitude in potential scope. This will enable the states to address a range of potential sources and differing degrees and types of violations. EPA believes that the contingency measures set forth in the submittal, combined with the states' commitment to an expeditious timeline and process for implementation, pro-

vide assurance that the states will promptly correct a future potential violation. Given the uncertainty as to timing, degree and nature of any future violation, EPA believes that the contingency measures set forth adequately balance the need for flexibility in the scope and type of measure to be implemented with the need for expeditious state action.

Comment 5: The Commenter asserts that the Ohio and Indiana Startup, Shutdown, Malfunction, and/or Maintenance provisions (SSM) are inconsistent with the Act and EPA policy because they provide that excess emissions are not violations. The Commenter also claims that the regulation is ambiguous because it lacks procedural specifications indicating whether it is to be interpreted as a "qualified exemption" or an "affirmative defense." In the second set of comments received, the Commenter asserts, "The Ohio and Indiana SIPs contain impermissible provisions governing startup, shutdown, malfunctions and scheduled maintenance."

Response 5: The CAA sets forth the general criteria for redesignation of an area from nonattainment to attainment in section 107(d)(3)(E). Specifically, that section identifies five criteria, including that "the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title." 42 U.S.C. 7407(d)(3)(E)(ii). Although the Commenter does not specifically cite to section 107(d)(3)(E)(ii), the language used in the comment ("fully approved adequate SIP") appears to derive from this section of the CAA (and the Commenter does later cite to section 107(d)(3)(E) in the concluding paragraph of the comment letter). As a preliminary matter, the issue before EPA in the current rulemaking action is a redesignation for the Ohio

and Indiana portions of the Cincinnati-Hamilton area to attainment for the 1997 $PM_{2.5}$ standard, including the maintenance plan. The SIP provisions identified in the Commenter's letter are not currently being proposed for revision as part of the redesignation submittals. Thus, EPA's review here is limited to whether the already approved provisions affect any of the requirements for redesignation in a manner that would preclude EPA from approving the redesignation requests. Because the rules cited by the Commenter are not pending before EPA and/or are not the subject of this rulemaking action, EPA did not undertake a full SIP review of the individual provisions. It has long been established that EPA may rely on prior SIP approvals in approving a redesignation request plus any additional measures it may approve in conjunction with a redesignation action. See e.g., page 3 of the September 4, 1992, John Calcagni Memorandum; *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001); 68 FR 25413, 25426 (May 12, 2003).

Additionally, the comment inserted the word "adequate" into the phrase "fully approved SIP" (which is the language of Section 107(d)(3)(E)(ii)), such that the Commenter stated that Ohio and Indiana must have a "fully approved adequate SIP." Clearly the word "adequate" is not included in Section 107(d)(3)(E)(ii), and its inclusion substantially alters the plain text of the CAA. Furthermore, while the Commenter opines that the cited-to provisions of the Ohio and Indiana rules result in a "regulatory structure that is inconsistent with the fundamental requirement that all excess emissions be considered violations," Commenter does not link this concern with deficiencies in Ohio's and Indiana's redesignation submittals for the Ohio and Indiana portions of

the Cincinnati-Hamilton area. There is no information in the comment indicating that Ohio or Indiana has excused violations and that such actions result in Ohio or Indiana failing to meet a requirement for redesignation. Furthermore, there is no information in the comment indicating that even if Ohio or Indiana were to excuse such violations that such violations would not be actionable by EPA or citizens. For Indiana's SIP, 326 IAC 1-6-4 was formerly codified as 325 IAC 1.1-5. When EPA approved that rule in 1984, it noted Indiana's clarification that any malfunction causing excess emissions would be treated as a SIP violation; and that the rule's criteria would be used in determining an appropriate enforcement response. (February 14, 1984, 49 FR 5618). This constitutes an "enforcement discretion" approach, acceptable under EPA's applicable policies. EPA also noted that it had independent authority under Section 113 of the CAA to determine whether enforcement discretion was an appropriate response in a particular case.

On June 30, 2011, Sierra Club filed a "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean ***80258** Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions". EPA has agreed to respond to this petition by August 31, 2012 as part of settlement of a lawsuit. *See Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal). At this time, with regards to the redesignation of the Ohio and Indiana portion of the Cincinnati-Hamilton area, EPA does not agree that the Commenter has raised a basis on which EPA could disapprove the redesignation. Ohio and Indiana have fully approved SIPs consistent with applicable requirements.

Comment 6a: The Commenter asserts that the Ohio SIP does not meet the requirement of section 107(d)(3)(E)(ii) because EPA has disapproved Ohio's "good neighbor provision" Section 110(a)(2)D)(i)(I).

Response 6a: The requirements applicable for purposes of redesignation are those which at a minimum are linked to the attainment status of the area being redesignated. As noted in the proposal (76 FR 64825), all areas, regardless of their designation as attainment or nonattainment, are subject to section 110(a)(2)(D). The applicability of this provision is not connected with nonattainment plan submissions or with the attainment status of an area. A nonattainment area remains subject to the requirements of section 110(a)(2)(D) after it has been redesignated to attainment. Therefore EPA has long interpreted the 110(a)(2)(D) requirements as not applicable requirement for purposes of redesignation. EPA has leeway to determine what constitutes an "applicable" requirement under section 107(d)(3)(E), and EPA's interpretation is entitled to deference. *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004).

EPA has consistently interpreted only those section 110 requirements that are linked with a particular area's designation as the requirements to be considered in evaluating a redesignation request. See, e.g., EPA's positions on the applicability of conformity, oxygenated fuels requirements for purposes of redesignations. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174-53176, October 10, 1996, and 62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio 1-hour

ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

Comment 6b: The Commenter contends that the Ohio and Indiana SIPs do not have approved RACT rules.

Response 6b: EPA interprets RACT for $PM_{2.5}$ as linked to attainment needs of the area. If an area is attaining the $PM_{2.5}$ standard, it clearly does not need further measures to reach attainment. Therefore, under EPA's interpretation of the RACT requirement, as it applies to $PM_{2.5}$, Ohio and Indiana have satisfied the RACT requirement without need for further measures. On May 22, 2008, EPA issued a memorandum that clarified its position with respect to the relationship between $PM_{2.5}$ attainment and RACT requirements.

"Memorandum from William T. Harnett, Director, Air Quality Policy Division to Regional Air Division Directors, $PM_{2.5}$ Clean Data Policy Clarification." This memorandum explained that 40 CFR 51.1004(c) provides that a determination that an area that has attained the $PM_{2.5}$ standard suspends the requirements to submit RACT and RACM requirements.

Section 51.1010 provides in part: 'For each $PM_{2.5}$ nonattainment area, the state shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all reasonably available control measures (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.'

Thus the regulatory text defines RACT as included in RACM, and provides that it is required only insofar as it is necessary to advance attainment. See also section 51.1010(b). The Commenter claims that *Wall v. EPA*, 265 F.3d 426, 442 (6th Cir. 2001), establishes that fully adopted RACT is nonetheless required. The *Wall* case, however, is not applicable to RACT requirements for the $PM_{2.5}$ standard. The *Wall* decision addressed entirely different statutory provisions for ozone RACT under CAA Part D subpart 2, which do not apply or pertain to the subpart 1 RACT requirements for $PM_{2.5}$.

Comment 6c: The Commenter asserts that the Ohio and Indiana SIPs lack $PM_{2.5}$ nonattainment New Source Review (NSR) programs. The Commenter also contends that the prevention of significant deterioration (PSD) program is part of the SIP that an area being redesignated needs to have to ensure that the area will stay in attainment. The Commenter takes the position that EPA cannot approve the redesignation requests because Ohio and Indiana do not have adequate $PM_{2.5}$ PSD programs. The Commenter bases its conclusion that Ohio and Indiana's PSD programs are inadequate for $PM_{2.5}$ on the contention that the programs do not contain significant emission rates for $PM_{2.5}$ and its precursors, and that the programs do not include $PM_{2.5}$ increments.

Response 6c: Both Ohio and Indiana have approved nonattainment NSR programs in their SIPs. EPA approved Ohio's current NSR program on January 10, 2003 (68 FR 1366). EPA approved Indiana's current NSR program on October 7, 1994 (59 FR 51108). Nonetheless, since PSD requirements will apply after redesignation, the area need not have a fully-approved NSR program for purposes of redesigna-

tion, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." The memo states, "[EPA] * * * is establishing a new policy under which nonattainment areas may be redesignated to attainment notwithstanding the lack of a fully-approved part D NSR program, provided the program is not relied upon for maintenance." In this case, neither Ohio nor Indiana has relied upon NSR to maintain the standard.

Ohio and Indiana also each have an EPA approved PSD program that includes $PM_{2.5}$ as a NSR pollutant. While the Commenter is correct in stating that both Ohio and Indiana's approved PSD SIPs do not include specific significant emissions rates for $PM_{2.5}$ or its precursors, the Ohio and Indiana SIPs do include a provision that sets "any emission rate" as the significant emission rate for any regulated NSR pollutant that does not have a specific significant emission rate listed in the state rule. Under Indiana's rule, a regulated NSR pollutant includes a pollutant, for which a NAAQS has been promulgated, and constituents or precursors for the pollutants identified as a NAAQS by EPA.

Therefore, any increase in direct $PM_{2.5}$ emissions or emissions of its precursors (SO_2 and NO_x) will trigger the requirements to obtain a PSD permit; to perform an air quality analysis that demonstrates that the proposed source or modification will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS; and to ap-

ply best available control technology (BACT) for direct $PM_{2.5}$ and/or the pertinent precursor.

In addition, the fact that Ohio's and Indiana's approved PSD SIPs lack $PM_{2.5}$ increments does not prevent the program from addressing and helping to ***80259** assure maintenance of the $PM_{2.5}$ standard in accordance with CAA section 175A. A PSD increment is the maximum increase in concentration that is allowed to occur above a baseline concentration for a pollutant. Even in the absence of an approved PSD increment, the approved PSD program prohibits air quality from deteriorating beyond the concentration allowed by the applicable NAAQS. Thus Ohio's and Indiana's approved PSD programs are adequate for purposes of assuring maintenance of the 1997 annual $PM_{2.5}$ standard as required by section 175A.

EPA notes that Indiana has adopted emergency rules containing significant emissions rates of 10 tons per year for direct $PM_{2.5}$ and 40 tons per year for sulfur dioxide and nitrogen oxide (as $PM_{2.5}$ precursors). The emergency rules also contain maximum allowable $PM_{2.5}$ increments of 4 micrograms per cubic meter (µg/m[FN3]) for the annual standard and 9 µg/m[FN3] for the 24-hour standard.[FN[4]] The state is currently implementing the emergency rules at the state level and is in the process of adopting permanent rules for submission to EPA.

Irrespective of the state's emergency rules, EPA concludes that the features of Indiana's currently approved PSD program cited by the Commenter do not

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[4] EPA's redesignation action here addresses only the 1997 annual PM—T22.5 standard, and does not address the 24-hour PM—T22.5 standard.

detract from the program's adequacy for purposes of maintenance of the standard and redesignation of the area. As it stands, the currently approved PSD program is sufficient for the purposes of maintaining the 1997 annual $PM_{2.5}$ NAAQS in the Cincinnati-Hamilton area.

IV. Why is EPA taking these actions?

EPA has determined that the Cincinnati-Hamilton area has attained the 1997 annual $PM_{2.5}$ NAAQS. EPA has also determined that all other criteria have been met for the redesignation of the Ohio and Indiana portions of the Cincinnati-Hamilton area from nonattainment to attainment of the 1997 annual $PM_{2.5}$ NAAQS. See CAA section 107(d)(3)(E). The detailed rationale for EPA's findings and actions is set forth in the proposed rulemaking of October 19, 2011 (76 FR 64825) and in this final rulemaking.

V. Final Action

EPA has previously made the determination that the Cincinnati-Hamilton area has attained the 1997 annual $PM_{2.5}$ standard (76 FR 60373). EPA is determining that the area continues to attain the standard and that the Ohio and Indiana portions of the area meet the requirements for redesignation to attainment of that standard under section 107(d)(3)(E) of the CAA. Thus, EPA is approving the requests from Ohio and Indiana to change the legal designation of their portions of the Cincinnati-Hamilton area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is approving Ohio's and Indiana's 1997 annual $PM_{2.5}$ maintenance plans for the Cincinnati-Hamilton area as revisions to the respective

SIPs because the plans meet the requirements of section 175A of the CAA. EPA is approving the 2005 emissions inventories for primary $PM_{2.5}$, NO_X, and SO_2, documented in Indiana's and Ohio's December 9, 2010, and January 25, 2011, submittals as satisfying the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory. Finally, EPA finds adequate and is approving 2015 and 2021 primary $PM_{2.5}$ and NO_X MVEBs submitted from each state for the Ohio and Indiana portions of the Cincinnati-Hamilton area. These MVEBs will be used in future transportation conformity analyses for the area after the effective date for the adequacy finding and approval.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the Area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule—grants or recognizes an exemption or relieves a restriction, and section 553(d)(3), which allows an effective date less than 30 days after publication—as otherwise provided by the agency for good cause found and published with the rule. The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare be-

fore the rule takes effect. Rather, today's rule relieves the Ohio and Indiana of various requirements for the Ohio and Indiana portions of the Cincinnati-Hamilton area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

VII. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For these reasons, these actions:

• Are not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

• Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);

• Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

• Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Are not significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because ***80260** application of those requirements would be inconsistent with the CAA; and,

• Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this final rule does not have tribal implications as specified by Executive Order 13175 (65 FR

67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 21, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks.

Dated: December 14, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR parts 52 and 81 are amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart P—Indiana

40 CFR § 52.776

2. Section 52.776 is amended by adding paragraphs (v)(3) and (w)(3) to read as follows:

40 CFR § 52.776

§ 52.776 Control strategy: Particulate matter.

* * * * *

(v) * * *

(3) The Indiana portion of the Cincinnati-Hamilton nonattainment area (Lawrenceburg Township in Dearborn County), as submitted on December 9, 2010. The maintenance plan establishes 2015 motor vehicle emissions budgets for the Ohio and Indiana portions of the Cincinnati-Hamilton area of 1,678.60 tpy for primary $PM_{2.5}$ and 35,723.83 tpy for NO_X and 2021 motor vehicle emissions budgets of 1,241.19 tpy for primary $PM_{2.5}$ and 21,747.71 tpy for NO_X .

(w) * * *

(3) Indiana's 2005 NOx, directly emitted $PM_{2.5}$, and SO_2 emissions inventory satisfies the emission inventory requirements of section 172(c)(3) of the Clean Air Act for the Cincinnati-Hamilton area.

Subpart KK—Ohio

40 CFR § 52.1880

3. Section 52.1880 is amended by adding paragraphs (p) and (q) to read as follows:

40 CFR § 52.1880

§ 52.1880 Control strategy: Particulate matter.

* * * * *

(p) Approval—The 1997 annual $PM_{2.5}$ maintenance plans for the following areas have been approved:

(1) The Ohio portion of the Cincinnati-Hamilton nonattainment area (Butler, Clermont, Hamilton, and Warren Counties), as submitted on January 25, 2011. The maintenance plan establishes 2015 motor vehicle emissions budgets for the Ohio and Indiana

portions of the Cincinnati-Hamilton area of 1,678.60 tpy for primary $PM_{2.5}$ and 35,723.83 tpy for NO_X and 2021 motor vehicle emissions budgets of 1,241.19 tpy for primary $PM_{2.5}$ and 21,747.71 tpy for NO_X .

(2) [Reserved]

(q) Approval—The 1997 annual $PM_{2.5}$ comprehensive emissions inventories for the following areas have been approved:

(1) Ohio's 2005 NOx, directly emitted $PM_{2.5}$, and SO_2 emissions inventory satisfies the emission inventory requirements of section 172(c)(3) for the Cincinnati-Hamilton area.

(2) [Reserved]

PART 81—[AMENDED]

4. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

40 CFR § 81.315

5. Section 81.315 is amended by revising the entry for Cincinnati-Hamilton in the table entitled "Indiana $PM_{2.5}$ (Annual NAAQS)" to read as follows:

40 CFR § 81.315

§ 81.315 Indiana.

* * * * *

Indiana $PM_{2.5}$

[Annual NAAQS]

Designated area	Designation[a]	
	Date[1]	Type
* * * * *		
Cincinnati-Hamilton, IN:	12/23/2011	Attainment.
Dearborn County (part)		
Lawrenceburg Township		
* * * * *		

***80261** * * * * *40 CFR § 81.336

6. Section 81.336 is amended by revising the entry for Cincinnati-Hamilton, OH in the table entitled "Ohio $PM_{2.5}$ (Annual NAAQS)" to read as follows:

40 CFR § 81.336

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[1] This date is 90 days after January 5, 2005, unless otherwise noted.

§ 81.336 Ohio.

* * * * *

Ohio $PM_{2.5}$

[Annual NAAQS]

Designated area	Designation[a]	
	Date[16]	**Type**
* * * * *		
Cincinnati-Hamilton, OH:	12/23/2011	Attainment.
Butler County		
Clermont County		
Hamilton County		
Warren County		
* * * * *		

* * * * *

[FR Doc. 2011-32818 Filed 12-22-11; 8:45 am]

BILLING CODE 6560-50-P

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[16] This date is 90 days after January 5, 2005, unless otherwise noted.

APPENDIX E

42 U.S.C.A. § 7407

§ 7407. Air quality control regions

Effective: January 23, 2004

(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 Admin-

istrator 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 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 classifica-

tion) 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 Ad-

ministrator 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) pursu-

ant 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 PM2.5 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) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CREDIT(S)

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

Notes of Decisions (47)

42 U.S.C.A. § 7407, 42 USCA § 7407
Current through P.L. 114-49 approved 8-7-2015

APPENDIX F

42 U.S.C.A. § 7410

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

(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 imple-

menting 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 type of emissions activity within the State from emit-

ting 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.A. § 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 approve 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) 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) 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 modi-

fied 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) 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.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2402

(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).

(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 of this title, as in effect before August 7, 1977, or section 7413(d) 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 of this title as in effect before August 7, 1977, or under section 7413(d) 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) 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 of the submission) to have failed to meet the minimum criteria estab-

lished 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 promulgated 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[1] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680; amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-

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

95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

Notes of Decisions (351)

42 U.S.C.A. § 7410, 42 USCA § 7410
Current through P.L. 114-49 approved 8-7-2015

APPENDIX G

42 U.S.C.A. § 7502

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial re-

view until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

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

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

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

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattain-

ment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant

or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the

applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 172, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746; amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(55), (56), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(b), 104 Stat. 2412.)

Notes of Decisions (50)

42 U.S.C.A. § 7502, 42 USCA § 7502
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