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VIA CM/ECF

The Honorable Lyle W. Cayce
U.S. Court of Appeals, Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: Joint Letter Brief of Non-State Petitioners and Petitioner-Intervenors Addressing Motion to Dismiss or Transfer and Motions to Stay, *Texas, et al. v. EPA, et al.*, Case No. 16-60118; Oral Argument on Motions Set for June 22, 2016

Dear Mr. Cayce:

In response to the Court's Order dated May 17, 2016, Non-State Petitioners and Petitioner-Intervenors[1] file this joint letter brief addressing the motion to dismiss or transfer filed by the U.S. Environmental Protection Agency ("EPA") and the two pending motions to stay EPA's final rule. The Court should deny EPA's motion to dismiss or transfer and should grant the stay motions.

Introduction

EPA's motion to dismiss or transfer stakes out an untenable position: that EPA has unreviewable discretion to dictate jurisdiction and venue for judicial review of its actions under the Clean Air Act ("CAA"). Under EPA's view, its position is "dispositive," and this Court has no say in determining its own jurisdiction. Doc. 00513434396 at 14 ("EPA Mot."). If EPA's position were the law, EPA would have absolute discretion to eliminate the jurisdiction conferred by Congress on this Court and the other regional Courts of Appeals in CAA matters simply by publishing its own unreviewable "findings." EPA's argument is contrary to the well-established precedent of this Circuit, and it should be rejected. *See Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391-92 (5th Cir. 2014) ("[Petitioner contends] that we should defer to FERC's interpretation of our own jurisdiction under the statutory scheme. While the Supreme Court has not addressed this novel argument, our own precedent forecloses

[1] All Non-State Petitioners and Petitioner-Intervenors are joining in this brief and are listed on the signature page.

it.”).

EPA’s litigating position apparently has been crafted in an attempt to avoid this Court’s well-established precedent confining EPA to a narrow role in its review of CAA state implementation plans (“SIP”).[2] The arguments on jurisdiction and venue that the agency now advances are directly contrary to those it has advanced in prior similar cases. For example, when EPA took action on the California SIP that “might set a ‘precedent’ for future SIP revisions,” EPA argued that that fact was “insufficient to establish the nationwide character of EPA’s action” and that the case could only be heard in the Ninth Circuit. Pet. Jt. Opp. at 18. But now, EPA asserts that the same “precedential effect” of its Texas rule for “future” SIP revisions (EPA Mot. at 19; Doc. 00513485025 at 8 (“EPA Reply”)) divests this Court of jurisdiction. EPA was right in the prior case—its application of general regulations to a particular state CAA plan does not justify concluding that exclusive review lies in the D.C. Circuit.

Similarly, EPA argues now that a CAA action that addresses only two state plans and regulates power plants in only one of those states is, by definition, of “nationwide scope or effect.” Yet, in the history of the regional haze program, EPA has *never* found (and no court has ever accepted) that a CAA regional haze rule regulating sources in only one state, or even two states in two judicial circuits, is of “nationwide scope or effect.” EPA points to no such rule in its briefing. Indeed, in prior proceedings, EPA tacitly recognized that the plain meaning of the term “nationwide” precludes such a position.

Finally, irrespective of the Court’s decision on EPA’s motion, the Court should grant the pending stay motions, in light of the substantial ongoing harm caused by the rule. This Court indisputably has subject matter jurisdiction under 42 U.S.C. § 7607(b)(1). The portions of the statute on which EPA relied are only relevant to venue. Thus, this Court unquestionably has authority to grant the stay motions to preserve the status quo, and, given its familiarity with the case and the advancement of proceedings in this Court, this is the court best suited to rule on those motions.

Background

This case involves an EPA final rule that imposes regulatory compliance obligations (in the form of emission limitations) on eight power plants in Texas. Pet. Jt. Opp. at 14 n.15. The rule includes Oklahoma only to the extent that it makes a technical adjustment to Oklahoma’s “reasonable progress goal” for the Wichita Mountains National Wildlife Refuge “based on” the emission “controls for Texas sources” in the Texas Federal Implementation Plan (“FIP”).[3] The rule, as EPA itself

[2] *See* Doc. 00513469930 at 2 n.2 (“Pet. Jt. Opp.”).

[3] 79 Fed. Reg. 74,818, 74,873 (Dec. 16, 2014); *see also* 81 Fed. Reg. 296, 307 (Jan. 5, 2016).

conceded, is "locally or regionally applicable" only and is *not* "nationally applicable."[4] EPA further conceded that the rule is not a rule of general applicability.[5]

The reach of the rule is also limited in time. SIPs addressing the "reasonable progress" portion of the regional haze program are, by law, limited to 10-year periods.[6] The portions of the Texas and Oklahoma SIPs at issue here address only the first 10-year planning period (2008-2018). 79 Fed. Reg. at 74,818. State plans for the second 10-year period (2018-2028) are not due until 2018. And when EPA issued the rule here, it had already "acted on all of the states' regional haze SIPs for the first planning period" except for those portions of the Texas and Oklahoma plans at issue here. *Id.* at 74,820.

ARGUMENT

I. This Court, Not the Agency, Decides Jurisdiction and Venue

EPA argues that the petitions for review must be dismissed or transferred to the D.C. Circuit based solely on the fact that EPA published its conclusion that the rule is of "nationwide scope or effect." EPA Mot. at 1; EPA Reply at 1. EPA further contends that its finding is "dispositive" and unreviewable by this Court. EPA Mot. at 14-16, 18; EPA Reply at 3-4. EPA is wrong on both counts.

First, EPA's argument is contrary to this Circuit's well-established precedent. This Court addressed a very similar issue in *Exelon Wind*. In that case, one of the petitioners argued that this Court "should defer to FERC's interpretation of [the Court's] jurisdiction under the statutory scheme." *Exelon Wind*, 766 F.3d at 392. Like EPA's "finding" in the present case, FERC's "interpretation" in that case involved a "characterization" of the nature of the underlying claim at issue. *Id.* at 391-92. This Court held that "our own precedent forecloses" such an argument. *Id.* at 392. As the Court explained, "[t]he courts . . . have to make their own determination" regarding jurisdiction "rather than defer to the [federal agency] in the first instance." *Id.* (brackets in original) (quoting *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 926 (5th Cir. 1975)). The Court further explained that "federal courts have an independent obligation to determine their own subject-matter jurisdiction" and "[r]equiring that a court defer to an agency's interpretation of the court's own subject-

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[4] 81 Fed. Reg. at 345-46 ("[W]e did not assert at proposal, nor do we assert now, that our FIP for Texas and Oklahoma is a 'nationally applicable' regulation.").

[5] *Id.* at 348 ("The FIP . . . is not a rule of general applicability because its requirements apply and are tailored to only eight individually identified facilities," all of which are located in Texas).

[6] 40 C.F.R. § 51.308(d)(1)(i)(B) ("[T]he State must consider . . . the emission reduction measures needed to achieve [a uniform rate of visibility improvement] *for the period covered by the implementation plan*." (emphasis added)); *id.* § 51.308(b), (f) (establishing 2008 start date and 2018 end date, respectively, for first planning period and requiring states to submit plans at 10-year intervals).

matter jurisdiction would interfere with this independent obligation." *Id.* (internal quotations and citations omitted). This Circuit precedent forecloses EPA's argument here that it, not the Court, has authority to decide this Court's jurisdiction in CAA matters "under the statutory scheme."[7] *Id.*

Second, EPA's claim of unfettered discretion is contrary to the plain language of the judicial review provision of the statute, 42 U.S.C. § 7607(b). As this Court has previously explained:

> The Clean Air Act's venue provision sorts petitions for review of EPA actions into three types, based on whether the challenged regulation is:
>
> (1) "nationally applicable";
>
> (2) "locally or regionally applicable"; or
>
> (3) locally or regionally applicable but "based on a determination of nationwide scope or effect," provided that "the Administrator [of EPA] finds and publishes that such action is based on such a determination."

Texas v. EPA, No. 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011). "A petition for review of regulations of type (1) or (3) may be brought only in the D.C. Circuit. Petitions for review of type (2) regulations must be brought in the relevant regional circuit." *Id.*

As noted above, EPA conceded that its action here is *not* a "type (1)," or "nationally applicable," action, but is only "locally or regionally applicable." Thus, the question for the Court is whether EPA's action is a "type (3)" action.

"Type (3)" actions are an exception to the rule, and, under the statute's plain language, two conditions must be met before an EPA action is considered a "type (3)" action. An action is "type (3)" only "[1] ***if*** such action ***is based on*** a determination of nationwide scope or effect ***and*** [2] ***if*** in taking such action the Administrator finds and publishes that such action is based on such a determination." 42 U.S.C. § 7607(b)(1) (emphasis added). Thus, the language and structure of the CAA plainly require both (1) a decision by the court that the rule "is based on" a determination that is "of nationwide scope or effect" "and" (2) a published finding by EPA that the rule is based on such a determination. *Id.*; *see Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 866 n.6 (D.C. Cir. 1996) ("[T]he proviso [in section 307(b)(1)] . . . seems to require both a court determination of scope and effect, *and* a similar published determination by the Administrator[.]" (italics in original)).

[7] *See also Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (holding that deference to an agency's "construction of its statutory powers . . . does not mean that similar deference [to the agency] is warranted with respect to the enforcement of this court's jurisdictional limitations" and that "the determination of our jurisdiction is exclusively for the court to decide").

EPA's reading of the statute eliminates entirely the first "if" clause. EPA's "reading is thus at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Exelon Wind*, 766 F.3d at 399 (citation and quotation omitted). Congress deliberately included two prerequisites—two "ifs"—before a "locally or regionally applicable" EPA action may be challenged in the D.C. Circuit, and the Court should read the statute to give meaning to both prerequisites. *Id.* ("When presented with two plausible readings of a regulatory text, this court common-sensically follows [that interpretive canon] and prefers the reading that does not render portions of that text superfluous.").

Instead of answering this argument, EPA insists that dispositive meaning be given to the phrase "may be filed only" in § 7607(b)(1). EPA Reply at 1. EPA claims this phrase means that the only question for this Court is whether EPA did "find and publish that the Final Rule is based on a determination of nationwide scope or effect." *Id.* But that argument assumes what it seeks to prove. The statutory phrase "may be filed only in the United States Court of Appeals for the District of Columbia" is operative only where both "ifs" are met—including that EPA's rule "*is* based on" a determination that is of nationwide scope or effect; it is never operative merely because EPA makes a finding in that regard. 42 U.S.C. § 7607(b)(1) (emphasis added).

EPA's back-up position—that its finding, if reviewable, is only reviewable by the D.C. Circuit (EPA Reply at 3-4)—is also contrary to law. It is axiomatic that "[w]hen judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists." *Okoro v. INS*, 125 F.3d 920, 925 n.10 (5th Cir. 1997) (internal quotation marks and citation omitted). Thus, contrary to EPA's view, this Court "has jurisdiction to review jurisdictional facts and determine the proper scope of its own jurisdiction." *Flores-Garza v. INS*, 328 F.3d 797, 802 (5th Cir. 2003). Here, the condition precedent to reviewability in the D.C. Circuit that must be judicially determined is that EPA's action "is based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1).

EPA's argument that the phrase "may be filed only" restricts the Court from conducting its own inquiry into the rule (EPA Reply at 3-4) conflicts with the language of the statute. All three of the choice-of-forum provisions in § 7607(b)(1) contain the same phrase "may be filed only." Thus, under EPA's view, a Court of Appeals could never inquire into what type of EPA action is before it in order to determine which court should hear the case. That is plainly not how § 7607(b)(1) works and not how this Court has applied it. Indeed, this Court has made clear that under § 7607(b)(1), it properly exercises the responsibility of determining which of the three types of EPA action is at issue. *See Texas*, 2011 WL 710598, at *3 (conducting substantive "venue inquiry" into what type of EPA action was before the Court).

II. EPA's Finding is Reviewable

EPA's claim that its finding of "nationwide scope or effect" is "committed to agency discretion by law" and thus unreviewable by any court (EPA Mot. at 15) is foreclosed by binding precedent. All final agency action is presumptively subject to court review. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action." (citation omitted)); *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) ("[W]e have read the [Administrative Procedure Act] as embodying a 'basic presumption of judicial review.'"). As this Court has explained, "[t]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'" *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (citation omitted), *cert. granted*, 136 S. Ct. 906 (2016).

Accordingly, agency action is outside the reach of court review in only two "rare instances": (1) where "Congress has expressed an intent to preclude judicial review"; or (2) where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "Establishing unreviewability is a 'heavy burden,' and 'where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Texas*, 809 F.3d at 164 (citations omitted).

EPA fails to meet its burden of demonstrating that either of these "rare instances" is present. As to the first, nothing in § 7607(b)(1) *prohibits* the Court from reviewing EPA's finding. EPA argues that "Congress did not give any indication that this decision [by EPA] should be reviewable." EPA Mot. at 15. But EPA has it backwards. EPA must show that Congress "affirmatively" "expressed an intent to *preclude* judicial review." *Heckler*, 470 U.S. at 830 (emphasis added). There is no language in § 7607(b)(1) or elsewhere in the CAA that precludes court review of EPA's finding of "nationwide scope and effect"—to the contrary, as discussed above, the statutory language positively indicates the court is to review that finding.

As to the second narrow circumstance, EPA has not shown that the statute is drawn so that a court would have no meaningful standard by which to judge the agency's finding. In fact, the phrase "nationwide scope or effect" is an objective and unambiguous standard against which the Court may readily review that finding. No statutory definition or list of factors is necessary where, as here, the statutory standard is clear and unambiguous. *See Mach Mining*, 135 S. Ct. at 1652 (holding that the plain meaning of statutory terms provides "concrete standards" for court review); *Texas*, 2011 WL 710598, at *3 & n.37 (applying dictionary definition of statutory term "regional" in § 7607(b)(1) to decide proper venue). "Nationwide"—like "regional"—

is an unambiguous term. It is defined as "including or involving all parts of a nation or country." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/nationwide. Here, that plain meaning excludes an EPA action that involves only two states.

Nor, as EPA argues, is EPA "better equipped" than this Court to judge whether a rule is of nationwide scope or effect. EPA Mot. at 16. EPA's finding here is far from the types of agency actions that are "traditionally regarded as committed to agency discretion," such as "an agency's decision not to institute enforcement proceedings," a decision by an intelligence agency "to terminate an employee in the interests of national security," and "an agency's allocation of funds from a lump-sum appropriation." *Lincoln*, 508 U.S. at 191-93. A finding of nationwide scope or effect for purposes of judicial review has nothing in common with these matters. In fact, the opposite is true: court jurisdiction and venue are *not* matters that are *ever* committed to agency discretion. *See Exelon Wind*, 766 F.3d at 392; *Lopez-Elias*, 209 F.3d at 791.

III. The Rule is not "Based on a Determination of Nationwide Scope or Effect"

The question for the Court is whether the rule "is based on a determination of nationwide scope or effect."[8] 42 U.S.C. § 7607(b)(1). It is not. The rule involves *only* EPA's determination to approve or disapprove portions of the regional haze SIPs of Texas and Oklahoma, promulgate separate FIPs for these two neighboring states, and impose emission controls only on eight power plants in Texas.[9] The *only* regulatory changes that EPA's rule effectuates are changes to two subparts in the Code of Federal Regulations that respectively concern the approved SIP provisions in Texas and Oklahoma.[10]

Thus, EPA's rule does not involve all, or even many, parts of the country. It does not involve, for example, any uniform federal standard, like the National Ambient Air Quality Standards ("NAAQS"), or a uniform federal program, like an emissions trading program that is uniformly implemented in many states across the

[8] Because the Court must determine its own jurisdiction without deference to EPA, *see Exelon Wind*, 766 F.3d at 392, the question is not whether EPA's position is "reasonable" or "arbitrary and capricious," as EPA contends. EPA Mot. at 18; EPA Reply at 7. The Court's decision about jurisdictional facts is de novo. *Lopez-Elias*, 209 F.3d at 791 ("[T]he determination of our jurisdiction is exclusively for the court to decide," and the Court "[r]eview[s] the matter de novo.").

[9] 81 Fed. Reg. at 347 ("This action finalizes a source-specific FIP for [sic] that applies to eight coal-fired power plants in Texas[.]").

[10] *Id.* at 349-50 (amending 40 C.F.R. Part 52 Subpart LL (Oklahoma) and Subpart SS (Texas)).

country.[11] Instead, the regional haze program is uniquely state-focused, and uniformity among states is not required or expected. EPA's regulations "call[] for states to play the lead role in designing and implementing regional haze programs[.]"[12] And when it adopted those regulations, EPA explained that they "provide[] States flexibility in determining the amount of progress that is 'reasonable' in light of the statutory factors[.]"[13] The expected variation in state regional haze SIPs is starkly illustrated in the rule here given EPA's disapproval of Texas's goal for the Guadalupe Mountains (which borders New Mexico) even though EPA had previously approved a higher (less stringent) goal established by New Mexico for the exact same air quality monitoring location.[14]

EPA's argument further conflates a "finding" with a "determination," which are very different things under § 7607(b)(1). In the final rule, EPA asserted that "the Administrator determines that this is a rulemaking of nationwide scope or effect[.]" 81 Fed. Reg. at 349. But the "determination of nationwide scope or effect" required by the statute is *not* EPA's published conclusion that the rule is of "nationwide scope or effect." The "determination" is an operative part of the rule itself that has regulatory consequences. Indeed, the rule must be "based on" such a determination. Here, what EPA "determined" in the final rule was that (in its view) Texas's plan was "flawed" and that additional emission controls should be required in Texas. *Id.* at 340 ("Also, although we agree Texas conducted an evaluation of the four reasonable progress factors, *we determined that that evaluation was flawed*." (emphasis added)); *see also id.* at 343. These "determinations" by EPA, which are the operative parts of the rule, do not have any scope or effect beyond Texas or Oklahoma. Thus, Petitioners are

[11] EPA contends Petitioners are offering a reading of the statute that "would effectively eliminate the possibility of 'type 3' rulemakings." EPA Reply at 6. To the contrary, EPA is the party that regularly conflates "nationally applicable" actions with actions of "nationwide scope or effect." *See* Pet. Jt. Opp. at 15 n.16. Although they may be the exception rather than the rule, there are EPA rulemakings under the CAA that do not "apply" in every state, but may nonetheless involve application of a uniform standard to all parts of the country. *See, e.g.*, 79 Fed. Reg. 53,008, 53,009 (Sept. 5, 2014) (taking action on Sierra Club petition to designate 57 areas in 22 states as not in attainment with the NAAQS and finding EPA's determination to be of "nationwide scope and effect because this action addresses areas across the country"); Sierra Club, Petition to EPA to Redesignate as Nonattainment, Dock. ID EPA-HQ-OAR-2014-0563-0002 (Nov. 14, 2013) (Att. A).

[12] *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002).

[13] 64 Fed. Reg. 35,714, 35,736 (July 1, 1999).

[14] 79 Fed. Reg. at 74,833-34 (EPA disapproval of Texas's 16.3 deciview goal for the visibility monitor used for Guadalupe Mountains National Park); 77 Fed. Reg. 36,044, 36,071, 36,078 (June 15, 2012) (proposed EPA approval of New Mexico's 16.92 deciview goal for the nearby Carlsbad Caverns National Park, using the same monitor); 77 Fed. Reg. 70,693 (Nov. 27, 2012) (final EPA rule approving New Mexico SIP with 16.92 deciview goal).

not requesting a "future" "judicial determination of nationwide scope or effect," as EPA contends, EPA Reply at 4 (emphases omitted); they are requesting that the Court make its own decision about whether EPA's "action is based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1).

The "two reasons" that EPA gives for its conclusion that the rule is "based on a determination of nationwide scope or effect," EPA Reply at 7, are both contrary to law and unsupportable.

"Two Circuits" is Not "Dispositive." EPA argues that when a rule "extends across two judicial circuits," that fact "should be dispositive" to establish exclusive jurisdiction in the D.C. Circuit. EPA Mot. at 19. That is clearly wrong and is belied by EPA's prior actions. Nothing in the statute indicates this is a determining, or even relevant, factor. And two circuits, like two states, is not "nationwide" in any sense. EPA clearly demonstrated this in its prior Michigan/Minnesota action, where EPA issued one rule taking action on the regional haze SIPs of two states in two judicial circuits.[15] EPA did not contend its two-circuit rule there was of "nationwide scope or effect." And, when petitions for review were filed in both the Eighth Circuit for the Minnesota requirements[16] and then in the Sixth Circuit for the Michigan requirements,[17] EPA supported transfer of the Sixth Circuit petitions *to the Eighth Circuit, not to the D.C. Circuit*,[18] pursuant to 28 U.S.C. § 2112(a)(5). Here, as in the Michigan/Minnesota case, the fact that petitions for review may be proper in two circuits (this Court and the Tenth Circuit) is easily addressed by application of 28 U.S.C. § 2112, which specifically addresses multi-circuit petitions for review of the same agency rule and calls for transfer to the circuit in which petitions were first filed (in this case, this Court). *See* 28 U.S.C. § 2112(a)(1) (last sentence); *id.* § 2112(a)(5).

Tellingly, in arguing that "two circuits" is "dispositive" of jurisdiction in the D.C. Circuit, EPA failed to mention the Michigan/Minnesota example, where it clearly did not think that fact was "dispositive." EPA's response to this inconsistency is that it "had the authority" to make a "nationwide" finding in that proceeding but simply chose not to. EPA Reply at 10. In other words, under EPA's view, the fact that two regional circuits may have concurrent jurisdiction is "dispositive" only when EPA decides that it should be.

Unable to cite to *even one* of its dozens of prior regional haze actions in which it has made a finding of nationwide scope or effect, EPA cites three examples from

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[15] *See* Pet. Jt. Opp. at 16 n.18.

[16] *See id.* at 17 n.19.

[17] *See id.* at 17 n.20.

[18] *See id.* at 17 n.21.

completely different contexts in an attempt to validate its position. EPA Reply at 9. None of EPA's three examples is remotely similar to the situation here, and, in fact, all three demonstrate that EPA's action here is not based on a determination of nationwide scope or effect. *First*, EPA cites an "Error Correction Rule" for Texas's Prevention of Significant Deterioration ("PSD") permitting program as it relates to greenhouse gases ("GHG"). *Id.* But that rule was simply the next iteration of the rulemaking that this Court had previously found in *State of Texas v. EPA* to be "nationally applicable" because it dealt with *all* states whose plans did not apply PSD requirements to GHGs, 2011 WL 710598, at *3, and those same facts (which are not present here) formed the basis of EPA's finding in that rule. 76 Fed. Reg. 25,178, 25,208 (May 3, 2011). *Second*, EPA cites an action on the California SIP regarding implementation of the NAAQS, which are uniform numeric standards that apply across the country. EPA Reply at 9 n.8. No such uniform standards are at issue in this case.[19] *Third*, EPA's Florida/North Carolina example only demonstrates why EPA's position here is wrong. That rule, EPA said, was a "type (1)" "nationally applicable" rule that "amend[ed] the EPA's regulations" for fuel standards, 79 Fed. Reg. 29,362, 29,363, 29,368 (May 22, 2014), thus making it fundamentally different from the rule here—which EPA concedes is *not* nationally applicable. And, tellingly, when separately EPA took action on Florida's and North Carolina's individual SIPs as they related to this nationwide fuels program, EPA stated that "petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit," not the D.C. Circuit. *See* 79 Fed. Reg. 573, 576 (Jan. 6, 2014) (Florida); 79 Fed. Reg. 4,082, 4,084 (Jan. 24, 2014) (North Carolina).

As a last resort, EPA takes an isolated sentence from the legislative history to claim support for its argument that "two circuits" is "dispositive" of exclusive jurisdiction in the D.C. Circuit. EPA Mot. at 19. But where the statute is clear, reliance on legislative history is prohibited. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). That principle applies with even greater force where EPA's customary practice conforms to the statutory text and contradicts its newfound reliance on legislative history. Moreover, the legislative history actually indicates that the revisions to § 7607(b)(1) were intended "to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged." 41 Fed. Reg. 56,767, 56,768 (Dec. 30, 1976).[20] The legislative history further explains that "undue duplication"

[19] Moreover, EPA's finding in that California case made no sense—EPA asserted, without any meaningful explanation, that a rule that "reflects EPA's determination . . . for California only" "extends to numerous judicial circuits." 79 Fed. Reg. 63,536, 63,537, 63,539 (Oct. 24, 2014).

[20] The relevant House Report notes that the committee adopted the views of the Administrative Conference of the United States as set forth in 41 Fed. Reg. 56,767 (Dec. 30, 1976) with respect to venue. *See* H.R. Rep. No. 95-294, at 324 & nn.10-11 (1977); 1977 U.S.C.C.A.N. 1077, 1403.

can be avoided through "available transfer provisions." *Id.* at 56,767. Here, the available transfer provision is 28 U.S.C. § 2112(a), which provides for transfer to this Court, not from this Court, because this is where petitions for review were first filed.

The Rule Does Not Create "Binding Precedent." Second, EPA argues that the challenges to the rule here must be heard in the D.C. Circuit because the rule "articulates EPA's interpretation of certain sections of the Act and multiple complex provisions of the Regional Haze Rule" and "these interpretations apply to every state." EPA Mot. at 18. But if the rule "appl[ied]" to every state, it would be "nationally applicable," which, as discussed above, is contrary to EPA's *own finding* in the rule. 81 Fed. Reg. at 345-46. EPA's argument would also prove too much. *Every* EPA action on an individual SIP necessarily involves interpretation and application of nationally applicable regulations, which in turn provide guidance for states going forward. Thus, under EPA's view, the exception for review in the D.C. Circuit for certain locally or regionally applicable actions would swallow the rule that those actions are generally to be heard in the regional circuits. The fact that EPA's application of its generally applicable regulations to the particulars of the Texas and Oklahoma plans "may establish precedent relevant to future cases does not transform" EPA's action into a rule of nationwide scope or effect. *Exelon Wind*, 766 F.3d at 391.

EPA says in its brief that it "clarified its interpretation of certain provisions of the CAA and the Regional Haze Rule" and that this makes the rule nationwide. EPA Mot. at 12. But in support, EPA cites the portion of the final rule that references the clarification set forth in the preamble to the *proposed* rule. *Id.* at 19 (citing 81 Fed. Reg. at 308-09); *see* 81 Fed. Reg. at 308-09 (stating that EPA "stand[s] by [its] clarified interpretation *as outlined in the proposal*" (emphasis added)). In any event, EPA's claim that this discussion in the preamble to the proposed rule is "legally-binding" on all states, EPA Reply at 8, is wrong. The CAA authorizes EPA to "promulgate *regulations* to assure" that reasonable progress is made under the regional haze program, 42 U.S.C. § 7491(a)(4) (emphasis added), and directs that those "[r]egulations" "provide guidelines to the States" for their regional haze SIPs, *id.* § 7491(b)(1). Nowhere in the statute is EPA authorized to issue guidance to states with the force of law—outside of the regulations—in the preamble to a proposed rule that is applicable to only two states. EPA is "a creature of statute," and may exercise "only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Here, that authority does not include the issuance of legally-binding guidance to all states as part of a rulemaking about two states' individual plans. Indeed, the statute affirmatively requires that EPA's guidance to the states be contained in the regulations themselves. 42 U.S.C. § 7491(b)(1).

In any case, the putative "precedential effect" of EPA's action is illusory. In the rulemaking here, Petitioners submitted comments to EPA outlining "specific

instances of inconsistency" between EPA's previous SIP actions and FIPs and the standards that EPA was using to judge Texas's plan. 81 Fed. Reg. at 326. EPA's response to these comments was that its regulations "*do not require uniformity* between those actions in all circumstances and instead, 'allow for some variation' in actions taken in different regions." *Id.* (quoting 80 Fed. Reg. 50,250, 50,258 (Aug. 19, 2015)) (emphasis added). Thus, in practice, EPA's action here, like its actions on prior state regional haze plans, does not establish any binding precedent.

Finally, as a legal matter, EPA's "interpretations" could have no effect beyond this rulemaking. At the time EPA issued the rule here, it had already "acted on all of the states' regional haze SIPs for the first planning period" except for those portions of the Oklahoma and Texas plans at issue here.[21] Thus, EPA's "interpretations" will not apply to any other state plans for the first regional haze planning period. Nor will EPA's "interpretations" underlying this rule apply to any future planning periods. After issuing the rule here, EPA proposed new regulatory provisions that would exclusively govern state plans for the second and all other future planning periods.[22] As EPA explained in this new proposed rule—which, when final, will apply in all states, but is not at issue here—the "changes would apply to periodic comprehensive state implementation plans developed for the second and subsequent implementation periods." 81 Fed. Reg. at 26,944. Thus, to the extent EPA's rulemaking in the instant case described new "interpretations," those interpretations will apply to future SIP submissions by virtue of the text of the new regulations—not because they were included in a discussion in the preamble of a proposed rule about Texas and Oklahoma.

IV. The Court Should Grant the Motions to Stay

Irrespective of its decision on EPA's transfer motion, this Court should grant the pending motions to stay the rule. There is no question that this Court has the jurisdiction and authority to grant those motions. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (courts have authority "'to make orders to preserve the existing conditions and the subject of the petition[s]'" even prior to making jurisdictional determinations); 28 U.S.C. § 2112(a)(4) ("*Any* court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order." (emphasis added)). Because the choice-of-forum provisions in § 7607(b)(1) are venue provisions, they cannot deprive this Court of jurisdiction.

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[21] 79 Fed. Reg. at 74,820.

[22] *See* 81 Fed. Reg. 26,942 (May 4, 2016) (proposing to promulgate extensive and detailed revisions to 40 C.F.R. § 51.308(f) to govern regional haze implementation plans for the second and all other future planning periods, and associated provisions of EPA's regional haze rules).

Dalton Trucking, Inc. v. EPA, 808 F.3d 875, 879 (D.C. Cir. 2015) ("[I]n addition to conferring subject matter jurisdiction on *the Courts of Appeals*, section 307(b)(1) is a venue provision." (emphasis added)). Even EPA, in its reply, has now conceded that "the D.C. Circuit has treated section 7607(b)(1) as delineating venue, as opposed to subject matter jurisdiction[.]" EPA Reply at 2. EPA cites *no authority* to the contrary.

Practically speaking, this Court is in the best position to decide the stay motions.[23] EPA says that "this Court has no greater familiarity with the case than would the D.C. Circuit," EPA Mot. at 20, but that is clearly wrong. The motions to stay establish that the rule is causing ongoing and substantial irreparable harm to the State of Texas, Texas businesses, and Texas citizens, all exclusively within this Circuit. These harms include not only economic harm to the Texas companies targeted by the rule, but also the loss of Texas jobs and substantial harm to the electricity grid in Texas as well as harms to Texas's sovereignty. Moreover, the motions to stay have been fully briefed before this Court (and no other), and the Court has ordered supplemental briefing and oral argument on them. No court is, or could be, in a better position to promptly decide the stay motions, and Petitioners respectfully request that this Court grant the motions to preserve the status quo. *Texas*, 809 F.3d at 169 (stating that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" (internal quotations omitted)).

As to the merits of the stay motions, Petitioner Stay Movants' prior filings and supporting evidence amply demonstrate the need and justification for a stay. Doc. 00513405269 ("Pet. Jt. Mot. to Stay"); Doc. 00513469785 ("Pet. Jt. Reply in Support of Stay"). EPA's unlawful rule imposes $2 billion of costs even though the visibility goals that EPA claims the rule targets have already been met. Pet. Jt. Mot. to Stay at 11, tbl. 1. Because these unnecessary and unlawful costs are accruing now (*id.* at 17-18), a stay is essential to prevent irreparable harm.

As Petitioner Stay Movants demonstrated in their stay briefing, EPA's Texas action contravenes EPA's underlying, generally applicable regional haze regulations. *See*, *e.g.*, Pet. Jt. Reply in Support of Stay at 4-6. For example, EPA acted outside of its authority and contrary to those regulations by imposing control measures that are to be implemented entirely beyond the first regulatory planning period (2008-2018). *Id.* at 4; Pet. Jt. Mot. to Stay at 10, 14-15. But EPA's regulations plainly limit the "emission reduction measures" that a state must consider for inclusion in its long-term strategy to those "needed to achieve [the reasonable progress goal] for the period

[23] This Court has previously ruled on a stay motion before ruling on an EPA motion to dismiss or transfer to the D.C. Circuit. *See* Order, *State of Texas v. EPA*, No. 10-60961 (5th Cir. Dec. 29, 2010) (ruling on stay); Order, *State of Texas v. EPA*, No. 10-60961 (5th Cir. Feb. 24, 2011) (ruling on EPA's motion to transfer to the D.C. Circuit).

covered by the implementation plan."[24] Because EPA's Texas rule imposes controls only *outside* "the period covered by the implementation plan," it violates the regulations and exceeds EPA's authority. Pet. Jt. Reply in Support of Stay at 4-5.

EPA has essentially conceded as much by proposing revisions to the text of its underlying regional haze regulations for future planning periods. EPA proposes to delete the limiting phrase "for the period covered by the implementation plan" from the regulatory provision that specifies the "emission reduction measures" "[t]he State must consider."[25] The table below shows relevant parts of EPA's current regulatory text and proposed new regulatory text.

Current Regulations	**New Proposed Regulations**
"The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures *as necessary to achieve the reasonable progress goals* established by States having mandatory Class I Federal areas."[26]	"The long-term strategy must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to achieve reasonable progress as determined pursuant to (f)(2)(i) through (vi)."[28]
"In establishing *the reasonable progress goal*, the State must consider the uniform rate of improvement in visibility and the emission reduction measures *needed to achieve it for the period covered by the implementation plan*."[27]	"The State must consider and analyze emission reduction measures based on the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected major or minor stationary source or group of sources."[29]

Thus, unlike its current regulatory text, the text of EPA's new proposed regulations appears to call on a state to consider emission reduction measures without being

[24] 40 C.F.R. § 51.308(d)(1)(i)(B) ("In establishing the reasonable progress goal, the State must consider the uniform rate of improvement in visibility and the emission reduction measures needed to achieve it for the period covered by the implementation plan."); *id.* § 51.308(d)(3) ("The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas.").

[25] 81 Fed. Reg. at 26,972 (proposed new 40 C.F.R. § 51.308(f)(2)(i)).

[26] 40 C.F.R. § 51.308(d)(3) (emphasis added).

[27] *Id.* § 51.308(d)(1)(i)(B) (emphasis added).

[28] 81 Fed. Reg. at 26,972 (proposed new § 51.308(f)(2)).

[29] *Id.* (proposed new § 51.308(f)(2)(i)).

expressly constrained by the progress goal established "for the period covered by the implementation plan," as states currently are constrained by the existing text. EPA concedes that these proposed changes to the "rule text" are needed to align the actual existing regulations with EPA's approach to Texas's plan in the rule before this Court, 81 Fed. Reg. at 26,949 & n.17, an approach that Petitioners contend directly conflicts with the current regulations.

The question whether EPA's new proposed regulatory revisions are lawful is not before this Court; that question would be decided by the D.C. Circuit should those revisions be finalized and challenged. But the changes in EPA's proposed rule aptly illustrate that EPA's approach to Texas's plan, which *is* properly before this Court, is unlawful and, therefore, Petitioners are likely to succeed on the merits. If the current regulations permitted EPA's "interpretation" and if EPA's "interpretation" were in fact "legally-binding" for future SIPs, as EPA claims (EPA Reply at 8), there would be no need for its proposed regulatory revisions. Clearly, that is not the case.

For these reasons and the reasons given in the prior briefing, the Court should deny EPA's motion to dismiss or transfer and should grant the motions to stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the court's CM/ECF system which will send notification of such filing to all attorneys of record.

Dated: June 1, 2016

s/ P. Stephen Gidiere III
P. Stephen Gidiere III

ATTACHMENT A

Petition to the Administrator of the U.S. Environmental Protection Agency to Redesignate as Nonattainment 57 Areas with 2012 Design Values Violating the 2008 8-Hour National Ambient Air Quality Standards for Ozone

I. Introduction.

A. 2012 Design Values Reveal That EPA Is Failing to Address Ozone Pollution That Threatens the Health of Millions of Americans.

In July 2013, the U.S. Environmental Protection Agency ("EPA") released the final 2012 Design Values ("DVs") for the 2008 8-hour National Ambient Air Quality Standards ("NAAQS") for ozone.[1] The 2012 DVs revealed that there are many areas in the country where air pollution is at unhealthy levels.

Over 94 million Americans live in metropolitan areas where air quality monitors, located in places designated attainment or unclassifiable for the 2008 NAAQS, register 2012 DVs above 0.075 ppm – a level EPA has determined to be harmful to public health and welfare. To protect the health of these 94 million people, Petitioner hereby requests that the EPA Administrator ("EPA" or "Administrator") use her authority under Clean Air Act § 107(d)(3) to redesignate the areas listed in Table 1 as nonattainment areas. Separately and severably, Sierra Club requests that EPA set the boundaries of those 57 nonattainment areas as specified in Table 1.

B. Description of Petitioner Organization.

Petitioner the Sierra Club is a national environmental organization with over two million members and activists in all 50 states and the District of Columbia. The Sierra Club's mission is to protect, explore, and enjoy the planet. To this end, the Sierra Club works to mobilize Americans to fight against air and water pollution and to preserve our nation's natural beauty. Sierra Club members live and recreate near, and breathe the air in and around, the areas at issue in this petition.

II. EPA Must Redesignate as Nonattainment and Simultaneously Classify the Areas with 2012 Design Values Violating the 2008 NAAQS.

A. EPA Has Legal Authority to Redesignate Areas as Nonattainment.

The Clean Air Act ("Act") defines a nonattainment area for a pollutant as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the

[1] EPA, Design Values 2012: Ozone Detailed Information, http://www.epa.gov/airtrends/pdfs/Ozone_DesignValues_20102012_FINAL_08_20_13.xlsx (July 1, 2013) [hereinafter Ozone Design Values 2010-12].

[NAAQS] for the pollutant."[2] When an area meets either prong of this definition, it must be designated nonattainment.[3] Additionally, the Act lays out the criteria governing redesignations: air quality data, planning and control considerations, or any other air quality-related consideration.[4] Redesignation action can be undertaken at any time.[5]

Interested parties such as Sierra Club are free to petition EPA to redesignate areas as nonattainment. Indeed, EPA has previously acted on such petitions to redesignate areas as nonattainment.[6] And EPA has also previously acted of its own accord to redesignate areas as nonattainment when air quality data reveals that areas violate the NAAQS for various criteria pollutants.[7]

Congress made clear that it intended EPA to redesignate areas based on their air quality, as indicated by their DVs.[8] Accordingly, EPA must redesignate the areas with 2012 DVs violating the 2008 8-hour ozone NAAQS as nonattainment. As the 2012 DVs for these areas violate the NAAQS, and indeed, in many areas, multiple monitors violate the NAAQS by a great deal, redesignation is quite clearly required.

B. EPA Must Immediately Begin the Redesignation Process for Areas with 2012 DVs Violating the NAAQS.

Of the various statutory factors governing redesignations, air quality data demonstrating violations of the NAAQS is dispositive that EPA must redesignate the areas at issue in this

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[2] Clean Air Act § 107(d)(1)(A)(i).

[3] Clean Air Act § 107(d)(3)(A) grants EPA exclusive authority to redesignate areas as nonattainment.

[4] *Id.* § 107(d)(3). That Congress intended EPA to redesignate areas as nonattainment when they fail to attain the NAAQS is affirmed by the Act's establishment of procedures for handling such redesignated areas. For example, the Act requires that EPA classify redesignated ozone nonattainment areas simultaneously with their redesignation. *Id.* § 181(b)(1). It further states that "[u]pon its classification, the area [subsequently redesignated to nonattainment for ozone under § 107(d)(3)] shall be subject to the same requirements … that would have applied had the area been so classified at the time of the [initial designations]." *Id.*

[5] *See id.* §§ 107(d)(3), 181(b)(1).

[6] 62 Fed. Reg. 66,578, 66,579 (Dec. 19, 1997) (discussing EPA's receipt of petitions from environmental organizations and a Congressman, which prompted the rulemaking).

[7] *E.g.*, 77 Fed. Reg. 32,024, 32,025 (May 31, 2012) (redesignating Pinal County, AZ, nonattainment for PM_{10}); 60 Fed. Reg. 38,726, 38,727 (July 28, 1995) (redesignating Ogden City, UT, nonattainment for PM_{10}); 59 Fed. Reg. 11,193, 11,193 (Mar. 10, 1994) (redesignating Muscatine County, IA, nonattainment for SO_2); 58 Fed. Reg. 67,334, 67,334-35 (Dec. 21, 1993) (final redesignations for a large number of areas); 57 Fed. Reg. 43,846, 43,846 (Sept. 22, 1992) (second proposed redesignations for a large number of areas); 56 Fed. Reg. 16,274, 16,275 (Apr. 22, 1991) (first proposed redesignations for a large number of areas).

[8] As noted above, § 107(d)(3)(A) provides for EPA to redesignate areas on the basis of air quality data, along with two other factors. Clean Air Act § 107(d)(3)(A). Moreover, § 107(d)(1)(A)(i) makes clear that Congress meant for areas to be designated "nonattainment" if they do not meet (or contribute to ambient air quality in a nearby area that does not meet) the NAAQS.

petition. The simple fact is that ozone pollution in these areas is at levels that EPA has determined to be dangerous to human health and welfare.

Although violations of the NAAQS are dispositive, redesignation is further warranted based on planning and control considerations, which are also particularly relevant when determining the boundaries of the nonattainment areas. Existing pollution controls have not succeeded in reducing ozone to safe levels in the areas in question. Thus, although some of the areas are nonattainment or maintenance for the 1997 NAAQS, the control measures currently in place are plainly insufficient to prevent them from violating the 2008 NAAQS.[9] Additionally, no other air quality factors can possibly explain such a large number of violations throughout the country – for example, no "exceptional events" could have caused violations at all 103 monitors at issue. If anything, as discussed below, various factors, potentially economic or meteorological, may have caused the 2010 and 2011 DVs to be unusually low.[10]

As shown below, 84 counties, listed in Table 1 and currently designated as unclassifiable/attainment for the 2008 ozone NAAQS, have 2012 DVs greater than 0.075 ppm, and are thus in violation of the 2008 8-hour ozone NAAQS.[11] These 84 counties are located in 22 states, and have a total of 103 violating air quality monitors.[12]

EPA must redesignate these violating areas as nonattainment because these 84 counties now plainly violate the 2008 8-hour ozone NAAQS.[13] Sierra Club requests that EPA notify the governors of the states in which such areas are located that available information indicates that redesignating the areas is warranted, pursuant to § 107(d)(3)(A) of the Act. Given the urgency of

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[9] Although the 2012 DVs are dispositive, another air planning and control consideration bolstering the case for redesignation is that Congress was very clear that Subpart 2 laid out the path for areas violating ozone standards and that it intended Subpart 2 to govern well into the future. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001); Clean Air Act § 181(b)(1).

[10] The 2010 and 2011 DVs include data from the core years of the 2008 recession. Additionally, in 2009 (data from which was included in the 2010 and 2011 DVs, but not the 2012 DVs), meteorological conditions were unfavorable to ozone formation in the Northeast. *See* EPA, *Response to Comments on Implementation of the 2008 National Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, Attainment Deadlines, and Revocation of the 1997 Ozone Standards for Transportation Conformity Purposes* 18 (EPA-HQ-OAR-2010-0885-0065, Apr. 2012); *cf.* Shao-Hang Chu, *Initial Analysis of Meteorologically Adjusted Sulfate Trend and Implication of the Recent Economic Slowdown* 31-32 (Dec. 2011), *available at* http://www.epa.gov/airtrends/specialstudies/ChuSulfatePresentation_2011AGUMeeting.pdf (concluding that lower power demand during the 2008-09 economic slowdown was a major factor responsible for accelerated SO_2 emissions decline). Moreover, current science indicates that temperatures experienced during 2012 will be common in the future due to climate change. If we do not reduce greenhouse emissions rapidly and substantially, the hottest summer of the 20th century is expected to occur every other year, or even more frequently, contributing to increased ozone levels. *See, e.g.*, Noah S. Diffenbaugh & Christopher B. Field, *Changes in Ecologically Critical Terrestrial Climate Conditions*, 341 Science 486, 488 (2013).

[11] *See* Ozone Design Values 2010-2012, *supra* note 1, tbl.2.

[12] *See id.*

[13] The counties are designated unclassifiable/attainment for the 2008 8-hour ozone NAAQS. 77 Fed. Reg. 30,088, 30,095-157 (May 21, 2012). The 2012 DVs for the counties are greater than the 0.075 ppm threshold. *See* Ozone Design Values 2010-2012, *supra* note 1, tbl.2.

protecting the health of millions of Americans living in areas with ambient ozone concentrations above the level EPA has identified as adequate to protect human health, Sierra Club requests that EPA provide such notice to the governors within 30 days of receiving this petition. After making such notification, EPA must follow the statutory timeframe for state comments and act at least as quickly as the statutory timeframe for responding to state comments on the proposed redesignation, as given in § 107(d)(3)(B)-(C) of the Act. Further, EPA must simultaneously classify all areas listed in Table 1 upon redesignating them because the Act requires that EPA simultaneously classify redesignated areas upon redesignation.[14]

As a separate, severable part of this petition, Sierra Club also requests that EPA redesignate the areas as nonattainment with boundaries to be determined in a manner consistent with EPA policies.[15] In this regard, Sierra Club notes that EPA policy is to designate as nonattainment the entire Combined Statistical Area ("CSA") or Core Based Statistical Area ("CBSA") where a violation has been monitored. CBSAs include metropolitan and micropolitan statistical areas, which can be combined into CSAs.[16] CSA and CBSA boundaries are determined by the Office of Management and Budget ("OMB").[17] The 2008 NAAQS implementation guidance document directs that CSAs (or CBSAs, where applicable) "associated with the violating monitor(s) serve as the starting point or "presumptive" boundary for evaluating the geographic boundaries of an ozone nonattainment area."[18] The Guidance Document cites an earlier memorandum explaining why: "In reducing ozone concentrations above the NAAQS, EPA believes it is best to consider controls on sources over a larger area due to the pervasive nature of ground level ozone and transport of ozone and its precursors."[19] Thus, as a severable element of this petition, Sierra Club requests that EPA establish the boundaries proposed in Table 1 below, which specify that EPA should redesignate as nonattainment the entire CSA or CBSA where a violating monitor is located, with a few exceptions as noted in the Table.[20]

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[14] Clean Air Act § 181(b)(1).

[15] *See* Memorandum from Robert J. Meyers, Principal Deputy Assistant Administrator, to Regional Administrators, Regions I-X at 3-4 (Dec. 4, 2008) (providing guidance on determining nonattainment area boundaries).

[16] 65 Fed. Reg. 82,228, 82,228, 82,237 (Dec. 27, 2000).

[17] OMB, OMB Bulletin No. 13-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas* (Feb. 28, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b13-01.pdf.

[18] Meyers memorandum, *supra* note 15, at 3.

[19] Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I-X attach. 3 (Mar. 28, 2000). This memorandum refers to C/MSAs, a term that OMB replaced with "CSA" in 2000. *See* 65 Fed. Reg. at 82,228.

[20] This element of the petition is severable. Thus, if EPA chooses to deny the petition with respect to one or more of the proposed boundaries, EPA must separately decide whether to grant or deny the petition with respect to the request that it redesignate the 57 areas as nonattainment.

Table 1: Areas Sierra Club Requests That EPA Redesignate as Nonattainment[21]

State	Counties with Violating Monitor(s) and DV at Highest Violating Monitor	Proposed Boundary
Alabama	Jefferson County: 0.080 ppm	Entire Birmingham-Hoover-Talladega CSA
Arizona	Pinal County (part): 0.076 ppm	Add eastern Pinal County to existing Phoenix-Mesa nonattainment area
	Yuma County: 0.077 ppm	Entire Yuma CBSA
Arkansas	Pulaski County: 0.077 ppm	Entire Little Rock-North Little Rock CSA
Delaware	Kent County: 0.078 ppm	Add Kent County to existing Philadelphia-Wilmington-Atlantic City nonattainment area[22]
Illinois	Hamilton County: 0.078 ppm	Redesignate all of Hamilton County as nonattainment[23]
	Jersey County: 0.079 ppm	Add Jersey County & Lincoln County, MO, to existing St. Louis-St. Charles-Farmington nonattainment area[24]
Indiana	Clark County: 0.081 ppm Floyd County: 0.079 ppm	Entire Louisville/Jefferson County-Elizabethtown-Madison CSA[25]
	Greene County: 0.078 ppm	Redesignate all of Greene County as nonattainment
	La Porte County: 0.083 ppm	Add La Porte County to existing Chicago-Naperville nonattainment area
Kansas	Johnson County: 0.076 ppm	Entire Kansas City-Overland Park-Kansas City CSA[26]
	Sedgwick County: 0.077 ppm Sumner County: 0.077 ppm	Entire Wichita-Arkansas City-Winfield CSA

[21] Ozone Design Values 2010-2012, *supra* note 1, tbls.1b, 2, 4; OMB, *supra* note 17 (providing boundaries of CSAs and CBSAs).

[22] Kent County, DE, is located between New Castle County, DE, which is in the Philadelphia-Wilmington-Atlantic City nonattainment area, and Sussex County, DE, which is in its own Seaford nonattainment area. Because Kent County, DE, is part of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 1997 ozone NAAQS, and is in the Philadelphia-Reading-Camden CSA, Sierra Club requests that it be added to the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2008 NAAQS. Alternatively, EPA could redesignate the entire state of Delaware (New Castle, Kent, and Sussex Counties) as a single nonattainment area, which was one of the options that Delaware itself proposed during the initial 2008 ozone NAAQS designation cycle. *See* EPA Region 3, *Delaware Area Designations for the 2008 Ozone National Ambient Air Quality Standards* 1 (2011), *available at* http://www.epa.gov/glo/designations/2008standards/rec/eparesp/R3_DE_tsd.pdf.

[23] Although Hamilton County is not located in a CSA or CBSA, the logic expressed in EPA's designation guidance documents suggests that redesignating the entire county as nonattainment will best capture all sources contributing to nonattainment in the area. *See* Meyers memorandum, *supra* note 15, at 3; Seitz memorandum, *supra* note 19, attach. 3. The same holds for the other counties that are not in or close to a CSA or CBSA: Greene County, IN; and Perry County, MO.

[24] Jersey County, IL, is in the same CSA as Lincoln County, MO, which itself violates the NAAQS.

[25] This is the same CSA as for Jefferson and Oldham Counties, KY, which themselves violate the NAAQS.

[26] This is the same CSA as for Clay and Clinton Counties, MO, which themselves violate the NAAQS.

Kentucky	Daviess County: 0.079 ppm Hancock County: 0.076 ppm	Entire Owensboro CBSA
	Henderson County: 0.079 ppm	Entire Evansville (IN) CBSA[27]
	Jefferson County: 0.085 ppm Oldham County: 0.086 ppm	Entire Louisville/Jefferson County-Elizabethtown-Madison CSA[28]
	McCracken County: 0.077 ppm	Entire Paducah-Mayfield CSA[29]

Louisiana	Bossier Parish: 0.078 ppm Caddo Parish: 0.076 ppm	Entire Shreveport-Bossier City CBSA
	Pointe Coupee Parish: 0.077 ppm	Add Pointe Coupee Parish to existing Baton Rouge nonattainment area

Maryland	Kent County: 0.082 ppm	Add Kent County to existing Baltimore nonattainment area.[30]

Michigan	Allegan County: 0.084 ppm Muskegon County: 0.082 ppm Ottawa County: 0.078 ppm	Entire Grand Rapids-Wyoming-Muskegon CSA
	Berrien County: 0.082 ppm Cass County: 0.078 ppm	Entire South Bend-Elkhart-Mishawaka CSA[31]
	Genesee County: 0.076 ppm Lenawee County: 0.076 ppm Macomb County: 0.079 ppm Oakland County: 0.078 ppm St. Clair County: 0.077 ppm Washtenaw County: 0.076 ppm Wayne County: 0.081 ppm	Entire Detroit-Warren-Ann Arbor CSA

Missouri	Clay County: 0.080 ppm	Entire Kansas City-Overland Park-Kansas City CSA[32]

[27] This CBSA includes Posey, Vanderburgh, and Warrick Counties, IN.

[28] This is the same CSA as for Clark and Floyd Counties, IN, which themselves violate the NAAQS.

[29] This CSA includes Massac County, IL.

[30] OMB does not include Kent County, MD, in the Washington-Baltimore-Arlington CSA. But EPA has historically grouped Kent as a unit with Queen Anne's County, which is part of the Washington-Baltimore-Arlington CSA, and the two counties were designated nonattainment for the 1997 ozone NAAQS. Further, although Kent County, MD, is located adjacent to Cecil County, MD, and New Castle County, DE, which are in the Philadelphia-Wilmington-Atlantic City nonattainment area, and is not contiguous with the Baltimore nonattainment area, it is just across the Chesapeake from Baltimore, and the Chesapeake Bay Bridge connects it to the Baltimore metropolitan area. Further, Maryland initially proposed that both Kent & Queen Anne's Counties be designated as an "Upper Eastern Shore" nonattainment area, although it later withdrew the proposal upon seeing the area's unusually low 2010 DV, and EPA chose not to designate the counties as nonattainment, also based on the unusually low 2010 DV. *See* Letter from Martin O'Malley, Governor of Maryland, to William T. Wisniewski, Acting EPA Region 3 Administrator (Mar. 10, 2009), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/03_MD_rec.pdf (proposing to designate Kent & Queen Anne's Counties as an "Upper Eastern Shore" nonattainment area); Letter from Martin O'Malley, Governor of Maryland, to Shawn M. Garvin, EPA Region 3 Administrator (Dec. 1, 2011), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/03_MD_rec2.pdf (withdrawing proposal); Letter from Shawn M. Garvin, EPA Region 3 Administrator to Martin O'Malley, Governor of Maryland (Dec. 9, 2011), *available at* http://www.epa.gov/ozonedesignations/2008standards/rec/eparesp/R3_MD_resp.pdf (rejecting Maryland's initial proposal to designate Kent and Queen Anne's Counties as nonattainment).

[31] This CSA includes Elkhart, Marshall, and St. Joseph Counties, IN.

[32] This is the same CSA as for Johnson County, KS, which itself violates the NAAQS.

	Clinton County: 0.080 ppm	
	Jasper County: 0.078 ppm	Entire Joplin-Miami CSA[33]
	Lincoln County: 0.080 ppm	Add Lincoln County & Jersey County, IL, to existing St. Louis-St. Charles-Farmington nonattainment area[34]
	Perry County: 0.077 ppm	Redesignate all of Perry County as nonattainment
Nevada	Clark County: 0.076 ppm	Entire Las Vegas-Henderson CSA[35]
North Carolina	Forsyth County: 0.078 ppm Guilford County: 0.076 ppm	Entire Greensboro-Winston-Salem-High Point CSA
Ohio	Clark County: 0.076 ppm Montgomery County: 0.078 ppm	Entire Dayton-Springfield-Sidney CSA
	Lucas County: 0.076 ppm	Entire Toledo-Port Clinton CSA
	Stark County: 0.079 ppm	Add Stark County to existing Cleveland-Akron-Lorain nonattainment area
	Trumbull County: 0.079 ppm	Entire Youngstown-Warren CSA[36]
Oklahoma	Cherokee County: 0.076 ppm Creek County: 0.078 ppm Tulsa County: 0.080 ppm	Entire Tulsa-Muskogee-Bartlesville CSA, Adair County, & Mayes County, OK[37]
	Canadian County: 0.076 ppm Cleveland County: 0.076 ppm Oklahoma County: 0.079 ppm	Entire Oklahoma City-Shawnee CSA & Caddo County, OK[38]
	Adair County: 0.076 ppm	Include with Tulsa-Muskogee-Bartlesville CSA (as noted above)
	Caddo County: 0.077 ppm	Include with Oklahoma City-Shawnee CSA (as noted above)
	Mayes County: 0.078 ppm	Include with Tulsa-Muskogee-Bartlesville CSA (as noted above)
	Ottawa County: 0.076 ppm	Entire Joplin-Miami CSA[39]

[33] This is the same CSA as for Ottawa County, OK, which itself violates the NAAQS.

[34] Lincoln County, MO, is in the same CSA as Jersey County, IL, which itself violates the NAAQS.

[35] This CSA includes Mohave County, AZ.

[36] This is the same CSA as for Mercer County, PA, which itself violates the NAAQS.

[37] Although Mayes County is located outside the Tulsa-Muskogee-Bartlesville CSA, it is immediately upwind of parts of the area, and emissions in Mayes County likely contribute to nonattainment in Tulsa. *See* Attachment C (map of Oklahoma and the location of Mayes County relative to the Tulsa-Muskogee-Bartlesville CSA; original map source, http://geo.ou.edu/images/statewells_big.jpg); *see also* Oklahoma Climatological Survey, *Climate of Oklahoma*, http://climate.ok.gov/index.php/site/page/climate_of_oklahoma (last visited Aug. 7, 2013) (describing prevailing wind direction in Oklahoma); Letter from Brad Henry, Governor of Oklahoma, to Lawrence E. Starfield, EPA Region 6 Acting Administrator (Mar. 9, 2009), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/06_OK_rec.pdf (noting NAAQS violations in the Tulsa area).

[38] Although Caddo County is located outside the Oklahoma City-Shawnee CSA, it is immediately west of the Oklahoma City area, and its substantial oil and gas operations likely contribute to ozone nonattainment in Oklahoma City. *See* Attachment C. Oklahoma acknowledged NAAQS violations in the Oklahoma City area in its initial designation proposal, but EPA did not designate the area as nonattainment. *See* Letter from Henry to Starfield, *supra* note 37.

[39] This is the same CSA as for Jasper County, MO, which itself violates the NAAQS.

Pennsylvania	Dauphin County: 0.077 ppm York County: 0.077 ppm	Entire Harrisburg-York-Lebanon CSA
	Erie County: 0.076 ppm	Entire Erie-Meadville CSA
	Indiana County: 0.079 ppm	Add Indiana County to existing Pittsburgh-Beaver Valley nonattainment area[40]
	Mercer County: 0.079 ppm	Entire Youngstown-Warren CSA[41]

Rhode Island	Washington County: 0.078 ppm	Entire Providence-Warwick CBSA[42]

Tennessee	Hamilton County: 0.076 ppm	Entire Chattanooga-Cleveland-Dalton CSA[43]
	Jefferson County: 0.078 ppm Sevier County: 0.076 ppm	Add Jefferson & Sevier Counties to existing Knoxville nonattainment area
	Sumner County: 0.079 ppm	Entire Nashville-Davidson-Murfreesboro CSA

Texas	Bexar County: 0.080 ppm	Entire San Antonio-New Braunfels CBSA
	Gregg County: 0.079 ppm	Entire Longview-Marshall CSA
	Hood County: 0.077 ppm	Add Hood County to existing Dallas-Fort Worth nonattainment area
	Jefferson County: 0.080 ppm	Entire Beaumont-Port Arthur CBSA

Virginia	Charles City County: 0.079 ppm Hanover County: 0.076 ppm Henrico County: 0.078 ppm	Entire Richmond CBSA
	Hampton City: 0.076 ppm	Entire Virginia Beach-Norfolk CSA[44]
	Stafford County: 0.076 ppm	Add Stafford County, VA, to existing Washington nonattainment area

[40] Indiana County is part of the Clearfield & Indiana Counties, PA, maintenance area for the 1997 ozone NAAQS. But only monitors in Indiana County now violate the NAAQS. Further, Indiana County is part of the Pittsburgh-New Castle-Weirton CSA, and it is adjacent to the existing Pittsburgh-Beaver Valley nonattainment area for the 2008 NAAQS. Thus, Sierra Club requests to add it to the Pittsburgh-Beaver Valley nonattainment area.

[41] This is the same CSA as for Trumbull County, OH, which itself violates the NAAQS.

[42] EPA supplied two 2012 DVs indicating the Boston-Worcester-Providence CSA should be designated nonattainment. First, it supplied data from a monitor in Washington County, RI. Second, it provided a DV for the "Boston-Lawrence-Worcester (E Mass)" maintenance area for the 1997 NAAQS. Both values (0.078 and 0.079 ppm, respectively), violate the 2008 NAAQS. But no monitors within the CSA outside of Rhode Island had 2012 DVs above 0.075 ppm. Accordingly, Sierra Club requests that EPA only redesignate as nonattainment the Providence-Warwick CBSA, which covers most of the state of Rhode Island and a small part of Massachusetts. Notably, both Rhode Island and Massachusetts initially proposed to designate all of the Providence-Warwick CBSA as nonattainment. *See* Letter from Laurie Burt, Commissioner, Massachusetts Department of Environmental Protection, to Ira W. Leighton, EPA Region 1 Acting Administrator at 1 (Mar. 11, 2009), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/01_MA_rec.pdf*;* Letter from Donald L. Carcieri, Governor of Rhode Island, to Ira W. Leighton, EPA Region 1 Acting Administrator at 1-2 (Mar. 12, 2009), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/01_RI_rec.pdf.

[43] This CSA includes Jackson County, AL; and Catoosa, Dade, Murray, Walker, and Whitfield Counties, GA.

[44] This CSA includes Currituck and Gates Counties, NC.

Wisconsin	Kewaunee County: 0.078 ppm	Entire Green Bay-Shawano CSA and Door & Manitowoc Counties[45]
	Door County: 0.078 ppm	Include with Green Bay-Shawano CSA & Manitowoc County (as noted above)
	Manitowoc County: 0.080 ppm	Include with Green Bay-Shawano CSA & Door County (as noted above)
	Milwaukee County: 0.082 ppm Ozaukee County: 0.080 ppm Racine County: 0.081 ppm	Entire Milwaukee-Racine-Waukesha CSA

C. EPA Based Its Initial Designations on Abnormally Low Ozone Years.

Because the 2012 DV data show that the areas listed in Table 1 are violating the ozone NAAQS, those areas must be redesignated nonattainment, regardless of whether those areas may have previously met the standard. Even if prior compliance were relevant, we note EPA issued most of the designations for the 2008 NAAQS in May 2012.[46] It generally used 2010 DVs for the designations, but used 2011 DVs if doing so allowed an attainment designation or lower classification.[47]

Both the 2010 and 2011 DVs were abnormally low. Among the 2012 DVs EPA released that exceed 0.075 ppm and are located in areas designated attainment or unclassifiable for the 2008 NAAQS, nearly 99% were below their 10-year mean in 2010.[48] Similarly, nearly 93% were

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[45] Door, Manitowoc, and Kewaunee Counties form an unbroken line of counties and have 2012 DVs violating the 2008 NAAQS by relatively high magnitudes. Although they are not part of the same CSA (Kewaunee is part of the Green Bay-Shawano CSA, but the others are not), they share several common attributes beyond geography. Most importantly, although relatively sparsely populated, their populations swell during the summer ozone season. For example, Door County has a year-round population of only about 28,000, but attracts 2 million tourists a year and has a summer population of 250,000. *See* Door County Wisconsin, *Door County Fact Sheet*, http://www.doorcounty.com/media/door-county-fact-sheet (last visited Nov. 13, 2013); LandsofWisconsin.com, *County Data for Door County, Wisconsin*, http://www.landsofwisconsin.com/County-Data-For-Door-County-Wisconsin (last visited Nov. 13, 2013). Notably, one of the options that Wisconsin initially proposed for the 2008 ozone NAAQS designations was to designate Door, Manitowoc, and Kewaunee counties, along with neighboring Brown County, as a single nonattainment area. *See* Wisconsin Dep't of Natural Res., *2008 Daily Ozone Standard Nonattainment Designation Options, Technical Support Document* 2 (Feb. 27, 2009), *available at* http://www.epa.gov/glo/designations/2008standards/rec/letters/05_WI_rec.pdf. Designating all three counties together is important because prevailing winds blow pollution from the Green Bay area (Brown, Manitowoc, and Kewaunee County) northwest to Door County. *See id.* at 40. Further, taking an area-wide approach to the ozone problems in eastern Wisconsin is critical because all eight Wisconsin counties on the western shore of Lake Michigan (Door, Kewaunee, Manitowoc, Sheboygan, Ozaukee, Milwaukee, Racine, and Kenosha) are either already designated nonattainment or have 2012 DVs violating the 2008 NAAQS.

[46] 77 Fed. Reg. 30,088 (May 21, 2012). EPA issued the designations for the Chicago Metro area in a separate rule a month later. 77 Fed. Reg. 34,221 (June 11, 2012).

[47] *See* EPA, *8-Hour Ozone (2008 Standard) Design Value Notes*, www.epa.gov/airquality/greenbook/dv_ozone2008_notes.html (last updated July 31, 2013).

[48] *See* Attachment B. Note that not all monitors had 10 years of data available. Some monitors appear to have been discontinued at various points, new monitors were added, and some monitors are missing one or more years of data. Note also that these figures include data from 103 monitors and an additional 1 DV that EPA calculated for areas that are maintenance for the 1997 NAAQS based on the aggregate monitors in the area.

below their 10-year mean in 2011.[49] Indeed, over 91% experienced their lowest recorded DVs for the 10-year period in either 2010 or 2011 (73% in 2010 and 30% in 2011).[50]

Given the abnormally low DVs that EPA used to support its designations, it is hardly surprising that a total of 103 monitors, located in areas designated attainment or unclassifiable for the 2008 NAAQS, had 2012 DVs above 0.075 ppm.[51] EPA has already admitted to the Supreme Court that the 2012 DVs are cause for concern, stating that they "identif[ied] numerous areas with ozone levels exceeding the revised [2008] 8-hour ozone NAAQS, and show that air quality has deteriorated in many areas."[52]

But although higher than the abnormally low 2010 and 2011 DVs, the 2012 DVs are not themselves abnormally high. Among the 2012 DVs that exceed 0.075 ppm and are located in areas designated attainment or unclassifiable for the 2008 NAAQS, nearly 52% were at or *below* their 10-year mean.[53] None were outliers based on data from the past 10 years.[54]

Thus, EPA based the current 2008 8-hour ozone NAAQS designations on unusually low-pollution years, leaving many areas with historic and ongoing ozone problems without adequate nonattainment controls. The 2012 DVs, although not unusually high themselves, nevertheless reveal that the 2010 and 2011 DVs were anomalies, and areas nationwide designated attainment or unclassifiable now register DVs violating the NAAQS. EPA must redesignate the areas listed above in order to provide effective and legally mandated health protections to millions of Americans.

III. SUMMARY OF REQUESTS.

For the reasons discussed above, Sierra Club hereby requests the following:

1. That, pursuant to its authority under Clean Air Act § 107(d)(3)(A), EPA redesignate as nonattainment the 57 areas currently designated attainment/unclassifiable that have 2012 DVs violating the 2008 8-hour ozone NAAQS (listed in Table 1 and Attachment A) by informing the governors of the states where the areas are located that available information indicates that redesignation is warranted within 30 days of receiving this petition; and that

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[49] *Id.* 2010 and 2011 DVs below the 10-year mean are highlighted in red.

[50] *Id.* Note that 9 monitors had a tie for lowest DV in the 10-year period between 2010 and 2011.

[51] *See* Attachments A, B (providing a full list of the 57 areas and the Design Values registered by their monitors).

[52] Reply in Support of Petition for Writ of Certiorari 3-4, *EPA v. EME Homer City Generation, L.P.*, No. 12-1182 (U.S. June 2013).

[53] *See* Attachment B. 2012 DVs greater than the 10-year mean are highlighted in green.

[54] *Id.* Outliers (values two standard deviations above or below the mean) are in boldface.

EPA simultaneously promulgate such redesignations and classify the areas at least as quickly as the timeline established by Clean Air Act § 107(d)(3); and

2. As a severable request, that EPA establish the boundaries of those 57 nonattainment areas as specified in Table 1 and in Attachment A.

Given Congress's directive to follow precise schedules to remedy ozone nonattainment subsequent to designations and redesignations, which are tied to the date of nonattainment classification,[55] EPA must take expeditious action on this petition. Accordingly, Sierra Club calls on EPA to grant this petition within 30 days of receiving it.

Sincerely,

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On behalf of the Sierra Club

DATED: November 14, 2013

Cc: Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation
Steve Page, Director, Office of Air Quality Planning and Standards

[55] *See, e.g.*, Clean Air Act §§ 107(d)(3)(B)-(C), 181(b)(1).