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March 18, 2013

By Electronic Mail and Overnight Delivery

The Honorable Robert Perciasepe
Acting Administrator
United States Environmental Protection Agency
Ariel Rios Building (Mail Code 4101M)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: EPA Docket No. EPA-HQ-OAR-2007-0492; Petition for Reconsideration and Request for an Administrative Stay of the Final Rule on the National Ambient Air Quality Standards for Particulate Matter

Dear Acting Administrator Perciasepe:

Please find enclosed the Petition for Reconsideration and Request for an Administrative Stay of EPA's January 15, 2013 final rule: "National Ambient Air Quality Standards for Particulate Matter," 78 Fed. Reg. 3086. This petition is being filed by the following parties pursuant to section 307(b)(7)(B) of the Clean Air Act: the American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; American Wood Council; Chamber of Commerce of the United States of America; Corn Refiners Association; Council of Industrial Boiler Owners; National Oilseed Processors Association; and Utility Air Regulatory Group. The reasons for the petition for reconsideration and request for administrative stay are forth in the enclosed Petition.

With this letter, we are also informing you that the Utility Air Regulatory Group, the PM NAAQS Coalition, and the Chamber of Commerce of the United States of America filed today a petition for review of the final rule in the United States Court of Appeals for the D.C. Circuit.

Please contact any of us if you have any questions.



The Honorable Robert Perciasepe
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Sincerely,

A handwritten signature in cursive script that reads "Allison D. Wood".

William L. Wehrum
Allison D. Wood
Lucinda Minton Langworthy

Enclosure

cc: Air and Radiation Docket (via electronic mail)

**In the Matter of:
National Ambient Air Quality Standards for
Particulate Matter; Final Rule (78 Fed. Reg. 3086 (Jan. 15, 2013))
EPA Docket No. EPA-HQ-OAR-2007-0492**

**PETITION FOR RECONSIDERATION OF THE FINAL RULE
AND REQUEST FOR AN ADMINISTRATIVE STAY**

On January 15, 2013, the United States Environmental Protection Agency (“EPA” or “Agency”) published in the *Federal Register* a final rule reflecting the results of its review of its national ambient air quality standards (“NAAQS” or “standards”) for particulate matter (“PM”).¹ The Final PM Rule, which has an effective date of March 18, 2013, *inter alia*, revised the level of the primary annual NAAQS for PM that is less than or equal to 2.5 microns in diameter (“PM_{2.5}”) to 12.0 micrograms per cubic meter (“µg/m³”) and contained provisions for implementing the revised standard.

For the reasons set forth herein, pursuant to section 307(d)(7)(B) of the Clean Air Act (“CAA” or “the Act”), the American Forest & Paper Association (“AF&PA”),² American Iron and Steel Institute (“AISI”),³ American Petroleum Institute (“API”),⁴ American Wood Council

¹ 78 Fed. Reg. 3086 (Jan. 15, 2013) (“Final PM Rule” or “Final Rule”).

² AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Its companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. Industry companies produce about \$175 billion in products annually and employ nearly 900,000 men and women.

³ AISI serves as the voice of the North American steel industry and represents member companies accounting for over three-quarters of U.S. steelmaking capacity, with facilities located in more than forty states.

⁴ API is a national trade association that represents all segments of America’s technology-driven oil and natural gas industry. Its more than 550 members – including large integrated companies, exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms – provide most of the nation’s energy. The industry

(“AWC”),⁵ Chamber of Commerce of the United States of America (“Chamber”),⁶ Corn Refiners Association (“CRA”),⁷ Council of Industrial Boiler Owners (“CIBO”),⁸ National Oilseed Processors Association (“NOPA”),⁹ and Utility Air Regulatory Group (“UARG”)¹⁰ –

also supports 9.2 million U.S. jobs and 7.7 percent of the U.S. economy, delivers \$86 million a day in revenues to our government, and, since 2000, has invested over \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

⁵ AWC is the voice of North American traditional and engineered wood products, representing over 60% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs 360,000 men and women in well-paying jobs. AWC’s engineers, technologists, scientists and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations, advocating for balanced government policies that sustain the wood products industry.

⁶ The Chamber is the world’s largest business federation. The Chamber represents the interests of 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

⁷ CRA is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture starches, sweeteners, corn oil, bioproducts (including ethanol), and animal feed ingredients.

⁸ CIBO is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates, with members representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law, and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for industrial boilers.

⁹ NOPA is a national trade association that represents 12 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.6 billion bushels of oilseeds annually at 61 plants located throughout the country, including 56 plants that process soybeans.

hereinafter collectively referred to as “Petitioners” – request, pursuant to CAA §§ 301(a) and 307(d)(7)(B), that the EPA Administrator: (1) grant reconsideration of the Final PM Rule (a) to eliminate the requirement for near-road PM_{2.5} monitoring, and (b) to establish through rulemaking the requirements for implementation of the revised NAAQS in accordance with the CAA; and (2) to stay the Final Rule, pending completion of reconsideration, as specified above.

I. INTRODUCTION AND BACKGROUND

A. State-Led NAAQS Implementation

Since 1970, the CAA’s NAAQS program has been carried out by the federal government and states through a cooperative federalism partnership. The EPA Administrator lists pollutants whose emissions “may reasonably be anticipated to endanger public health or welfare” and for which EPA intends to issue air quality criteria.¹¹ The Administrator must issue such criteria for each air pollutant within 12 months of listing the pollutant.¹² The Administrator then must publish regulations that provide primary (health-based) and secondary (welfare-based) NAAQS for each air pollutant for which the Administrator has issued air quality criteria.¹³

EPA’s promulgation of a new or revised NAAQS sets into motion a timetable for specific action by the states. First, states are required by section 107 of the Act within a year (or a shorter period of time if specified by the EPA Administrator) after the promulgation of the new or revised NAAQS to propose initial designations of each area under their jurisdiction as:

¹⁰ UARG is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators.

¹¹ CAA § 108(a)(1).

¹² *Id.* § 108(a)(2).

¹³ *Id.* § 109(a)-(b).

(i) “nonattainment” (for areas not meeting the NAAQS); (ii) “attainment” (for areas meeting the NAAQS); or (iii) “unclassifiable” (for areas “that cannot be classified on the basis of available information”).¹⁴ In making their designations, states must analyze available air quality data and consider other factors to determine the boundaries for each area. Within two years after a new or revised NAAQS is promulgated, the EPA Administrator promulgates final federal designations of areas as attainment, nonattainment, or unclassifiable.¹⁵ The Administrator may modify a state’s proposed designations, but must first give the state an opportunity to demonstrate why the modification is inappropriate.¹⁶

Second, section 110(a)(1) of the Act requires that each state adopt and submit to the EPA Administrator within three years after the promulgation of a new or revised NAAQS (or a shorter period if the Administrator so specifies), a plan – called a state implementation plan (“SIP”) – that provides for implementation, maintenance, and enforcement of the NAAQS in each air quality control region within the state.¹⁷ Among other requirements, each SIP must: (1) include enforceable emission limitations or other control measures, as well as schedules and timetables for compliance with such limitations, that are needed to meet applicable requirements of the Act; (2) “provide for establishment and operation of appropriate devices, methods, systems, and procedures” to monitor and analyze ambient air quality and such other measures as may be necessary to ensure attainment and maintenance of the NAAQS; (3) include a permit program for modification or construction of stationary sources to assure the NAAQS are achieved and to

¹⁴ *Id.* § 107(d)(1)(A).

¹⁵ *Id.* § 107(d)(1)(B)(i).

¹⁶ *Id.* § 107(d)(1)(B)(ii).

¹⁷ *Id.* § 110(a)(1).

prevent significant deterioration of air quality in the state; (4) provide for the installation, maintenance, and replacement of equipment to monitor emissions from major sources as required by the EPA Administrator; and (5) provide for air quality modeling as prescribed by the Administrator.¹⁸ These SIPs apply to all areas within a state, regardless of their designation, and are subject to review by EPA, which approves or disapproves the SIP.¹⁹ If EPA finds the SIP “substantially inadequate,” the Agency must notify the state of those inadequacies and establish a deadline for the submission of revisions to the plan.²⁰

Third, states are required to bring any nonattainment areas within their borders into attainment by deadlines that are contained with the CAA and that are triggered from the date that EPA promulgates final designations.²¹ Section 172(c) of the Act enumerates requirements to be addressed by states in revisions to their SIPs to address nonattainment areas, including requirements for: (1) adoption of “reasonably available control technology”; (2) reasonable further progress annually; (3) a “comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant”; and (4) a revised permitting program for construction and operation of new or modified major sources in the nonattainment area.²² Subpart 4 of Part D of Title I of the Act also includes “Additional Provisions for Particulate Matter Nonattainment Areas” that are largely addressed initially by the states.²³ The SIP revisions must also be

¹⁸ *Id.* § 110(a)(2).

¹⁹ *Id.* § 110(k).

²⁰ *Id.* § 110(k)(5).

²¹ *Id.* § 172(a)-(b).

²² *Id.* § 172(c).

²³ *Id.* §§ 188-190.

submitted to EPA for approval or disapproval. All of these requirements that states must meet – and the deadlines by which they must meet them – are triggered by EPA’s promulgation of the Final PM Rule. If EPA determines that a state has failed to submit a SIP meeting these requirements, the Agency must adopt a federal implementation plan (“FIP”).²⁴

B. Regulation of PM Under the NAAQS Program

EPA issued the first NAAQS for PM in 1971.²⁵ Before the rulemaking that is the subject of this petition, EPA had revised the PM NAAQS three times: in 1987, 1997, and 2006.²⁶ Notably, the first NAAQS using a PM_{2.5} indicator were promulgated in 1997 and included standards with annual and 24-hour averaging times.²⁷ EPA revised the 24-hour PM_{2.5} NAAQS in 2006, but retained the annual standard.²⁸ The U.S. Court of Appeals for the District of Columbia Circuit remanded parts of the 2006 NAAQS to the Agency for reconsideration.²⁹ EPA published its most recent proposal concerning revisions to the PM NAAQS in June 2012, taking into account the D.C. Circuit’s remand as well as more recent scientific data.³⁰

Petitioners filed, or joined in, extensive comments on the Proposed Rule regarding the level of the standard, as well as on various aspects of the way in which EPA proposed to

²⁴ *Id.* § 110(c)(1).

²⁵ 36 Fed. Reg. 8186 (Apr. 30, 1971).

²⁶ 71 Fed. Reg. 61144 (Oct. 17, 2006); 62 Fed. Reg. 38652 (July 18, 1997); 52 Fed. Reg. 24634 (July 1, 1987).

²⁷ 62 Fed. Reg. at 38652/1.

²⁸ 71 Fed. Reg. at 61144/1.

²⁹ *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009).

³⁰ 77 Fed. Reg. 38890, 38893/1 (June 29, 2012) (“Proposed Rule”).

implement its new standard.³¹ Those comments largely took the position that the science did not warrant revision of any of the PM NAAQS and that near-road monitoring for PM_{2.5} was not appropriate. The comments also stressed the need for timely rules and guidance for implementation of any revised PM NAAQS.

On January 15, 2013, EPA published the Final PM Rule. In the Final Rule, EPA lowered the primary annual NAAQS for PM_{2.5} from 15 µg/m³ to 12 µg/m³.³² The Agency also added requirements for near-road monitors.³³ Other PM NAAQS were retained.³⁴ Despite recognition of “states’ need for timely guidance on how to implement the revised NAAQS,”³⁵ EPA failed to address many key aspects of implementation in the Final Rule.

³¹ See, e.g., AWC & AF&PA, Comments on EPA’s Proposed Rule on National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM) (Aug. 31, 2012), Doc. ID No. EPA-HQ-OAR-2007-0492-9526; API, Comments on the National Ambient Air Quality Standards for Particulate Matter (Aug. 31, 2012), Doc. ID No. EPA-HQ-OAR-2007-0492-9530; Chamber of Commerce, Comments on Proposed National Ambient Air Quality Standards for Particulate Matter (Aug. 31, 2012), Doc. ID No. EPA-HQ-OAR-2007-0492-9378; UARG, Comments on National Ambient Air Quality Standards for Particulate Matter (Aug. 31, 2012), Doc. Id No. EPA-HQ-OAR-2007-0492-9483; Nat’l Ass’n of Mfrs., Aluminum Ass’n, Am. Chemistry Council, Am. Coke & Coal Chems. Inst., AF&PA, Am. Foundry Soc., AISI, API, AWC, BCCA Appeal Group, Brick Industry Ass’n, CIBO, CRA, Hardwood Plywood and Veneer Ass’n, Industrial Energy Consumers of Am., Motor & Equipment Mfrs. Ass’n, Nat’l Ass’n for Surface Finishing, Nat’l Fed’n of Independent Business, NOPA, Nat’l Mining Ass’n, North American Die Casting Ass’n, Rubber Mfrs. Ass’n, Chamber, and Wisconsin Mfrs. & Commerce, Comments of the Associations Regarding the National Ambient Air Quality Standards for Particulate Matter Proposed Rules (Aug. 31, 2012), Doc. ID No. EPA-HQ-OAR-2007-0492-9425.

³² 78 Fed. Reg. at 3088/3.

³³ *Id.* at 3088/3, 3089/3.

³⁴ *Id.* at 3086/1.

³⁵ *Id.* at 3251/2.

C. Basis for Petition and Requested Relief

This petition focuses on two aspects of the Final Rule: (1) the provisions specifying near-road monitoring of PM_{2.5}; and (2) implementation issues. EPA's rationale for the requirement for near-road monitoring of PM_{2.5} changed between the Proposed Rule and Final Rule, depriving Petitioners of an opportunity to comment on the ultimate basis of such monitoring. Furthermore, EPA's failure to provide timely regulations, guidance, and tools for implementation of the revised NAAQS places both Petitioners and states in the untenable position of facing short-term requirements under the Act without the means to meet them. The situation is worsened because D.C. Circuit decisions since the EPA Administrator signed the Final Rule have invalidated portions of EPA's regulations governing implementation of existing PM_{2.5} NAAQS, and Petitioners have not had an opportunity to address the impact of these decisions on implementation of the revised annual PM_{2.5} NAAQS.

1. Reconsideration

This petition for reconsideration is filed pursuant to CAA § 307(d)(7)(B), which provides in relevant part:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time [period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.³⁶

This petition for reconsideration is appropriate because: (1) the objections raised in this petition are based on actions that EPA took for the first time in the Final Rule or developments

³⁶ CAA § 307(d)(7)(B).

(or lack thereof) since promulgation of the Final Rule, and thus Petitioners could not have raised them during the period for public comment on the Proposed Rule; (2) the objections arose during the period for seeking judicial review of the Final Rule;³⁷ and (3) Petitioners' objections are of central relevance to the outcome of the rulemaking. For the reasons presented below, EPA should immediately reconsider Final PM Rule both to address the near-road monitoring provisions of the Final Rule, as well as to provide through rulemaking the tools needed for its implementation.

2. Administrative Stay

EPA should also grant immediate administrative relief to alleviate the hardships imposed upon Petitioners and other affected parties. Specifically, Petitioners request that EPA immediately stay the effectiveness of the Final PM Rule, pursuant to CAA § 307(d)(7)(B) and EPA's general rulemaking authority under CAA § 301(a). The stay should remain in place until EPA promulgates, pursuant to the CAA's rulemaking provisions, the regulations, tools, and guidance required to implement the revised NAAQS, including under the Act's prevention of significant deterioration ("PSD") preconstruction permitting program.

II. EPA SHOULD RECONSIDER ITS REQUIREMENTS FOR NEAR-ROAD MONITORING OF PM_{2.5} AND STAY THE RULE PENDING RECONSIDERATION.

EPA changed the primary purpose for near-road monitoring between the Proposed and Final Rules. The Proposed Rule discussed a potential new requirement to place PM_{2.5} monitors near roads. At that time, however, the Agency emphasized the helpfulness of such monitors for research. Thus, although noting that the near-road network would support "collection of

³⁷ The Final PM Rule was published on January 15, 2013. Any petition for judicial review of that decision must be filed within 60 days. *Id.* § 307(b)(1). Thus, the filing deadline, pursuant to the Federal Rules of Appellate Procedure, is Monday, March 18, 2013. *See* FED. R. APP. P. 26(a)(1)(C).

NAAQS comparable data in the near-road environment,” EPA emphasized that the network would “support ... long-term health studies investigating adverse effects on people, provid[e] a better understanding of pollutant gradients impacting neighborhoods that parallel major roads, [enhance] availability of data to validate performance of models simulating near-road dispersion, characteriz[e] ... areas with potentially elevated concentrations and/or poor air quality, [and] [enhance] implementation of a multi-pollutant paradigm.”³⁸ The Agency emphasized the usefulness of the data for multi-pollutant research.³⁹ In fact, “EPA recognize[d] that the location of maximum concentration of PM_{2.5} from roadway sources might differ from the maximum location of [nitrogen dioxide (“NO₂”)] or other pollutants,” but the Agency nevertheless proposed to co-locate the PM_{2.5} monitors with NO₂ monitors to “maximize the utility of the network.”⁴⁰ In the Proposed Rule, the Agency referred only in passing to roadside monitors as reflecting significant population exposures.⁴¹

In the Final Rule, EPA promulgated a requirement to relocate some PM_{2.5} monitors to near-road locations.⁴² Under the Final Rule, these monitors must be co-located with the roadside

³⁸ 77 Fed. Reg. at 39009/2.

³⁹ *See, e.g., id.* at 39009/3 (noting near-road monitoring would “provide a valuable platform for ... measuring other pollutants besides PM_{2.5} mass to enhance knowledge of exposure in the near road environment”); *id.* at 39010/3 (referencing “multi-pollutant monitoring objectives” of the near-road monitoring network).

⁴⁰ *Id.* at 39010/2.

⁴¹ *See id.* at 39009/2 (“EPA believes that there are gradients in near-roadway PM_{2.5} that are most likely to be associated with heavily travelled roads ... with the largest numbers of impacted populations in the largest [core based statistical areas] in the country.”); 39010/1-2 (indicating that these areas “are likely to have greater numbers of exposed populations, a higher likelihood of elevated near-road PM_{2.5} concentrations, and a wide range of diverse situations with regard to traffic volumes, traffic patterns, roadway designs, terrain/topography, meteorology, climate, surrounding land use and population characteristics”).

⁴² 78 Fed. Reg. at 3241/1.

monitors for NO₂ that the Agency required when it adopted a 1-hour NAAQS for NO₂ in 2010.⁴³ These monitors will be used in assessing compliance with the NAAQS,⁴⁴ and likely for development of strategies to bring nonattainment areas into compliance.⁴⁵ In adopting a requirement for near-road PM_{2.5} monitors in the Final Rule, EPA concluded that such monitors are necessary “as the near-road environment is an area where significant public exposure can occur....”⁴⁶ This conclusion was not presented for public comment in the Proposed Rule.⁴⁷ In reaching this conclusion, the Agency relies on a report by the Census Bureau (hereinafter “Housing Survey”),⁴⁸ which was not cited in the Proposed Rule and thereby not subject to public

⁴³ *Id.*; see also 75 Fed. Reg. 6474, 6505/3 (Feb. 9, 2010) (final NO₂ NAAQS).

⁴⁴ 78 Fed. Reg. at 3238/2 (describing “a modest network of near-road compliance PM_{2.5} monitors”).

⁴⁵ As discussed in more detail below, EPA has failed to provide states with information on SIPs for nonattainment areas. See *infra* Section III.A.

⁴⁶ 78 Fed. Reg. at 3241/1; see also EPA, Responses to Significant Comments on the 2012 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter (June 29, 2012; 77 FR 38890) at V-8 (Dec. 2012), Doc. ID No. EPA-HQ-OAR-2007-0492-10095 (“RTC”) at V-8 (“significant fraction of the population lives, works, plays and goes to school near major roads”); *id.* at V-17 (“people spend a substantial amount of time in these environments . . . near-road monitoring is important to ensure that public health is protected”); *id.* at V-20 to V-21 (“large numbers of people (in the tens of millions) . . . live, work, play, and go to school in close in proximity to major roadways”).

⁴⁷ Comments were solicited, instead, on the “approach” to near-road monitoring, “especially the proposed network design requirements; any alternative strategies that would provide comparable long-term characterization of PM_{2.5} in area-wide locations of maximum concentration in the absence of a specific near-road compliance requirement for monitoring of PM_{2.5}; priorities for the collection of supplemental data at a small subset of near-road monitoring sites to enhance knowledge of particle exposure (e.g., noncompliance [special purpose monitors]); and the interest of monitoring agencies (or other parties) in the collection of supplemental (e.g., non-compliance) measurements relevant for the near-road environment.” 77 Fed. Reg. at 39011/1.

⁴⁸ 78 Fed. Reg. at 3239-40 n.228 (citing U.S. Census Bureau, U.S. Dep’t of Commerce, H1 50/09, American Housing Survey for the United States: 2009, Current Housing Reports (2011), available at <http://www.census.gov/prod/2011pubs/h150-09.pdf> (“Housing Survey”).

comment. EPA relies on the Housing Survey for the proposition that “45 million Americans live within 300 feet of a major roadway or other source of mobile emissions.”⁴⁹

The Agency’s current rationale for near-road monitoring deviates sufficiently sharply from the rationale given in the Proposed Rule that affected parties, including Petitioners, did not have an opportunity to comment on it.⁵⁰ The fact that EPA received comments in support of this new rationale is unavailing.⁵¹ EPA cannot “bootstrap notice [of its new rationale] from a comment” on the Proposed Rule.⁵² Accordingly, because this issue arose after publication of the Final Rule, but during the period for judicial review, and because the character of the monitoring network is of central relevance to determining attainment with and compliance strategies for the revised NAAQS,⁵³ reconsideration of the near-road monitoring requirement is warranted.

Moreover, EPA’s new rationale does not justify near-road PM_{2.5} monitoring. As a preliminary matter, not all of the 45 million Americans considered in the Housing Survey live near highways; an unknown proportion of them live in the vicinity of other types of facilities or even water bodies.⁵⁴ Additionally, the existence of residences near roadways does not, in and of

⁴⁹ 78 Fed. Reg. at 3239 n.228; *see also* RTC at V-8.

⁵⁰ *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (while an agency can make changes between issuance of the proposal and the final rule, “if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.”).

⁵¹ *See, e.g.*, 78 Fed. Reg. at 3239/3.

⁵² *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (internal citation omitted).

⁵³ *See supra* nn.44-45, and accompanying text.

⁵⁴ Housing Survey at 26. The Housing Survey actually uses the term “4-or-more lane highway, railroad, airport, bodies of water” and specifies that it “include[s] divided or undivided highways of at least four lanes, railroad or streetcar tracks, public, private, or military airfields.”

itself, provide justification for a roadside monitor requirement for several reasons. First, air inside residences is not ambient air, and, therefore, is not regulated by NAAQS. Ambient air is, by definition, “external to buildings.”⁵⁵ Second, it is highly unlikely that people are outside in ambient air 24-hours at a time, let alone for a full year. Yet those are the averaging times for the PM_{2.5} NAAQS.⁵⁶ Third, the “composite monitor distributions” that were used for the studies that underlie the PM_{2.5} NAAQS reflect the PM_{2.5} exposure of the population as a whole.⁵⁷ By representing the exposure of the population *in toto*, these composite monitor values necessarily represent those members of the population who spend greater than average time near roads.

The Clean Air Scientific Advisory Committee (“CASAC”) cautioned EPA against emphasizing roadside monitoring for PM_{2.5} because it might not reflect the concentrations (and exposures) of greatest health concern:

The majority of panelists acknowledged that there is an increment to PM_{2.5} in the near road environment. They did not suggest that the near road environment will represent the areas of highest PM_{2.5} ... including the combination of primary emissions and secondary formation processes. The committee was also generally in agreement that mass based measurements and specifically the

Id. App. A at A-5. The population living in the vicinity of these facilities is not reported in the Housing Survey, and EPA has not explained its derivation.

⁵⁵ 40 C.F.R. § 50.1(e).

⁵⁶ This is in contrast to the relevance of exposure to near-road short-term peaks for the NO₂ NAAQS, which include a standard with a one-hour averaging time. Although there is also an annual NAAQS for NO₂, the near-road NO₂ monitors are to be sited based solely on consideration of the one-hour NO₂ NAAQS. EPA, EPA-454/B-12-002, Near-road NO₂ Monitoring Technical Assistance Document at ES-1 (June 2012) (“NO₂ TAD”) (“[S]tate and local air monitoring agencies are required to install near-road NO₂ monitoring stations at locations where peak hourly NO₂ concentrations are expected to occur....”).

⁵⁷ See 78 Fed. Reg. at 3102/1-2 & n.24; 77 Fed. Reg. at 38904/3 -05/1.

PM_{2.5} [Federal Reference Method] is not appropriate for use at the near road NO₂ sites.⁵⁸

Indeed, CASAC indicated PM_{2.5} should be given relatively low priority as a candidate for near-road monitoring.⁵⁹ Thus, EPA should reconsider its decision, based on the Housing Survey, to require relocations of some of the existing compliance monitors for PM_{2.5} to roadsides.

Had Petitioners known that EPA was concerned primarily with exposures of the population living near roadways (as opposed to research), they would have commented that co-locating PM_{2.5} monitors at the sites of the NO₂ monitors would not reflect exposures of the 45 million people about whom EPA is concerned. Siting of the NO₂ monitors is not based primarily on the population nearby,⁶⁰ but on the road segments with the greatest traffic.⁶¹ These road segments are likely to be interstate highways,⁶² not the four-lane roads considered highways in the Housing Survey that are more likely to be lined with residential buildings.⁶³ Moreover, NO₂

⁵⁸ See Letter from Armistead (Ted) Russell, Chair, CASAC Ambient Air Monitoring & Methods Comm. & Jonathan M. Samet, Chair, CASAC, to Lisa P. Jackson, at xix (Nov. 24, 2010), available at <http://yosemite.epa.gov/sab/sabproduct.nsf/WebReportsbyTopicCASAC!OpenView&Start=1&Count=1000&Expand=2.1.1#2.1.1> (“CASAC Letter”).

⁵⁹ *Id.* at xi-xii (CASAC placed PM_{2.5} seventh in terms of priority for near-road monitoring on a list of thirteen pollutant groups about which EPA had asked, after NO₂, NO, and NO_x; CO; ultrafine particles/particle number; particles size distribution; and PM_{10-2.5}); NO₂ TAD at 82 tbl. 16-1 (identifying PM_{2.5} as a “tertiary” priority for near-road monitoring).

⁶⁰ Population is a consideration in identifying those core-based statistical areas required to operate at least one near-road NO₂ monitor. 40 C.F.R. pt. 58, App. D, § 4.3.2 (2012).

⁶¹ See *id.* § 4.3.2(a)(1) (explaining that monitors are to be located by a road segment with a high annual average daily traffic count).

⁶² See NO₂ TAD at 24, tbl. 6-1.

⁶³ Four-lane highways, as defined by the Housing Survey cited by EPA, include many roads that would not typically be “highways” in common parlance. The Housing Survey apparently considers *any* road with at least four lanes, even one that is not divided, to be a highway. See Housing Survey App. A at A-5. Many roads meet this definition. By contrast a “highway” is generally taken to be “a main road, especially one connecting major towns or

monitors are to be located as close as possible to the outside nearest edge of traffic lanes of these interstate highways.⁶⁴ Very few residential buildings would be as close as possible to any road, and certainly not that close to an interstate highway. PM_{2.5} levels drop rapidly moving away from the immediate side of a road,⁶⁵ meaning that PM_{2.5} concentrations measured at the location of NO₂ monitors will almost certainly be higher than those at the closest residence.

In fact, research funded by EPA has identified traffic as a significant predictor of concentrations measured at existing compliance monitors for the PM_{2.5} NAAQS. Investigators reported that traffic was the best predictor of PM_{2.5} concentrations at monitors in the database on which EPA relies to determine compliance with the PM_{2.5} NAAQS.⁶⁶ Thus, even if exposure to traffic-related PM_{2.5} is of concern to EPA, relocating PM_{2.5} monitors to the site of near-road NO₂ monitors is not warranted. The current PM_{2.5} monitoring network adequately captures that source. Moreover, the current monitoring network consists of “monitoring stations or sites [that] ... represent community wide air quality.”⁶⁷ At least one of the monitors in the network “is to be sited in a population-oriented area of expected maximum concentration.”⁶⁸ Changing the

cities.” Oxford Dictionaries, <http://oxforddictionaries.com/definition/english/highway?q=highway> (last visited Mar. 18, 2013) (definition of “highway”).

⁶⁴ 40 C.F.R. pt. 58, App. E, § 6.4(a). NO₂ monitors may not be located further than fifty meters from the road, *id.*, and EPA “strongly encourages” that the monitors be located no further than twenty meters from the edge of the closest traffic lane, NO₂ TAD at 45.

⁶⁵ See Leonard M. Zwack, et al., *Characterizing Local Traffic Contributions to Particulate Air Pollution in Street Canyons Using Mobile Monitoring Techniques*, 45 *Atmospheric Env't* 2507, 2512 & fig. 3 (2011).

⁶⁶ See Zev Ross, et al., *A Land Use Regression for Predicting Fine Particulate Matter Concentrations in the New York City Region*, 41 *Atmospheric Env't* 2255, 2260-61 (2007).

⁶⁷ 40 C.F.R. pt. 58, App. D, § 4.7.1(b).

⁶⁸ *Id.* § 4.7.1(b)(1).

network to mandate near-road monitors simply is not warranted to reflect either exposure to PM_{2.5} related to mobile sources or the maximum PM_{2.5} concentrations to which the population will be exposed.

In short, EPA's new rationale does not support the requirement for near-road PM_{2.5} monitoring. The Agency should reconsider and rescind that requirement.

III. EPA SHOULD RECONSIDER THE REVISED PM_{2.5} NAAQS TO PROVIDE THROUGH RULEMAKING THE REGULATIONS, GUIDANCE, AND TOOLS NECESSARY FOR IMPLEMENTATION AND SHOULD STAY THE RULE DURING RECONSIDERATION.

In the Final Rule, EPA acknowledges that rules, guidance, and tools still needed to be issued to assist with implementation of the revised NAAQS. To date, EPA has not issued any of the required materials in final form. Moreover, recent D.C. Circuit decisions have vacated, remanded, or both vacated and remanded portions of past implementation rules upon which EPA relied in setting the revised NAAQS. The lack of necessary implementation rules, guidance, and tools – and the recent court decisions invalidating key portions of existing PM_{2.5} implementation rules – are, as is discussed in greater detail below, of central relevance to the revised NAAQS. Without these tools, implementation of the revised NAAQS in the manner that Congress specified cannot be achieved. Both EPA's failure to provide necessary rules, guidance and tools and the court's decisions against EPA's existing implementation rules for PM_{2.5} occurred followed the comment period on the Proposed Rule (but within the period to seek judicial review of the Final Rule). Accordingly, EPA should reconsider the Final Rule to address the requirements for implementation of the PM_{2.5} NAAQS and should stay the rule until this reconsideration has been completed.

A. Missing Rules and Guidance for States Implementing the Revised NAAQS

The D.C. Circuit recently underscored the cooperative federalism nature of the NAAQS program:

EPA is the first mover in regulating ambient air pollution in Title I of the Clean Air Act. Section 109 requires EPA to promulgate NAAQS for common air pollutants. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 462, 121 S. Ct. 903, 149 L.Ed.2d 1 (2001) (citing 42 U.S.C. § 7409(a)). But once EPA sets a NAAQS, “responsibility under the Act shifts from the federal government to the states.” *Lead Industries Ass’n v. EPA*, 647 F.2d 1130, 1137 (D.C. Cir. 1980).⁶⁹

As EPA recognizes in the Final Rule, implementation obligations are imposed on states as a matter of law once the Agency has promulgated a new or revised NAAQS. For example, section 107(d)(1)(A) of the Act requires each state governor to submit to EPA within a year after the NAAQS promulgation a list that designates areas within the state as attainment, nonattainment, or unclassifiable.⁷⁰ Section 110(a)(2) of the Act requires each state to submit to EPA what the Agency refers to as an “Infrastructure SIP” within three years of the promulgation of the revised NAAQS.⁷¹ For areas that are designated nonattainment for the revised NAAQS, states must also subsequently adopt and implement control programs to bring those areas into attainment within statutorily-prescribed time periods.⁷² As EPA recognizes, “[i]f a state fails to

⁶⁹ *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 30 (D.C. Cir. 2012).

⁷⁰ *See* 78 Fed. Reg. at 3249/1-2. EPA characterizes each of these lists as a “recommendation to which the EPA must respond via a specified process if the EPA does not accept it.” *Id.* at 3249 n.242. Simply because EPA may modify a state’s action does not mean that action is merely a “recommendation.” Indeed, the D.C. Circuit has cited section 107(a) as one of the ways – along with SIPs – in which “[t]he Clean Air Act ordinarily gives States the initial opportunity to implement a new air quality standard on sources within their borders.” *EME Homer City*, 696 F.3d at 28.

⁷¹ *See* 78 Fed. Reg. at 3251/1.

⁷² CAA § 189.

adopt and implement the required SIPs by the time periods provided in the CAA, the EPA has responsibility under the CAA to adopt a Federal Implementation Plan (FIP) to ensure that areas attain the NAAQS in an expeditious manner.”⁷³

In light of these looming deadlines for state actions, EPA acknowledged in the Final Rule “states’ need for timely guidance on how to implement the revised NAAQS,” but said that the Agency “is not able to propose an implementation rule or finalize any aspect of the implementation program beyond [a] PSD grandfathering provision....”⁷⁴ EPA made this assertion even though EPA solicited – and received – comments on numerous implementation topics beyond the limited PSD permit grandfathering provision.⁷⁵ In the preamble to the Final Rule, EPA promised rules and guidance in the near future concerning implementation of the new NAAQS, but the Agency has not issued anything final to date.

For example, after acknowledging that “developing recommendations on appropriate nonattainment area boundaries is a significant effort for states, especially for states with little or no experience in PM_{2.5} air quality planning,”⁷⁶ EPA repeatedly promised to provide “designation guidance and technical information shortly after the NAAQS are promulgated.”⁷⁷ Although it is

⁷³ 78 Fed. Reg. at 3249/1.

⁷⁴ *Id.* at 3251/2.

⁷⁵ *See* 77 Fed. Reg. at 38890, 39016/3-39021/2, 39027/2-39030/2; RTC at VI-1 to VI-29, VII-6 to VII-8.

⁷⁶ 78 Fed. Reg. at 3251/1.

⁷⁷ RTC at VI-3; *see also id.* (“EPA intends to address the factor analysis and boundary setting process in the designation guidance to the states and tribes, expected to be available shortly after promulgation of the PM NAAQS.”); *id.* at VI-4 (“EPA intends to provide designation guidance and technical information shortly after the NAAQS are promulgated. The EPA expects this guidance to include the intended designation categories for area designations for the revised primary annual PM_{2.5} NAAQS.”); *id.* (“Shortly after the NAAQS are

now more than three months since Administrator Lisa Jackson signed the Final Rule, and even though the CAA requires states to undertake the “significant effort” to submit their list of designations for the revised PM NAAQS in less than nine months from now,⁷⁸ the Agency has posted *nothing* to date on the website on which it announced the planned guidance would be provided.⁷⁹

EPA similarly indicated that it intended to “issue, in the very near future, a guidance document on section 110 infrastructure SIP requirements, which will aim to help states develop SIP submissions for all NAAQS, including the revised PM_{2.5} NAAQS.”⁸⁰ In the Final Rule, the Agency also indicated that it “may issue supplemental infrastructure SIP guidance specific to the revised PM_{2.5} if needed.”⁸¹ EPA has yet to provide either general or PM_{2.5}-specific guidance on infrastructure SIPs. Moreover, to the extent that this guidance specifies what states *must* include in their infrastructure SIPs,⁸² it should be issued as a rule,⁸³ meaning that states and the public

promulgated, the EPA intends to further clarify in designations guidance and technical information the use of monitoring data, factor analyses, and ‘contribution.’”).

⁷⁸ See 78 Fed. Reg. at 3251/1.

⁷⁹ See *id.* (citing <http://www.epa.gov/pmdesignations> (last visited on March 18, 2013)).

⁸⁰ RTC at VI-7; see also 78 Fed. Reg. at 3251/1-2 (discussing same guidance).

⁸¹ 78 Fed. Reg. at 3251/2.

⁸² See RTC at VI-8 (“EPA agrees that for infrastructure SIPs to be approvable for the revised PM_{2.5} NAAQS, SIP submissions need to address all infrastructure-related requirements that have become applicable since the PM_{2.5} NAAQS were revised in 2006. The EPA’s forthcoming guidance ... will include discussion of these requirements.”).

⁸³ Exemptions from the requirement for notice-and-comment rulemaking must be construed narrowly. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (discussing notice and comment requirement of Administrative Procedure Act § 553). A document, even if labeled as guidance, must be adopted using rulemaking procedures if it “denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement’s position.” *McLouth Steel Prod.*

must be provided notice and a reasonable opportunity to comment on it, and EPA must take those comments into account in finalize the rule.⁸⁴

In the Final Rule, EPA also indicated its plans to develop an implementation rule.⁸⁵ That rule will address implementation requirements applicable to areas that are designated nonattainment for the revised PM_{2.5} NAAQS.⁸⁶ EPA stated that it “intends to finalize” that rule “around the time the initial area designations process is finalized,” *i.e.*, December 2014.⁸⁷ This is an ambitious schedule given that EPA does not yet have a projected publication date for a draft of the rule,⁸⁸ and given that it took between a year and a half and two years for EPA to finalize its implementation rules for the 1997 PM_{2.5} NAAQS.⁸⁹ Moreover, even if EPA issues an implementation rule at the time of final designations, it is unclear whether that schedule would provide sufficient time for states to develop and adopt their SIPs for nonattainment areas, which must be submitted within eighteen months of the nonattainment designation.⁹⁰

Corp. v. Thomas, 838 F.2d. 1317, 1320 (D.C. Cir. 1988). Agencies, including EPA, cannot immunize such documents from the requirement to conduct rulemaking by characterizing them as guidance or a policy statement. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000).

⁸⁴ *See* CAA § 307(d); 5 U.S.C. §§ 551(4), 553(b).

⁸⁵ 78 Fed. Reg. at 3251/2.

⁸⁶ RTC at VI-5.

⁸⁷ 78 Fed. Reg. at 3251/2; *see also* RTC at VI-5.

⁸⁸ *See* EPA, Implementation Rule for 2012 PM_{2.5} NAAQS, *available at* <http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2060-AQ48> (last visited Mar. 18, 2013).

⁸⁹ *See* 73 Fed. Reg. 28321 (May 16, 2008) (Final PM_{2.5} New Source Review (“NSR”) Implementation Rule); 72 Fed. Reg. 20586 (Apr. 25, 2007) (Final PM_{2.5} SIP-Related Implementation Rule); 70 Fed. Reg. 65984 (Nov. 1, 2005) (Proposed PM_{2.5} Implementation Rule).

⁹⁰ CAA § 189(a)(2)(B).

EPA must provide states with the necessary rules and guidance to complete designations, infrastructure SIPs, and control strategy SIPs so that the states have a reasonable opportunity to fulfill these implementation obligations for the revised PM_{2.5} NAAQS. The D.C. Circuit’s recent explanation that the NAAQS program is built on principles of cooperative federalism⁹¹ means EPA must respect states’ rights to have the first opportunity for implementation following promulgation of a new NAAQS.⁹² EPA must therefore provide states with the tools to implement NAAQS so states have a meaningful opportunity as the “first implementer.”⁹³

A fundamental problem with the Cross-State Air Pollution Rule (“CSAPR”) at issue in *EME Homer City* – and a fundamental reason the D.C. Circuit vacated CSAPR – was that EPA deprived states of their authority to implement a NAAQS within their borders by issuing FIPs without first telling states what their implementation responsibilities were and giving them a reasonable time to fulfill them.⁹⁴ Similarly here, if states are not given the guidance they need to implement the PM_{2.5} revised NAAQS, they will be powerless to exercise their implementation authority because EPA has not provided them with guidance as to *how* to exercise their authority. As the Court recognized, “By the time EPA makes the target clear, it’s already too late for the States to comply.”⁹⁵

⁹¹ See *EME Homer City*, 696 F.3d at 29.

⁹² *Id.* at 28.

⁹³ See *id.* at 32, 37 (explaining that when a state needs “more precise guidance” from EPA to define a SIP obligation, EPA “must give” that state “a reasonable first opportunity” to fulfill that obligation before stepping in and taking federal action).

⁹⁴ *Id.* at 32-33.

⁹⁵ *Id.* at 32.

In light of the short statutory timeline for states to take action before EPA itself is obliged to make designations and impose FIPs, EPA must promulgate regulations governing, and provide guidance to the states concerning, implementation of a NAAQS at the time it is revised. The issuance of a new or revised NAAQS triggers timing deadlines for states under the CAA, and states cannot fulfill their obligations under the Act without such rules and guidance. Because EPA has not specified for states the necessary requirements for implementation of the revised NAAQS (in terms of rules and guidance), it must stay the Final Rule pursuant to CAA § 307(d)(7)(B), and extend the stay as long as necessary pursuant to § 301(a), until it has provided states with the rules and guidance that they need to fulfill their CAA obligations with regard to the revised PM_{2.5} NAAQS.

B. Missing Regulations, Guidance, and Tools for Members of the Regulated Community Seeking PSD Permits

Members of the regulated community also immediately face requirements as a result of the revised PM_{2.5} NAAQS. As EPA stated, the “final rule revising the primary annual PM_{2.5} NAAQS will affect PSD permitting requirements as of the effective date of [the] final rule, March 18, 2013, which is also the effective date of the revised PM_{2.5} NAAQS.”⁹⁶ As with the implementation issues affecting states discussed above, EPA has failed to provide timely guidance and tools necessary for this permit application process. EPA’s provision of a grandfathering provision for certain pending permit applications⁹⁷ fails to resolve the problems

⁹⁶ 78 Fed. Reg. at 3252/1; *see also id.* at 3259/1 (“Upon the effective date of today’s final revisions to the PM NAAQS, proposed new major stationary sources and major modifications that are not grandfathered from the new requirements ... will be required to demonstrate compliance with the suite of PM NAAQS, including the revised primary annual PM_{2.5} NAAQS.”).

⁹⁷ *Id.* at 3258/3-3259/1; *see also id.* at 3281/2-3 (to be codified at 40 C.F.R. § 52.21(i)(11)).

of many applicants for PSD permits, however. Not all PSD permit applicants will qualify for such grandfathering.

Apparently EPA recognizes that providing for grandfathering of a limited number of PSD permit applicants will not resolve the difficulties the revised PM_{2.5} NAAQS pose for future applicants who seek to expand existing operations or develop new ones (thereby creating new jobs in this difficult economy). In the Final Rule, EPA indicated that it intended “to issue final guidance by the end of calendar year 2012, prior to the effective date of today’s final PM NAAQS revisions,” addressing “appropriate technical approaches for conducting a PM_{2.5} NAAQS compliance demonstration.”⁹⁸ The Agency did not issue such guidance by the end of 2012, however. Instead, EPA released *draft* guidance for public comment on March 4, 2013.⁹⁹ Although EPA has indicated that it expects to release final guidance by July 31, 2013,¹⁰⁰ the history of this document’s development does not inspire confidence that EPA will meet that deadline. The Agency had initially planned to release the *draft* in Fall 2011.¹⁰¹ And even if EPA meets its intended July 31, 2013 goal for releasing final guidance, that will still be more than

⁹⁸ *Id.* at 3259/2. Elsewhere, EPA indicated that its plan was “to provide this draft guidance for public review and comment soon after final rule signature, no later than [the] end of calendar year [2012] with the intent of issuing final guidance in Spring 2013.” RTC at VI-17.

⁹⁹ Memorandum from Stephen D. Page, Dir., Office of Air Quality Planning & Standards, EPA, to Air Division Dirs., EPA, EPA 454/D-13-001, Draft Guidance for PM_{2.5} Permit Modeling (Mar. 4, 2013), *available at* http://www.epa.gov/ttn/scram/guidance_permit.htm.

¹⁰⁰ *Id.* at 4.

¹⁰¹ George M. Bridgers, Draft PM_{2.5} Permit Modeling Guidance, 10th Conference on Air Quality Modeling, RTP, NC (Mar. 14, 2012), *available at* <http://www.epa.gov/ttn/scram/10thmodconfpres.htm>.

four months *after* applicants for PSD permits were first required to address the revised PM_{2.5} NAAQS.¹⁰²

The problems for those in industry seeking a PSD permit extend, however, well beyond the question of what approach applicants must take when performing a compliance demonstration for the revised PM_{2.5} NAAQS. Industry commenters on the Proposed Rule identified many limitations in EPA's current technical modeling tools.¹⁰³ The Agency acknowledged that there are problems for those seeking permits,¹⁰⁴ but did not commit to address them immediately. Indeed, in several cases, the Agency explicitly deferred any regulatory response to the comments until a future revision of its Guideline on Air Quality Models (published as Appendix W of 40 C.F.R. part 51),¹⁰⁵ which is not planned for completion until 2015.¹⁰⁶

Similarly, commenters pointed out problems with EPA's tools for measuring or estimating emissions.¹⁰⁷ Indeed, technical information generated and compiled by the National Council for Air and Stream Improvement (NCASI) in late 2012 – after the close of the comment

¹⁰² See 78 Fed. Reg. at 3259/1.

¹⁰³ See, e.g., RTC at VI-16 to VI-20 (noting concerns expressed in comments about the existing AERMOD and CALPUFF regulatory models).

¹⁰⁴ See e.g., *id.* at VI-17 (“The EPA acknowledges the need to conduct a thorough review and evaluation of existing and developing models and modeling techniques to address the complexities of accounting for PM_{2.5} impacts for single sources.”).

¹⁰⁵ See, e.g., *id.* at VI-18, VI-20.

¹⁰⁶ Tyler J. Fox, Overview of EPA's Process & Scope for Updating Appendix W, 10th Conference on Air Quality Modeling, RTP, NC (Mar. 13, 2012) *available at* <http://www.epa.gov/ttn/scram/10thmodconfpres.htm>.

¹⁰⁷ See RTC at VI-25 to VI-26 (noting comments concerning measurement of emissions from wet stacks and AP-42 emission factors).

period on the Proposed Rule – and subsequently shared with the Agency’s technical staff, indicates that currently promulgated versions of EPA measurement techniques for particulate matter emissions, Methods 201A and 202, can significantly overstate PM_{2.5} emissions from both process-area and combustion sources. For certain categories of low PM_{2.5} emitting sources (e.g., boilers firing natural gas, and sources with wet stacks), emissions may be overstated by up to four times the true level of emissions. This overstatement could mean the difference between compliance and non-compliance with the PM_{2.5} NAAQS, a problem that is more acute with the newly-promulgated, more stringent standard. As was the case with regard to industry comments on the inadequacy of the available air quality models, the Agency acknowledged the validity of the concerns about emission measurements.¹⁰⁸ EPA indicated, however, that development and approval of an improved tool to measure PM_{2.5} emissions from wet stacks is “several years” away.¹⁰⁹

The lack of realistic tools to quantify emissions or to estimate them accurately, and the lack of modeling and modeling approaches that provide realistic predictions of the ambient impacts of those emissions, are effective bars to permitting many sources that will not, in fact, cause or contribute to NAAQS violations. The stricter revised PM_{2.5} NAAQS amplifies the problems created by this dearth of appropriate, realistic tools. It raises the specter of a *de facto* moratorium on PSD permits for sources of PM_{2.5} or PM_{2.5} precursor emissions.

When establishing the grandfathering program for certain PSD permit application in the preamble to the Final Rule, EPA recognized that the PSD program “call[s] for a balancing of

¹⁰⁸ *Id.* at VI-26 (“The EPA recognizes the need to develop a method which quantifies PM_{2.5} emissions in a wet stack environment.”).

¹⁰⁹ *Id.*

economic growth and protection of air quality.”¹¹⁰ Indeed, EPA cites “[l]egislative history [that] illustrates Congressional intent to avoid a moratorium on construction and delays in permit processing.”¹¹¹ Because the Final Rule will effectively create such a moratorium for any sources that have not already submitted what is deemed to be a complete permit application or a permit application on which notice of a preliminary determination has been published, EPA should reconsider the date by which PSD permit applications must address the revised PM_{2.5} NAAQS. The EPA should defer the requirement for *any* permit application to address the revised PM_{2.5} NAAQS until a reasonable time after the Agency has provided the necessary guidance and tools for permit applicants to use in addressing that standard, and, in the meantime, stay the Final Rule.

C. New Information Limiting Reliance on Existing Regulations, Guidance, and Tools Used In Implementing Prior PM_{2.5} NAAQS

In the Final Rule, “EPA notes that fine particle standards have been implemented by States and regulated entities for a number of years already and there are a number of technical tools in place already to facilitate the implementation of a newly revised PM_{2.5} standard.”¹¹² First, as discussed above, such tools are lacking. Second, since the Final Rule was signed, aspects of three key implementation rules that go back to the first PM_{2.5} NAAQS, established in 1997, have been remanded and, in some instances, vacated. The Final Rule, alludes to EPA’s identification of “certain PM_{2.5} precursors (SO₂ and NO_x) as regulated NSR pollutants” in a May 2008 rule on NSR of PM_{2.5}, suggesting that the same provisions apply to the revised PM_{2.5}

¹¹⁰ 78 Fed. Reg. at 3255/2.

¹¹¹ *Id.*

¹¹² RTC at VI-11; *see also id.* at VI-23 (“Permitting procedures and tools should already be in place for the previously existing primary annual PM_{2.5} NAAQS, and these same procedures and tools are applicable to the revised standard.”).

NAAQS.¹¹³ After the signature of the Final Rule, however, the D.C. Circuit remanded that 2008 rule to the Agency.¹¹⁴ Focusing on EPA’s decision to address areas that were designated nonattainment for previous PM_{2.5} NAAQS under Subpart 1 of Part D of Title I of the Act instead of Subpart 4, the D.C. Circuit specifically questioned EPA’s identification of PM_{2.5} precursors to be regulated.¹¹⁵

In the Final Rule, EPA also indicates that “permitting decisions should continue to be based on ... the [significant impact levels (“SILs”)] and [significant monitoring concentrations (“SMC”)] for PM_{2.5} in existing regulations.”¹¹⁶ But in January 2013 the D.C. Circuit vacated and remanded “some portions of the EPA’s rule establishing [PM_{2.5}] SILs” and vacated the parts of the rule that established the PM_{2.5} SMC “because these parts of the rule exceed the EPA’s statutory authority.”¹¹⁷ Although in the Final Rule EPA addressed the likely vacatur of the SILs provisions (which EPA had requested, so that it could “correct” them) saying the Agency does not “preclude appropriate use of the PM_{2.5} SILs in the interim,”¹¹⁸ EPA did not consider the implications of an SMC vacatur.

¹¹³ 78 Fed. Reg. at 3252/3 (citing 73 Fed. Reg. 28321 (May 16, 2008) (PM_{2.5} NSR Implementation Rule)).

¹¹⁴ *NRDC v. EPA*, 706 F.3d 428 (D.C. Cir. 2013).

¹¹⁵ *Id.* at 429, 435 n.7. In the Final Rule, EPA does not indicate whether it intended the revised PM_{2.5} NAAQS to be implemented under Subpart 1 or under Subpart 4. EPA likely assumed that the new PM_{2.5} NAAQS would be implemented under Subpart 1, as was the case for the previously issued NAAQS. The D.C. Circuit’s decision that nonattainment of PM_{2.5} NAAQS must be addressed under Subpart 4 has implications for many aspects of implementation of the new revised NAAQS that extend beyond PSD permitting, including classifications, attainment dates, control requirements, and applicability of nonattainment NSR.

¹¹⁶ 78 Fed. Reg. at 3260/3; *see also* RTC at VI-21.

¹¹⁷ *Sierra Club v. EPA*, 705 F.3d 458, 469 (D.C. Cir. 2013).

¹¹⁸ 78 Fed. Reg. at 3260/1.

Because EPA has not yet provided states with regulations and guidance regarding implementation of the revised PM_{2.5} NAAQS, because EPA has not yet provided the necessary guidance and tools needed to obtain PSD permits for the revised PM_{2.5} NAAQS, and because EPA did not consider the recent D.C. Circuit decisions concerning implementation of PM_{2.5} NAAQS, Petitioners request EPA to reconsider the Final Rule and stay the Rule pending reconsideration.

IV. CONCLUSION

For the foregoing reasons and in light of the fundamental and central relevance of the issues raised in this Petition, which arose after the close of the comment period but during the period for judicial review, the Administrator should reconsider the Final PM Rule pursuant to section 307(d)(7)(B) of the CAA and should conduct notice-and-comment rulemaking on the near-road monitoring provisions of the Final Rule and regulations and guidance needed for implementation of the revised NAAQS.

Moreover, EPA should administratively stay that Rule for a period of three months pursuant to section 307(d)(7)(B) of the Act and extend the stay until the necessary and appropriate revisions to the Final PM Rule are finalized and necessary implementation guidance, regulations, and implementation tools are available.

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