Oral Argument Not Yet Scheduled

No. 15-1385 (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494)

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

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency 80 FED. REG. 65,292 (OCT. 26, 2015)

STATE PETITIONERS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 15-1385: Murray Energy Corporation.

No. 15-1392: State of Arizona; State of Arkansas; New Mexico Environment Department; State of North Dakota; and State of Oklahoma.

No. 15-1490: Sierra Club; Physicians for Social Responsibility; National Parks Conservation Association; Appalachian Mountain Club; and West Harlem Environmental Action, Inc.

No. 15-1491: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Petroleum Institute; Utility Air Regulation Group; Portland Cement Association; American Coke and Coal Chemicals Institute; Independent Petroleum Association of America; National Oilseed Processors Association; and American Fuel & Petrochemical Manufacturers.

No. 15-1494: State of Texas; and Texas Commission on Environmental Quality.

Respondents:

Respondents are the United States Environmental Protection Agency (in No. 15-1385) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1392, 15-1490, 15-1491, 15-1494).

Intervenors and *Amici Curiae*:

State of Wisconsin; Commonwealth of Kentucky; State of Utah; and State of Louisiana are Petitioner-Intervenors†

American Lung Association; Natural Resources Defense Council; Physicians for Social Responsibility; Sierra Club; Utility Air Regulatory Group; National Association of Manufacturers; American Forest & Paper Association; Chamber of Commerce of the United States of America; American Chemistry Council; American Coke and Coal Chemicals Institute; American Petroleum Institute; Independent Petroleum Association of America; American Iron and Steel Institute;

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† This Brief uses the term "State Petitioners" to refer collectively to the Petitioners in Nos. 15-1392 and 15-1494 as well as the State Intervenors.

National Oilseed Processors Association; Portland Cement Association; American Wood Council; American Fuel & Petrochemical Manufacturers; and American Foundry Society are Respondent-Intervenors.

American Thoracic Society is *amici curiae* in support of Petitioners.

Institute for Policy Integrity at New York University School of Law is *amici curiae* in support of Respondents.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, "National Ambient Air Quality Standards for Ozone," and published on October 26, 2015, at 80 FR 65,292.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of no other related cases.

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GLOSSARY

Agency	United States Environmental Protection Agency
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
FR	Federal Register
NAAQS	National Ambient Air Quality Standard
NASA	National Aeronautics and Space Administration
NOAA	National Oceanographic and Atmospheric Administration
O_3	Ozone
ppb	Parts Per Billion
SIP	State Implementation Plan

JURISDICTIONAL STATEMENT

This case challenges the following final rule promulgated by the United States Environmental Protection Agency (EPA): "National Ambient Air Quality Standards for Ozone," 80 FR 65,292 (October 26, 2015)) (the "Rule"). Petitioners filed their Petitions for Review under 42 U.S.C. § 7607(b) within 60 days of the Rule's publication in the Federal Register, as required by the statute. This Court has jurisdiction pursuant to that provision.

ISSUES PRESENTED‡

1. Whether EPA violated the CAA by failing to address adequately the peak effect of uncontrollable sources on peak days, thus undermining States' ability to meet their obligation for ensuring that "national primary and secondary ambient air quality standards will be achieved and maintained." 42 U.S.C. § 7407(a).

2. Whether EPA's construction of the Act fails to give meaning to the "intelligible principle" needed to avoid an unconstitutional delegation of legislative authority.

3. Whether EPA provided adequate scientific justification for a new NAAQS.

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‡ The Intervenor and Petitioner States also incorporate by reference the Industry Petitioners' argument that EPA has failed to provide a reasoned explanation for changing the conclusions it draws from the same basic scientific evidence considered in the prior NAAQS revision.

STATUTES AND REGULATIONS

All applicable statutes are contained in the Brief for the Industry Petitioners; the applicable regulations, 40 C.F.R. §§ 50.14, 50.19, appear in the Addendum to this brief.

INTRODUCTION

Sunland Park, NM, is a town of 15,000 people cornered between the New Mexico-Texas border to the east and the United States' international border with Mexico to the south. It has no major industry and contributes just 3% of the precursor substances that form ozone in the Paso del Norte airshed. Westar Comment at 19, (JA__). Its larger neighbors—El Paso, TX and Juarez, Mexico—are close in proximity but unreachable by the policies adopted in New Mexico, or (in the case of Juarez) even Washington, DC. In fact, New Mexico is virtually powerless to reduce the concentration of ozone around Sunland Park, which arises overwhelmingly from sources beyond the State's ability to control. Moreover, because the area abuts El Paso, it does not qualify for relief as a "rural transport area" under the Clean Air Act (CAA). Nor can it escape the Act's heavy regulatory burdens by pointing to pollution generated in Juarez. Instead, through no fault of its own, the State of New Mexico will now face heavy federal regulations and the threat of punitive sanctions, including loss of highway funds, for failing to do the impossible.

The story of how Sunland Park's attainment area became the target of regulations that New Mexico has no hope of satisfying begins with a legally flawed rule that fails to account for uncontrollable sources of ozone. By imposing an unachievable standard, the Rule has made it impossible for New Mexico and many other States to fulfill their "responsibility" for ensuring that "national primary and secondary ambient air quality standards will be achieved and maintained." 42 U.S.C. § 7407(a). Any rule that ignores the States' responsibility to "achieve[] and maintain[]" the standard violates the CAA and must be vacated.

STATEMENT OF THE CASE

A. The Clean Air Act and the NAAQS Program

The Clean Air Act requires EPA to issue and, at pentannual intervals, review National Ambient Air Quality Standards (NAAQS) for air pollutants that meet certain criteria. 42 U.S.C. §§ 7408(a)(1), 7409(d)(1). EPA must set primary NAAQS that are, "in the judgment of the Administrator, . . . allowing an adequate margin of safety, [] requisite to protect the public health." *Id.* § 7409(b)(1); *see also id.* § 7409(b)(2) (secondary NAAQS "requisite to protect public welfare").

"'Requisite' means the NAAQS must be sufficient, but not more than necessary." *Mississippi v. EPA*, 744 F.3d 1334, 1342 (D.C. Cir. 2013) (internal quotation omitted).

Every five years, EPA must "complete a thorough review" of a NAAQS and "make such revisions . . . as may be appropriate." 42 U.S.C. § 7409(d)(1). That process involves consultation with the Clean Air Scientific Advisory Committee (CASAC), *id.* § 7409(d)(2)(A)-(B), and publication of "air quality criteria" explaining the "latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare," *id.* §§ 7408(a)(2), 7409(a)(2).

Once a NAAQS is set, EPA classifies each air quality control region as "attainment," "nonattainment," or "unclassifiable." 42 U.S.C. § 7407(d). For ozone, these classifications are based on the "3-year average of the annual fourth-highest daily maximum 8-hour O_3 concentration." 40 C.F.R. § 50.19(b).

Each State has "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards ***will be achieved and maintained***." 42 U.S.C. § 7407(a) (emphasis added). After EPA sets or revises a NAAQS, the task then falls to the States to

propose state implementation plans (SIPs) for the "implementation, maintenance, and enforcement" of the new standard. *Id.* § 7410(a). If a State fails to provide a SIP or if the Administrator disapproves it, EPA may impose a federal implementation plan (FIP) of its own creation. *Id.* § 7410(c). Either way, nonattainment areas face a variety of regulations, including a census of all ozone-causing emissions and onerous permitting requirements for new sources. *See*, *e.g.*, *id.* § 7511a(a) (listing requirements for "marginal" nonattainment areas). Even for areas designated as in attainment, the SIP must "contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality." *Id.* § 7471.

B. Background Ozone from Uncontrollable Sources

Ground-level ozone (O_3) forms through the interaction of sunlight with volatile organic compounds, mono-nitrogen oxides, and, over longer periods, methane and carbon monoxide as well. 80 FR 65,299 (JA__). These precursor compounds arise from various sources: human activities within a State, which that State can control; human activities outside a State, which that State cannot control; and natural sources that no one can control. *Id.* Given the prevalence of uncontrollable

sources of ozone and its precursors, ozone measurements "can be substantially influenced by sources that cannot be addressed by domestic control measures." 80 FR 65,300 (JA__).

EPA itself recognizes that background ozone can be significant, including "a non-de-minimis number" of locations where uncontrollable ozone levels can "exceed the [former] NAAQS (*i.e.*, 75ppb)." 79 FR 75,242 (JA__). According to NOAA, Las Vegas will "exceed EPA's proposed range of ozone NAAQS almost entirely due to background ozone." Eisenberg Testimony at 15-16 (JA__). Similarly, in Cochise County, Arizona, EPA's own models anticipate that uncontrollable background ozone will account for 90.7% of the allowable 70ppb. Massey Comment at 7, (JA__).

Even if background alone does not exceed the standard and force an area into nonattainment, it can leave so little room for anthropogenic ozone that attainment is functionally impossible. *See*, *e.g.*, 79 FR 75,382 (JA__) (explaining that background levels can "prevent attainment" where there are "few remaining opportunities for local emission reductions"). Here, multiple studies show background levels at or near the new standard of 70ppb. One study found that significant

uncontrollable events could raise background ozone levels to 60–75 ppb. Lin at 14, (JA__). Another recent study concluded that "[i]f the NAAQS is lowered in the 60–70 ppbv range, areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls." Zhang at 6774. Yet another study found that background ozone could reach levels of 60–70ppb. Emery 206-17, (JA__).

The issue of background ozone is particularly acute when dealing with peak effects of uncontrollable emissions on peak ozone days. Although some background sources are relatively constant producers, other sources are highly volatile and can produce significant spikes in ozone and its precursors. "Stratospheric intrusions," for example—in which upper-atmosphere ozone descends to the surface, usually in connection with warm weather and high altitude—can dramatically increase ozone levels through no fault of the States or their industries. *See* Tools Fact Sheet at 4 (JA__). A recent study funded by NOAA found over a dozen intrusions during just three months, contributing as much as 20-40ppb to background ozone, and pushing eight-hour ozone

readings above the new NAAQS, sometimes as high as 86ppb. Lin Intrusions at 17, (JA__).

Similarly, transport from foreign industry increases ground-level ozone and can cause spikes in ozone under certain conditions. As foreign industry has expanded, the United States has seen a corresponding increase in the share of its background ozone attributable to foreign sources. Cooper 344-48 (JA__) ("[T]ransported ozone pollution from Asia . . . is increasing by approximately 0.63ppb per year."). One modeling study found that 49% of springtime ozone readings above 70ppb in the southwestern United States "would not have occurred" without Asian emissions. Lin at 14 (JA__).

Wildfires and lightning also cause sudden increases in ozone levels. One modeling study found that lightning can add as much as 25-30ppb and wildfires can add more than 50ppb. Mueller & Mallard 4817-23 (JA__).

C. Recent NAAQS Revisions.

The Industry Petitioners have provided an extensive summary of the recent NAAQS revisions, which reduce the primary and secondary standards to 70ppb. Indus. Pets. Br. 7-16. In particular, the Industry

Petitioners have traced the gradual ratcheting down of the ozone NAAQS—beginning at 120ppb, proceeding to 80, then 75, and now 70ppb—to the point that the current standard is colliding with background levels in many parts of the country.

The Petitioner States adopt that summary but highlight several features of the key clinical study on which EPA relies. Unlike epidemiological studies that attempt to estimate the effects of ozone by studying respiratory illnesses in the general population, clinical studies control for the many other components of the atmosphere and isolate subjects' responses to an increase in ozone. The availability of new ***clinical*** evidence was central to this Court's affirmance of the 2008 NAAQS revision. *Mississippi*, 744 F.3d at 1343-44; *see also id.* at 1351 ("'[T]he epidemiological studies are not themselves direct evidence of a causal link between exposure to O_3 and the occurrence of health effects.'" (quoting 73 FR 16,479)); *see also* 80 FR 65,323 (JA__) (epidemiological evidence of health effects is "complicated by the presence of co-occurring pollutants or pollutant mixtures").

In 2008, EPA had before it a pair of clinical studies in which 30 participants were exposed to ozone concentrations of 60 and 80ppb.

Mississippi, 744 F.3d at 1349-50. At the lower concentration, just six of the participants experienced lung-function decrements of at least 10%. *Id.* at 1349-50. EPA concluded that this minor deviation from normal lung function did not justify lowering the NAAQS to 60ppb and instead settled on 75ppb as the level requisite to protect public health. *Id.*

The current rulemaking cites two clinical studies and relies almost exclusively on one of them. Schelegle 265-72 (JA__). That study exposed 31 participants to over six hours of near-continuous activity in an environment of 72ppb ozone. It found that six of the 31 participants—almost exactly the same ratio that proved unpersuasive in 2008—reported (reversible) decrements of at least 10%. *Id.* at 269 (JA__); Feldman Comment at 4 (JA__). Even by EPA's definition, decrements alone do not constitute an "adverse health effect." They must appear "in combination with" respiratory symptoms. 80 FR 65,330 (JA__). Although the study found some evidence of both respiratory symptoms and reduced lung function, they were uncorrelated across study participants. *Id.*; Feldman Comment at 4 (JA__). EPA identified no other clinical evidence to support the existence of any harm to public health at levels below 80ppb.

In light of the paucity of new evidence, EPA took years to announce its latest revision to the standard. Seeking to compel the Agency to complete its rulemaking, several environmental organizations filed suit in the Northern District of California. *Sierra Club v. EPA*, No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014). In its brief opposing the plaintiffs' timeline, EPA argued that "'[t]he public has a significant interest in ensuring that the government does not promulgate rules via a process that emphasizes expediency over quality and accuracy.'" EPA Opposition Br., No. 13-cv-2809, at 11-12 (N.D. Cal. Feb. 25, 2014) (quoting *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000)). The Agency countered the plaintiffs' arguments for feasibility, stating that "[i]t is difficult to imagine a circumstance where an agency could not sign some sort of a flawed rule by any particular date; but promulgating a flawed rule does nothing to advance the goals of Congress." *Id.* at 12. On April 30, 2014, the court ordered EPA to act on precisely the timeline plaintiffs requested, and EPA did just that.

Finally, the Petitioner States add that the Rule irrationally lengthens ozone monitoring seasons for several States based upon ozone readings above *60*ppb between 2010 and 2013. 80 FR 65,416 (JA__).

The Agency took this approach even for States that demonstrated that they never had a single reading above 70ppb in the last twenty years over the majority of the new monitoring period. Stepp Comment at 3-5 (JA__).

STANDARD OF REVIEW

An agency rule must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *accord* 5 U.S.C. § 706(2)(A). While this Court considers challenges to NAAQS under the "same highly deferential standard of review that we use under the Administrative Procedure Act," such challenges receive "a searching and careful inquiry into the underlying facts." *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) (quotation omitted).

Moreover, "[a]n agency's failure adequately to consider a relevant and significant aspect of a problem may render its rulemaking arbitrary and capricious." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009). In addition, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct.

2427, 2442 (2014) (citation omitted). EPA, in particular, violates the CAA if it wrongly considers itself bound not to consider "relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

SUMMARY OF THE ARGUMENT

I. The Rule must be vacated because the Agency's approach to the critical issue of background ozone violates the CAA.

A. Under the CAA, States have the "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards ***will be achieved and maintained***." 42 U.S.C. § 7407(a) (emphasis added). EPA's failure to address adequately the indisputably relevant issue of the States' ability to "achieve[]" the new NAAQS, and concomitant failure to provide an adequate response to significant public comments on this issue, is reason enough to vacate the Rule.

Numerous commenters presented EPA with studies demonstrating that the peak effects of sources that the States cannot control, on peak days, will make compliance with the new standard unduly onerous, and sometimes impossible. Indeed, EPA's own modeling illustrates the same problem. Yet, the Agency did not take account of this critical issue, instead choosing to focus on "average" and

"seasonal mean" impacts of uncontrollable sources. 80 FR 65,328 (JA__). This focus is unresponsive because nonattainment does not depend on averages, but instead requires just four exceedances per year.

EPA's analysis thus fails the basic requirement that an agency must address "significant aspect[s] of a problem," *Am. Farm Bureau*, 559 F.3d at 520, and respond to all "significant" comments on this issue, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977). The peak effects of uncontrollable sources on peak days will lead the Agency to impose burdensome pollution-control measures in areas where such measures have no potential to improve air quality or serve public health. This is the paramount problem with regard to the critical issue of background ozone, and EPA's failure to address the problem requires that the Rule be vacated.

B. EPA also violated the CAA by unlawfully limiting its consideration of the impact of background ozone from uncontrollable sources. *See Michigan*, 135 S. Ct. at 2706. The Agency took the position that it may only consider ozone from uncontrollable sources in selecting a standard from within a "range of values" that EPA has

already deemed "reasonable." 80 FR 65,328 (JA__). This is contrary to the text of the CAA, which requires EPA to set NAAQS such that States can fulfill their "responsibility" that the standard be "achieved and maintained." 42 U.S.C. § 7407(a). Since States have no legal or practical ability to control ozone from uncontrollable sources, EPA has a duty to consider fully such sources in setting the standard. EPA's contrary position would permit (and perhaps require) the Agency to set standards that cannot be "achieved and maintained" by the States. This result is not only contrary to the text of the CAA, but would transform the NAAQS program in violation of the bedrock administrative law principle that an agency's interpretation is unlawful if it is "inconsisten[t] with the design and structure of the statute as a whole." *UARG*, 134 S. Ct. at 2442.

C. Relying on the CAA's provisions for enforcement-stage relief is no response to these defects. Provisions addressing "exceptional events" are ill-suited to addressing routine exceedances that will inevitably occur due to uncontrollable background ozone. Likewise, the Act's limited measures for helping areas affected by rural transport and international pollution are intended for infrequent exceedances, as

demonstrated by the assumption that these areas should remain classified as nonattainment and subject to the corresponding burdens. More fundamentally, enforcement-stage relief measures require States to file onerous petitions with EPA, which the Agency may decline in its discretion.

II. EPA's construction of the CAA misapplies *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), to eschew any consideration that would halt the NAAQS for a "zero-threshold" pollutant at a level greater than zero. The Act offers several such "intelligible principles" to guide the Agency's work. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Its references to "achieve[] and maintain[]," "requisite," "appropriate," and "public health" all indicate that EPA must consider the burden of a NAAQS that is unprecedentedly close to background levels.

III. Finally, EPA failed to explain how the "latest scientific knowledge . . . on public health or welfare" justifies the new NAAQS. 42 U.S.C. § 7408(a)(2). This failure is apparent in the Agency's excessive reliance on a single clinical study with significant limitations.

STANDING

The Petitioner States have standing to challenge a Rule that requires them to revise their SIPs to comport with the new standard. 42 U.S.C. § 7410(a); *see West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). EPA's new standard also threatens to bring additional areas within the Petitioner States into nonattainment, which imposes an assortment of burdens. 42 U.S.C. §§ 7501-09a, 7511-15. As a result, the Petitioner States suffer an actual injury that is "fairly traceable" to the revised NAAQS and is likely to be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

ARGUMENT

I. EPA's Approach to Background Ozone Levels Caused by Uncontrollable Sources Violates the CAA.

The CAA provides that each State has "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards ***will be achieved and maintained***." 42 U.S.C. § 7407(a) (emphasis added). As EPA has conceded, in carrying out this statutory duty, "states are not responsible for reducing emissions from background sources." Tools Fact Sheet at 1 (JA__). In the Rule, EPA attempted to retreat partially from this necessary concession, arguing

that achievability is relevant to choosing a NAAQS level "within the range of reasonable values" that the Administrator identified, but forbidden when setting the "reasonable" range in the first place. 80 FR 65,328 (JA__). The Agency thereafter ignored this textually-indefensible distinction and sought to explain away the problem of uncontrollable ozone through a series of non sequitur arguments.

There are two approaches that this Court could take to finding that EPA acted unlawfully in addressing the critical issue of background ozone from uncontrollable sources. The narrower approach is to declare that the Rule is unlawful because the Agency conceded that the "states are not responsible for reducing emissions from background sources," *see infra* Part I.A, and then failed to explain adequately how the Rule's new standard is consistent with that textually-mandated principle. Alternatively, and more broadly, this Court could definitively hold that EPA violated the CAA by casting aside concerns regarding "achiev[ability]" and vacate the Rule on that basis. *See infra* Part I.B.

A. EPA Violated the CAA by Failing to Address Adequately the Peak Effect of Uncontrollable Emissions on Peak Days.

1. EPA has conceded that even under its own modeling, uncontrollable sources of ozone can make it harder—and, sometimes,

impossible—for States to attain EPA's new NAAQS standard. 80 FR 65,436 (JA__). Because EPA has acknowledged that the impact of uncontrollable ozone is a relevant, significant consideration for purposes of this rulemaking, the Agency was duty-bound to address rationally all "significant aspect[s] of [this] problem," *Am. Farm Bureau*, 559 F.3d at 520; *State Farm*, 463 U.S. at 43, and to respond to all "significant" comments on this issue, *Home Box Office*, 567 F.2d at 35 & n.58.

Numerous commenters addressed the background ozone issue, raising the critical point that peak impacts from uncontrollable sources on days with peak ozone measurements make it difficult or impossible for States to "achieve," 42 U.S.C. § 7407(a), the new NAAQS standard (the "peak/peak problem"). *See*, *e.g.*, Westar Comment at 6, (JA__) (noting the "significant difference" between average data and "actual exceedances of the standard, which EPA acknowledges is more relevant from a regulatory standpoint").

The process for NAAQS nonattainment designations illustrates why EPA's failure to address adequately the peak/peak problem is so consequential. 40 C.F.R. § 50.19(b). Every day during the monitoring

season, each site determines which eight-hour period has the highest average ozone reading, which then becomes the daily value. *Id.* Each area then determines the fourth-highest daily value in a given year. *Id.* Every year, the fourth-highest readings from the past three years are averaged to determine that year's "design value," which is compared to the NAAQS. *Id.* This process means that if uncontrollable sources cause high ozone readings even a few days per year, those infrequent peak readings will be sufficient to push an area out of attainment. The process thus magnifies—sometimes to the point of crowding out all other evidence—the peak effects of uncontrollable sources on peak days.

2. The administrative record unambiguously demonstrates that uncontrollable sources, at their peak, will make it difficult, and sometimes impossible, for States to meet EPA's new NAAQS on peak ozone days.

Multiple studies in the record demonstrate that uncontrollable sources will leave little to no room for U.S. manmade emissions at the new 70ppb NAAQS standard. One study, jointly funded by NOAA and NASA, found over a dozen instances in which ozone from stratospheric intrusions raised background levels to 60–75 ppb. Lin Intrusions

(JA__). Another study estimated that the annual fourth-highest background ozone levels in the intermountain west are 50–60ppb. *See* Zhang 6769, 6770 (JA__). This study concluded that "if the NAAQS is lowered in the 60–70 ppb range, areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls." JA__. A different study modeled background ozone and found that it could reach levels of 60–70 ppb. Emery 206, 216 (JA__). And another estimated that "background ozone concentrations . . . ranged from 47ppb to 68ppb at six western cities during ozone episodes." Sonoma Technologies at 3-1 (JA__).

Notably, many of these studies systematically underestimate the peak effects of uncontrollable sources of ozone on peak days because their models do not account for highly volatile events that can significantly impact ozone—such as wildfires, lightning, stratospheric intrusions, and unique meteorological conditions. *See* Zhang 6769, 6770 (JA__).

EPA's own modeling confirms the widespread nature of this peak/peak problem. Specifically, EPA's model identified a substantial number of days where uncontrollable sources are at, near, or above the

70ppb standard, and where uncontrollable source effects are also at peak levels.

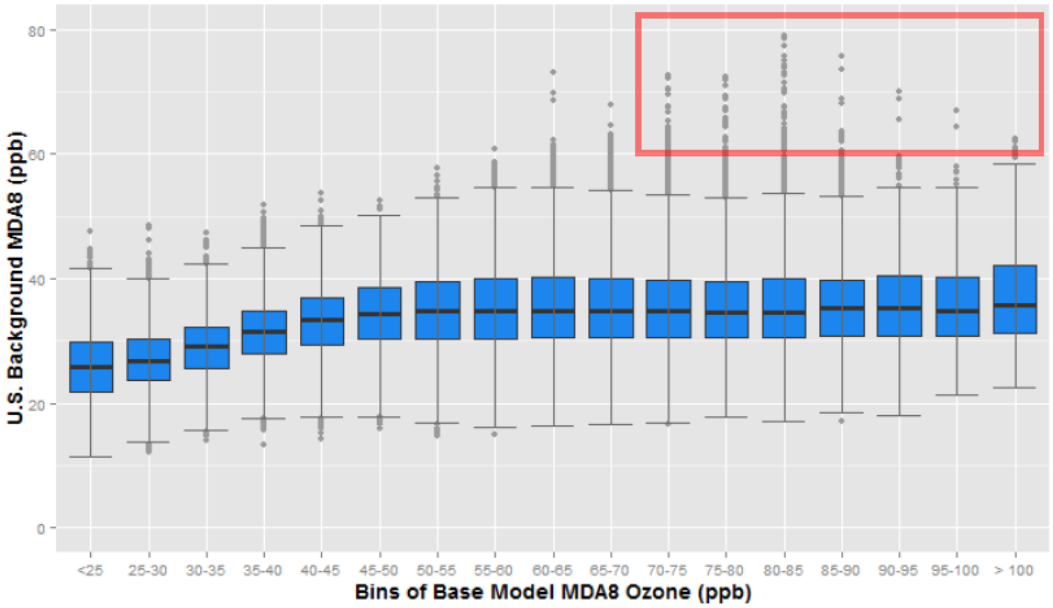

Figure 5c. Distribution of *U.S. background* MDA8 ozone (ppb) at monitoring locations across the U.S. (Apr-Oct), binned by base modeled site-day MDA8, as estimated by 2007 CMAQ simulations.

Policy Assessment at 2A-25 (JA__) (internal box added).[1] While EPA sought to downplay its model's results as "infrequent events," 80 FR 65,328 (JA__), EPA has no answer for the critical point that just a few high readings per year trigger a finding of nonattainment.[2]

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[1] Each dot in the red box represents at least one day where ozone exceeded 70ppb ***and*** where background ozone would have been at least 60ppb without ***any*** U.S. manmade emissions.

[2] EPA also pointed to an alternative model (dubbed the "source apportionment" model), Policy Assessment at 2-14, which predicts fewer—although still some—exceedances resulting from uncontrollable

In addition, while EPA's own modeling confirms the prevalence of the peak/peak problem, the Agency's reasoning undercounts that problem in significant respects. As EPA concedes, its model "was not expressly developed to capture" events such as wildfires, lightning, stratospheric intrusions, and unique meteorological conditions, Policy Assessment at 2A-42 (JA__), even though EPA acknowledges that "the highest background episodic concentrations are typically associated with [these types of events]," *Id.* at 2A-14. For example, although EPA modeled wildfire emissions, the Agency admits that its model accounts only for "*monthly-average* wildfire emissions which are not intended to capture discrete events." *Id.* at 2A-8-9. And there is no indication that EPA's model included ***any*** input for stratospheric intrusions, despite studies showing that these events can cause spikes as large as 40ppb. Lin Intrusions at 17 (JA__). Likewise, wildfires can add over 50ppb, Mueller & Mallard 4817-23 (JA__), lightning can add 30ppb, and unique meteorological conditions can cause Asian emissions to add up to 15ppb,

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ozone. This alternative significantly underestimates the peak effects of uncontrollable sources by classifying all ozone that is created by a combination of precursors emitted from both uncontrollable and controllable sources as controllable ozone. *Id.* at 2-16.

Lin Intrusions at 10 (JA__), beyond what they already contribute on an "average" day.

3. EPA's primary response to this overwhelming record evidence demonstrating the peak/peak problem for the new 70ppb standard is to change the subject, focusing on the ***average*** effects of uncontrollable sources. For example, the Agency reports "seasonal mean" background levels of only 25-50ppb. 80 FR 65,328 (JA__); *see also id.* (attempting a similar sleight of hand for background levels on high-ozone days by "average[ing] over the entire U.S."). But as explained above, States' "responsibility" for ensuring that the new NAAQS "will be achieved and maintained," 42 U.S.C. § 7407(a), flows from ***peak*** impacts—not averages. If the Agency's attainment designations were based on seasonal-average ozone readings, then seasonal-average background concentrations would be relevant. As it stands, however, NAAQS designations depend on an area's four worst days.

It is disingenuous for EPA to cite average figures when promulgating a new NAAQS only to use specific 8-hour data when determining nonattainment. The legal ramification of this legerdemain is that the Agency has not addressed a "significant aspect of [the]

problem," *Am. Farm Bureau*, 559 F.3d at 520, which arises not from averages, but from the peak effects of uncontrollable ozone on the relatively few days that determine an area's design value.

As a fallback to its "seasonal mean" response, the rulemaking briefly discusses the "average" effect of uncontrollable ozone sources on peak days. 80 FR 65,328 (JA__). This is not responsive to the problem commenters raised. The issue is not the average effect of uncontrollable sources of ozone on either average- or high-ozone days. Rather, the problem is peak effects of uncontrollable sources on peak ozone days. Given how NAAQS compliance is measured, these events are sufficiently common to make it difficult, or even impossible, for States to fulfill their "responsibility" for ensuring that the new 70ppb standard "will be achieved and maintained," 42 U.S.C. § 7407(a). EPA provided no adequate answer for this significant problem, *Am. Farm Bureau*, 559 F.3d at 520, and failed to respond to "substantial" comments raising that issue, *Home Box Office*, 567 F.2d at 35 & n.58. The Rule is thus unlawful on this basis alone.

B. EPA Violated the CAA by Impermissibly Adopting a Non-Textual Limitation on Its Own Authority.

The Agency also acted unlawfully because it narrowed its consideration of the critical issue of the new standard's "achiev[ability]" in a manner unsupported by statutory text. 42 U.S.C. § 7407(a). In the Rule, EPA concluded that background ozone was relevant only to selecting the NAAQS level "within the range of reasonable values" the Administrator had already identified, but that background could not inform the selection of the "reasonable" range. 80 FR 65,328 (JA__). EPA thus recognizes that achievability is relevant but, without statutory justification, treats it as ***selectively*** relevant. The Agency's non-textual narrowing of the NAAQS analysis violates the CAA. *See Michigan*, 135 S. Ct. at 2606-07 (EPA's erroneous conclusion that a mandatory factor is "irrelevant" to a regulatory decision renders the rule unlawful).

EPA's claim that it had to consider background ozone only when selecting the NAAQS standard from "within the range of reasonable values" is unauthorized. As noted above, the CAA assigns to States the "primary responsibility" for ensuring that "national primary and secondary ambient air quality standards will be achieved and

maintained." 42 U.S.C. § 7407(a). EPA's reading of the CAA as making "achiev[ability]" relevant ***only*** for selecting the NAAQS standard from "within a range of reasonable values," 80 FR 65,328 (JA__), is irreconcilable with this statutory text. Put another way, nothing in the statute's expectation of "achiev[ability]" suggests that the concept should be ignored entirely in determining a "reasonable range," but then reemerge when selecting from within that range. EPA's error here is remarkably similar to the violation that the Supreme Court recently found fatal in *Michigan*. In that case, just as here, EPA ignored a mandatory consideration (there, costs; here, achievability) at the first step of its regulatory analysis, but said that it could consider the factor at a later step. *See* 135 S. Ct. at 2710-11.

EPA's position is also "inconsisten[t] with the design and structure of the statute as a whole," *UARG*, 134 S. Ct. at 2442 (quotation omitted), and raises serious federalism concerns, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Under EPA's interpretation, if the Administrator selected a range that no State could meet "without action affirmatively *extracting* chemicals from nature," *Am. Trucking Ass'ns v. EPA* ("*ATA I*"), 175 F.3d 1027, 1036 (D.C. Cir. 1999), *opinion modified*

on reh'g, 195 F.3d 4, *aff'd in part, rev'd in part by Whitman*, the Agency would be duty-bound to impose upon States a standard within that impossible range. States, having no ability to "achieve" the impossible, would then be subject to severe sanctions under the CAA, including loss of highway funds. 42 U.S.C. § 7509(b)(1). It is hornbook administrative law that "[i]mpossible requirements imposed by an agency are perforce unreasonable." *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991). EPA's claim that Congress instructed the Agency to require the impossible here—especially in a context that carries severe punishments for noncompliance—is not credible.

In the Rule, EPA rested its argument on certain statements in *American Trucking* and *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981). 80 FR 65,328 (JA__). These cases do not support the Agency's position.

First, in *American Trucking*, EPA had set the ozone NAAQS at 80ppb, in part because a 70ppb standard would be "too close to peak background levels." 283 F.3d at 379. This Court rejected a challenge to the Agency's reliance on the peak impacts of uncontrollable sources, explaining: "although relative proximity to peak background ozone

concentrations did not, in itself, necessitate a level of [80ppb], EPA could consider that factor when choosing among the three alternative levels." *Id.* In the present case, the Agency inexplicably engrafted the word "only" into this holding, entirely changing the statement's meaning: "[C]ourts have clarified that EPA may consider proximity to background concentrations . . . ***only*** in the context of considering standard levels within the [pre-determined] range." 80 FR 65,328 (JA__) (citing *Am. Trucking*, 283 F.3d at 379) (emphasis added). But *American Trucking* never held that selecting a standard from within a "range" is the *only* situation in which EPA can consider proximity to background ozone concentrations, and the Agency's attempt to suggest otherwise is incorrect.

Second, this Court's statement in *American Petroleum* that EPA "may not consider economic and technological feasibility in setting air quality standards," and later reiteration of the same point, similarly does not support the Agency's position. 665 F.2d at 1185 (quoting *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)). *American Petroleum* first made this statement while responding to the specific argument raised by the American Petroleum Institute (API)

that the "costs of meeting [the new NAAQS]" were too high. *Id.* at 1184. As the Supreme Court explained in *Whitman*, 531 U.S. at 464, *American Petroleum* was merely one of several cases from this Court following the rule from *Lead Industries* that "economic considerations may play no part in the promulgation of ambient air quality standards."

When *American Petroleum* turned to the city of Houston's objections that the new standard would be "impossible" for the city to meet because of "natural factors," this Court noted that its prior response to API's cost argument addressed this objection "***in part***." 665 F.2d at 1185 (emphasis added). Another "part" of this Court's answer to Houston's argument, however, was that the Agency need not "tailor national regulations to fit each region or locale." *Id.*

The issue in the present case is entirely different. *American Petroleum* involved a single city asserting that it would not be able to meet the new standard, based primarily on concerns regarding the availability of emission-control technology. In the present case, the States argue that the new standard will make it extremely difficult, and sometimes impossible, for many of them to satisfy their statutory responsibility for ensuring that NAAQS "will be achieved and

maintained." 42 U.S.C. § 7407(a). Given that the CAA imposed no such duty on the city of Houston, this Court's rejection of the city's arguments does not address the issues of statutory authority and achievability the States raise here. *American Petroleum* is also factually distinguishable because the current NAAQS is closer to the level of ozone from uncontrollable sources, and the role of foreign-generated pollution has mushroomed during the intervening 35 years.

C. EPA's Promised Enforcement Relief Measures Are Impractical and Misuse Portions of the CAA Intended for Exceptional Rather than Routine Events.

Tacitly acknowledging that it would be unlawful to hold States responsible for ozone levels that they cannot control, the Rule suggests that the States may qualify for limited relief at the enforcement stage. 80 FR 65,436 (JA__). The tools EPA has in mind, however, are limited in their applicability and, even where applicable, do not undo the burdens created by the new standard.[3] Promulgating a rule that depends on enforcement relief is problematic in its own right, but that

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[3] Of course, even if they were completely effective at responding to nonattainment resulting from uncontrollable background ozone, these mechanisms do not relieve EPA of its responsibility to engage in "reasoned decisionmaking" that addresses "all relevant factors." *Michigan*, 135 S. Ct. at 2706; *see supra* Part I.A.

strategy becomes a basis for vacatur when the promised relief is illusory.

1. The Relief Mechanisms Identified by EPA Do Not Adequately Address Uncontrollable Background Ozone.

EPA identifies three measures that it promises will provide relief for areas where background ozone levels approach or exceed the revised NAAQS: (1) areas that would be classified as nonattainment under the 70ppb standard due only to exceptional events could avoid that designation "through exclusion of data affected by [those] exceptional events;" (2) nonattainment areas that qualify as "rural transport areas" could avoid certain more stringent requirements applicable to higher classifications of nonattainment areas; and (3) nonattainment areas that qualify for the international transport provisions could escape their obligation "to demonstrate attainment" and to adopt "more than reasonable controls" on local stationary sources. 80 FR 65,436 (JA__). Behind all three of these measures are provisions of the CAA. Unsurprisingly, none of them creates an exception so malleable that it can allow an area to demonstrate compliance with a standard that is set at, near, or below background levels.

First, the CAA's "exceptional events" provision tasks the Administrator with promulgating "regulations governing the review and handling of air quality monitoring data influenced by exceptional events." 42 U.S.C. § 7619(b)(2). It defines an "exceptional event" as one that "is not reasonably controllable or preventable" and "is caused by human activity that is unlikely to recur at a particular location or a natural event." *Id.* § 7619(b)(1)(A).

In 2007, EPA announced a rule for excluding data based on the occurrence of an exceptional event. 40 C.F.R. § 50.14. The threshold is high. A State must show that a specific event "caused a specific air pollution concentration at a particular air quality monitoring location" and must establish "a clear causal relationship" between the event and the air-quality measurement at issue. 40 C.F.R. §§ 50.14(a)(1), (c)(3)(iv)(E). Moreover, the rule provides that an exceptional event cannot reflect "normal historical fluctuations, ***including background***." *Id.* § 50.14(c)(3)(iv)(C) (emphasis added). EPA also notes in the preamble to the revised NAAQS that exceptional events do not include "routine natural emissions from vegetation, microbes, animals, and lightning." 80 FR 65,439 n.239 (JA__).

The reason the "exceptional events" provision does not encompass biological, meteorological and recurring anthropogenic events is that they are not exceptional, precisely because they are part of background conditions. As Harvard's Daniel Jacob explains regarding a NAAQS of 70ppb, "[y]ou're not talking about events anymore. You're talking about the routine. . . . And at that point, I think the system is going to break." Bennett Comment at 15 (JA__). The Act's exclusion of truly exceptional events only underscores EPA's failure to consider routine obstacles to achievability, in setting the NAAQS.

Moreover, the exceptional events provision does not allow an area to exclude anthropogenic foreign emissions because it applies only to "an event caused by human activity that is ***unlikely to recur***." 42 U.S.C. § 7619(b)(1)(A)(iii) (emphasis added). As recognized by all parties, international transport is very likely to recur, and with increasing intensity. Cooper 344, 344-48 (JA__). The provision also excludes "stagnation of air masses," "meteorological inversions," and other meteorological events "involving high temperatures or lack of precipitation." 42 U.S.C. § 7619(b)(1)(B).

EPA has recently proposed a revision to the exceptional events rule. 80 FR 72,840 (Nov. 20, 2015). Even if EPA finalizes a revised rule, regulations and new agency guidance cannot alter the statutory criteria.[4] Chief among these are the CAA's exclusion of recurring human-caused events and meteorological events that EPA recognizes are "the cause" of increased exceedances. Policy Assessment at 2-3 to 2-4. The only time EPA may consider these factors is in setting the NAAQS itself. At best, EPA peddles false hope in suggesting that it has the latitude to address background ozone through exceptional events regulations. At worst, the Agency has strategically refused to consider the impossibility of achieving its NAAQS rule while pointing to future enforcement-stage relief, only to claim later that its hands are tied by the statute.

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[4] EPA promulgated the NAAQS before making revisions to its exceptional events rule. But States are already at work designating nonattainment areas in order to meet an October 1, 2016 deadline. 79 FR 75,354 (JA__). As a result, the subsequent issuance of a revised rule is of little benefit, a fact compounded by the proposed rule's failure to address uncontrollable background ozone. For example, the revised rule would still exclude biological processes and lightning, as well as foreign anthropogenic emissions.

Second, the CAA's provisions for rural transport areas fail to provide effective relief for nonattainment due to background. To begin with, designation as a rural transport area simply moves the area from one class of nonattainment to another, 42 U.S.C. § 7511a(h); it does not avoid the requirements applicable to all nonattainment areas. *See infra* Part II.B.

Even that minor accommodation excludes huge swaths of the country. Under the statute, a rural transport area cannot contain sources that make a "significant contribution" to ozone concentrations and cannot include or be adjacent to a Metropolitan Statistical Area ("MSA"). 42 U.S.C. § 7511a(h). When applied to large counties in the West, these criteria render the rural transport provision a nullity. White Pine County, Nevada, for example, covers 9,000 square miles and has a tiny population of just 10,000 inhabitants. It nevertheless cannot qualify as a rural transport area because it is adjacent to the Salt Lake City MSA, which is itself approximately the size of New Jersey. Westar Comment at 15 (JA__). In fact, due to the size of western counties, the Salt Lake City MSA has the potential to disqualify 46,023 square miles—an area the size of Pennsylvania—from being classified as rural

transport areas. Similar disqualifications occur around Phoenix, Las Vegas, Denver, and El Paso. In Cochise County, Arizona, which cannot benefit from the rural transport rule because of its proximity to Tucson, EPA estimates that background ozone contributes 92% of that county's design value. Westar Comment at 7 (JA__). The unlucky correspondence of large counties and high background ozone levels in western States means that the CAA's rural transport provision is ineffective medicine to cure a NAAQS set at or near background levels.

Third, the CAA's international transport provisions authorize limited relief for nonattainment areas that can establish "to the satisfaction of the Administrator" that they would have met the NAAQS "but for emissions emanating from outside of the United States." 42 U.S.C. § 7509a(b). Even where applicable, these provisions do not allow a State to avoid a nonattainment designation or even to obtain a lower nonattainment classification, *see* 80 FR 65,444 (JA__); they simply provide exemptions from a handful of nonattainment requirements. *See infra* Part II.B.

Relief under these provisions is further illusory because they require the ***States*** to establish that international transport is the "but

for" cause of nonattainment. The issue of which party bears the burden is important because quantifying the amount of pollution carried from outside the United States is difficult. *See* Response to Comments at 343 (JA__) ("there is no way to definitively measure or validate these numbers"); Workshop Slides at 21 (JA__) (using a "surrogate" for internationally transported ozone to identify a wide range—between 0.1 and 0.7 ppb/year—of annual increase in ozone attributable to foreign sources). Furthermore, by requiring States to show that international transport is the "but for" cause of nonattainment, these provisions fail to provide relief for situations where multiple background sources contribute to nonattainment.

By relying on these provisions to justify its rule, EPA attempts to duck its responsibility under the Act to take into account whether its NAAQS is achievable. Rather than the Agency "meet[ing] its obligation to explain and expose every step of its reasoning," *Mississippi*, 744 F.3d at 1349 (quotation omitted), EPA's reliance on Section 7509a is an impermissible attempt to impose on States the task of showing why achievability is impossible. The Act does not countenance this inversion of its relief measures.

2. Where They Apply, the Relief Measures Are Inadequate Solutions to the Problem of Uncontrollable Background Ozone.

Common to all of the enforcement-stage "tools" is their dependence on EPA's discretion. 42 U.S.C. § 7511a(h)(1) ("in the Administrator's discretion"); 42 U.S.C. § 7509a(b) ("to the satisfaction of the Administrator"). The discretionary nature of this relief renders it onerous to request, uncertain to obtain, and nearly impossible to challenge if denied. Utah, for example, has invested 4,000 hours since 2008 preparing a dozen exceptional event demonstrations that EPA has denied. Bennett Comment at 15 (JA__). Other States, like Nevada, have concluded that they lack the resources necessary to prove an exceptional event. *Id.* Even if a State shoulders the immense cost and lodges a request, EPA concedes that "few" nonattainment areas have ever obtained relief. 79 FR 75,384 (JA__). This admission is consistent with the experience of Wyoming, which has filed 25 exceptional event applications since 2012; EPA has granted only one. Bennett Comment at 14 (JA__); Wyoming DEQ (JA__). The Agency also has discretion in recognizing rural transport areas and has designated only four such areas in history, none of them for the 8-hour ozone NAAQS. 80 FR

65,438 & n.235 (JA__). Finally, EPA also has unfettered discretion to decide whether a State has made the required "but for" showing to qualify for the international transport provisions. *See* 42 U.S.C. § 7509a(a).

Because discretionary relief is uncertain, these tools do not provide the States any assurance that they will be able to fulfill their responsibility for ensuring that NAAQS be "achieved and maintained." 42 U.S.C. § 7407(a). They are therefore no substitute for an achievable standard that addresses the issue of uncontrollable background ozone.

Even under the best of circumstances—when States can devote resources to seeking relief and EPA agrees to the request—the relief provided is incomplete. A rural transport area, for example, must still complete a "comprehensive, accurate, current inventory of actual emissions from all sources," and must still comply with the onerous New Source Review permitting process "for the construction and operation of each new or modified major stationary source." 42 U.S.C. §§ 7511a(a)(1), 7511a(a)(2)(C). Likewise, an area that satisfies the international transport requirements obtains relief from three provisions of the CAA, 42 U.S.C. § 7509a(b), but remains a

"nonattainment" area and therefore faces mandatory emission control measures and must meet special emission reduction targets, 79 FR 75,384 (JA__). These "remedies" are no substitute for a proper NAAQS.

Additionally, case-by-case discretionary relief creates obstacles for obtaining judicial review. Unlike the rulemaking at issue in this litigation, an EPA decision to deny relief under the foregoing mechanisms would take the form of an individual adjudication. In that posture, courts defer to the agency both on its fact-finding, *see NLRB v. Brown*, 380 U.S. 278, 292 (1965), and on the application of law to facts, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In fact, none of the State Petitioners is aware of a case in which EPA denied relief under any of the three provisions and a court later reversed that decision. This extreme deference undermines EPA's argument that potential enforcement-stage relief is a substitute for enacting an achievable standard in the first place. By attempting to channel objections to the impossibility of compliance through adjudications, EPA endeavors to stack the deck in its favor, all while maintaining that this mechanism is itself a reason for this Court to rubberstamp an unachievable NAAQS.

EPA cannot redeem a rule that is unlawful by pointing to statutory "tools" that are cumbersome, discretionary, and, in any event, cannot provide adequate relief. The CAA's provisions for exceptional events and rural and international transport are supposed to apply under rare circumstances. This Court should not read these provisions to cannibalize the more foundational principles of their parent statute, including the requirement that NAAQS be "achiev[able]." EPA's reliance on these relief measures as a justification for its failure to account for background ozone is arbitrary, capricious, and inconsistent with the Clean Air Act as a whole.

II. Under EPA's Construction of the Act, the NAAQS Review Process Would Lack an "Intelligible Principle."

Because Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const., art. I, § 1, courts have insisted that Congress cannot delegate its legislative power. *Field v. Clark*, 143 U.S. 649, 692 (1892). So long as Congress provides "an intelligible principle" for an agency to follow, however, "such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

In *Whitman*, the Supreme Court found an "intelligible" principle in the language of the Act itself—"requisite"—which the Court defined as "not lower or higher than is necessary." 531 U.S. at 475-76. But for that "principle" to be truly "intelligible," EPA must also ***apply*** it in a way that is intelligible. Otherwise, the principle identified by the Supreme Court in *Whitman* would dissolve in EPA's semantics, which was precisely what concerned this Court in *ATA I*:

> For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

175 F.3d at 1034. In short, while *Whitman* held that EPA cannot supply a principle missing from the statute, the more relevant question here is whether EPA has "conform[ed]" to, not merely restated and then ignored, the "intelligible" principles that Congress provided. *See J.W. Hampton*, 276 U.S. at 409.

The new ozone NAAQS demonstrates how EPA's current interpretation of Section 109(d) of the CAA, 42 U.S.C. § 7409(d), would in effect violate the nondelegation doctrine essential to the separation of powers embedded in the Constitution. Specifically, EPA's

interpretation ignores several ways that EPA could give meaning to the principle identified in *Whitman*, including (i) ensuring standards are achievable, (ii) explaining any departures from prior standards, and (iii) considering potential detriment to "public health" from a standard that is too low. EPA's failure to give any true meaning to its invocation of *Whitman* has left EPA "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." *ATA I*, 175 F.3d at 1037.

EPA's evaluation of the 1997 ozone standard—the standard at issue in *Whitman*—confirms that *Whitman* is not as infinitely malleable as EPA now suggests. In crafting the 1997 standard, EPA recognized that background levels provided a reasonable lower bound to the analysis, a concept this Court accepted as relevant in upholding EPA's decision not to lower the standard to 70ppb. *Am. Trucking*, 283 F.3d at 379 (on remand after *Whitman*). Likewise, Judge Tatel, in dissenting from the initial panel decision that was overturned by *Whitman*, agreed with EPA that its decision was well-reasoned, in part because EPA "set the ozone level just above peak background concentrations." 175 F.3d at 1061 (Tatel, J., dissenting in part). Thus,

at least one lower bound on EPA's standard-setting authority was well-understood and real—EPA would not set a standard that could be violated by "uncontrollable natural levels of ozone;" that would be too low, and therefore not "requisite" under *Whitman*.

Thus, in context, the holding in *Whitman* found an intelligible principle ("requisite . . . not lower or higher than is necessary") and EPA gave that principle meaning and effect (a standard below peak background is too low). Here, in contrast, EPA has jettisoned that lower bound.

EPA also appears to have abandoned any meaningful attempt to allow prior standards to serve as a lower bound, at least in cases where EPA cannot articulate a meaningful reason for contradicting its prior analysis. To be sure, the determination of a certain standard as "requisite" on one date does not make that assessment "sacrosanct . . . until every aspect of it is undermined." *Mississippi*, 744 F.3d at 1343 (2013). However, EPA must nevertheless explain any direct contradiction of its prior analysis, *id.*, and the decision to lower the standard itself must also be "appropriate," 42 U.S.C. § 7409(d)(1). But when commenters pointed out that EPA itself agreed in 1997 that

70ppb would be too close to peak background levels, EPA's only response was to claim that a standard of 65ppb would present an even greater concern. *See* Response to Comments at 350 (JA__). The failure to directly answer the question exposes EPA's failure to conform to any "intelligible principle" in crafting the new standard. The same statutory provision cannot "intelligibly" mean that 70ppb was "lower … than . . . necessary" in 1997, due to peak background levels, but "appropriate" in spite of peak background levels in 2015, especially when peak background levels have only increased.

Citing *Whitman* and other cases, EPA also ignores all cost considerations. But ignoring all costs fails to give full effect to the statute's primary focus: "public health." As noted in *Whitman*, the Act's primary instruction governing NAAQS standards is not just that they be "requisite" in some undefined sense, but rather "requisite" to protect ***"public health."*** 42 U.S.C. § 7409(b)(1) (emphasis added). Because "public health" is undefined, it must bear its "ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). When Congress added the language "public health" in 1970, the authoritative public health treatise defined that concept as "preventing disease, prolonging

life, and promoting physical health and efficiency [through] the development of social machinery which will ensure to every individual in the community ***a standard of living*** adequate to the maintenance of health." Winslow at 28 (emphasis added). At a minimum, costs imposed on industry and the States—the "social machinery" that EPA regulates—influence the "standard of living" in the community. Justice Breyer recognized this concept in his concurring opinion in *Whitman*, noting that "requisite" protection of public health should not "lead to deindustrialization" because "[p]reindustrial society was not a very healthy society." *Whitman*, 531 U.S. at 496 (Breyer, J., concurring).

Justice Breyer's connection between a NAAQS's impact on the economy and its ability to serve the public health is not limited to the word "requisite." It is also present in the Act's reference to "public health." Recognizing this feature of the statutory language not only faithfully applies the law but also avoids a collision with the Constitution's assignment of legislative power to Congress alone.

Having eliminated "achievability," unexplained contradictions of prior determinations, and "public health" as principled boundaries on how low a NAAQS should go, EPA has reduced the intelligible principle

identified in *Whitman* to a nullity, particularly for a "non-threshold" pollutant "that inflict[s] a continuum of adverse health effects at any airborne concentration greater than zero." *Whitman*, 531 U.S. at 475. EPA's application of *Whitman* thus results in a standard that has all the hallmarks of an unconstitutional delegation of authority—an unbounded, essentially legislative policy announcement of how low is too low. If EPA is truly so unfettered in its application of the Act, then a reevaluation of the constitutionality of Section 109(d) is warranted—this time (and for the first time) in the context of a standard that fully exposes EPA's ability to interpret away whatever intelligible principle the Supreme Court identified in *Whitman*.

III. EPA's Reliance on a Single Clinical Study to Justify the New NAAQS Is Arbitrary and Capricious.

The State Petitioners incorporate by reference the Industry Petitioners' argument that EPA has arbitrarily "changed the conclusions it drew from the same basic scientific evidence" available in 2008. *See* Indus. Pet. Br. 36-41. To that convincing exposition, the States add only that the 2009 Schelegle study does not bear the weight EPA places on it.

EPA recognizes the weaknesses in the Schelegle study, noting that, as several commenters pointed out: (1) "lung function decrements and respiratory symptoms . . . were not correlated with each other;" (2) average "decrements observed following exposures below 75 ppb are small (e.g., < 10% . . .);" and (3) the lung-capacity limitations observed were "transient and reversible, do not interfere with daily activities, and do not result in permanent respiratory injury." 80 FR 65,330.

In response, EPA infers from the American Thoracic Society's silence that ATS's requirement of both decrements and symptoms "is not restricted to effects of a particular magnitude ***nor*** a requirement that individual responses be correlated." *Id.* (emphasis added); *see also id.* ("Similarly, CASAC made no such qualification"). This position is unreasonable on both counts, regardless of whether EPA chooses to focus on average or individualized data. If focused on average data, Schelegle's 6% average decrements fall well short of the 10% minimum that EPA requires. If individual data are controlling, meaning that six of the 31 study participants satisfy the 10% threshold, those six

individuals are not the same people who reported symptoms.[5] EPA's claim that CASAC does not expressly forbid bundling decrements from one person with symptoms from another is also inconsistent with the requirement of both decrements and symptoms before finding an "adverse health effect," a concept that is necessarily tied to individual human bodies. The effect on individuals is, moreover, precisely the reason why EPA prioritizes controlled human-exposure studies over less reliable epidemiological evidence. *Mississippi*, 744 F.3d at 1343-44; 73 FR 16,479; 79 FR 75,288.

Either way, EPA must explain its choice. It is arbitrary and capricious to rely on uncorrelated individual results and a too-low average decrement based on ATS's failure to foreclose this particular portmanteau of unpersuasive data.

Ultimately, the 2009 Schelegle study does not present any new information on the effects of ozone. Additionally, EPA has not offered a reasoned explanation for how the study's predictable findings justify a lower NAAQS under the scientific framework the Agency itself

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[5] Additionally, EPA would need to provide a non-arbitrary explanation for how this tiny group—six of 31 participants—is compelling evidence today, when six of 30 was unconvincing in 2008.

endorses. It is arbitrary and capricious for EPA to dismiss the Schelegle study's limitations in the manner it has.

CONCLUSION

EPA's hastily-crafted ozone NAAQS imposes an unachievable standard, divorced from the scientific realities of background ozone. The Agency's only response is to promise a partial accommodation that the statute limits in both applicability and degree of relief. This model of rulemaking does not accord with the Clean Air Act, which demands that NAAQS be achievable. To abandon that expectation and instead impose standards that would require cessation of human activity across large parts of the country is either an abuse of discretion or proof that EPA's construction of the Act does not reflect an intelligible principle. This Court should vacate the Rule.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because this brief contains 9,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The total number of words contained in this brief and the Industry Petitioners' Brief is fewer than 19,000, per this Court's Order of March 9, 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on April 22, 2016. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Regulatory Addendum

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40 C.F.R. § 50.14 **Treatment of air quality monitoring data influenced by exceptional events.**

(a) *Requirements.*

(1) A State may request EPA to exclude data showing exceedances or violations of the national ambient air quality standard that are directly due to an exceptional event from use in determinations by demonstrating to EPA's satisfaction that such event caused a specific air pollution concentration at a particular air quality monitoring location.

(2) Demonstration to justify data exclusion may include any reliable and accurate data, but must demonstrate a clear causal relationship between the measured exceedance or violation of such standard and the event in accordance with paragraph (c)(3)(iv) of this section.

(b) *Determinations by EPA.*

(1) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that an exceptional event caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section.

(2) EPA shall exclude data from use in determinations of exceedances and NAAQS violations where a State demonstrates to EPA's satisfaction that emissions from fireworks displays caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section. Such data will be treated in the same manner as exceptional events under this rule, provided a State demonstrates that such use of fireworks is significantly integral to traditional national, ethnic, or other cultural events including, but not limited to July Fourth celebrations which satisfy the requirements of this section.

(3) EPA shall exclude data from use in determinations of exceedances and NAAQS violations, where a State demonstrates to EPA's satisfaction that emissions from prescribed fires caused a specific air pollution concentration in excess of one or more national ambient air quality standards at a particular air quality monitoring location and otherwise satisfies the requirements of this section provided that such emissions are from prescribed fires that EPA determines meets the definition in § 50.1(j), and provided that the State has certified to EPA that it has adopted and is implementing a Smoke Management Program or the State has ensured that the burner employed basic smoke management practices. If an exceptional event occurs using the basic smoke management practices approach, the State must undertake a review of its approach to ensure public health is being protected and must include consideration of development of a SMP.

(4) [Reserved]

(c) *Schedules and Procedures.*

(1) Public notification.

(i) All States and, where applicable, their political subdivisions must notify the public promptly whenever an event occurs or is reasonably anticipated to occur which may result in the exceedance of an applicable air quality standard.

(ii) [Reserved]

(2) Flagging of data.

(i) A State shall notify EPA of its intent to exclude one or more measured exceedances of an applicable ambient air quality standard as being due to an exceptional event by placing a flag in the appropriate field for the data record of concern which has been submitted to the AQS database.

(ii) Flags placed on data in accordance with this section shall be deemed informational only, and the data shall not be excluded from determinations with respect to exceedances or violations of the national ambient air quality standards unless and until, following the State's submittal of its demonstration pursuant to paragraph (c)(3) of this section and EPA review, EPA notifies the State of its concurrence by placing a concurrence flag in the appropriate field for the data record in the AQS database.

(iii) Flags placed on data as being due to an exceptional event together with an initial description of the event shall be submitted to EPA not later than July 1st of the calendar year following the year in which the flagged measurement occurred, except as allowed under paragraph (c)(2)(iv) or (c)(2)(v) of this section.

(iv) For $PM_{2.5}$ data collected during calendar years 2004-2006, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than October 1, 2007. EPA may grant an extension, if a State requests an extension, and permit the State to submit the notification of the flag and initial description by no later than December 1, 2007.

(v) For lead (Pb) data collected during calendar years 2006-2008, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2009. For Pb data collected during calendar year 2009, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than July 1, 2010. For Pb data collected during calendar year 2010, that the State identifies as resulting from an exceptional event, the State must notify EPA of the flag and submit an initial description of the event no later than May 1, 2011.

(vi) When EPA sets a NAAQS for a new pollutant or revises the NAAQS for an existing pollutant, it may revise or set a new schedule for flagging exceptional event data, providing initial data descriptions and providing detailed data documentation in AQS for the initial designations of areas for those NAAQS. Table 1 provides the schedule

for submission of flags with initial descriptions in AQS and detailed documentation. These schedules shall apply for those data which will or may influence the initial designation of areas for those NAAQS. EPA anticipates revising Table 1 as necessary to accommodate revised data submission schedules for new or revised NAAQS.

Table 1—Schedule of Exceptional Event Flagging and Documentation Submission for Data To Be Used in Designations Decisions for New or Revised NAAQS

NAAQS Pollutant/ standard/(level)/ promulgation date	**Air quality data collected for calendar year**	**Event flagging & initial description deadline**	**Detailed documentation submission deadline**
$PM_{2.5}$/24-Hr Standard (35 µg/m3) Promulgated October 17, 2006	2004-2006	October 1, 2007 [a]	April 15, 2008. [a]
Ozone/8-Hr Standard (0.075 ppm) Promulgated March 12, 2008	2005-20072008 2009	June 18, 2009 [a] June 18, 2009 [a] 60 days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date	June 18, 2009 [a] June 18, 2009 [1] 60 days after the end of the calendar quarter in which the event occurred or February 5, 2010, whichever date occurs first.[b]

		occurs first [b]	
NO_2/1-Hour Standard (80-100 PPB, final level TBD)	2008 2009 2010	July 1, 2010 a July 1, 2010 [a] April 1, 2011 [a]	January 22, 2011 [a] January 22, 2011 [a] July 1, 2010 [a]
SO_2/1-Hour Standard (50-100 PPB, final level TBD)	20082009 2010	October 1, 2010 [b] October 1, 2010 [b] June 1, 2011 [b]	June 1, 2011 [b] June 1, 2011 [b] June 1, 2011 [b]
	2011	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first [b]	60 days after the end of the calendar quarter in which the event occurred or March 31, 2012, whichever date occurs first. [b]

[a] These dates are unchanged from those published in the original rulemaking, or are being proposed elsewhere and are shown in this table for informational purposes—the Agency is not opening these dates for comment under this rulemaking.

[b] Indicates change from general schedule in 40 CFR 50.14.

Note:EPA notes that the table of revised deadlines *only* applies to data EPA will use to establish the final initial designations for new or revised NAAQS. The general schedule applies for all other purposes, most notably, for data used by EPA for redesignations to attainment.

(3) *Submission of demonstrations.*
(i) A State that has flagged data as being due to an exceptional event and is requesting exclusion of the affected measurement data shall, after notice and opportunity for public comment, submit a demonstration to justify data exclusion to EPA not later than the lesser of, 3 years following the end of the calendar quarter in which the flagged concentration was recorded or, 12 months prior to the date that a regulatory decision must be made by EPA. A State must submit the public comments it received along with its demonstration to EPA.
(ii) A State that flags data collected during calendar years 2004-2006, pursuant to paragraph (c)(2)(iv) of this section, must adopt the procedures and requirements specified in paragraph (c)(3)(i) of this section and must include a demonstration to justify the exclusion of the data not later than the submittal of the Governor's recommendation letter on nonattainment areas.
(iii) A State that flags Pb data collected during calendar years 2006-2009, pursuant to paragraph (c)(2)(v) of this section shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify exclusion of the data not later than October 15, 2010. A State that flags Pb data collected during calendar year 2010 shall, after notice and opportunity for public comment, submit to EPA a demonstration to justify the exclusion of the data not later than May 1, 2011. A state must submit the public comments it received along with its demonstration to EPA.
(iv) The demonstration to justify data exclusion shall provide evidence that:(A) The event satisfies the criteria set forth in 40 CFR 50.1(j);(B) There is a clear causal relationship between the measurement under consideration and the event that is claimed to have affected the air quality in the area;(C) The event is associated with a measured concentration in excess of normal historical fluctuations, including background; and(D) There would have been no exceedance or violation but for the event.

(v) With the submission of the demonstration, the State must document that the public comment process was followed.

[72 FR 13580, Mar. 22, 2007; 72 FR 28612, May 22, 2007; 73 FR 67051, Nov. 12, 2008; 74 FR 70598, Nov. 21, 2008; 74 FR 23312, May 19, 2009; 75 FR 6531, Feb. 9, 2010; 75 FR 35592, June 22, 2010]

40 C.F.R. § 50.19 **Categorical exclusions not subject to the Federal laws and authorities cited in § 50.4.**

(a) *General.* The activities and related approvals of policy documents listed in paragraphs (b) and (c) of this section are not subject to the individual compliance requirements of the Federal laws and authorities cited in § 50.4, unless otherwise indicated below. These activities and approvals of policy documents are also categorically excluded from the EA required by NEPA except in extraordinary circumstances (§ 50.20(b)). HUD approval or implementation of these categories of activities and policy documents does not require environmental review, because they do not alter physical conditions in a manner or to an extent that would require review under NEPA or the other laws and authorities cited at § 50.4.

(b) *Activities.*
(1) Environmental and other studies, resource identification and the development of plans and strategies.
(2) Information and financial advisory services.
(3) Administrative and management expenses.
(4) Public services that will not have a physical impact or result in any physical changes, including but not limited to services concerned with employment, crime prevention, child care, health, drug abuse, education, counseling, energy conservation and welfare or recreational needs.
(5) Inspections and testing of properties for hazards or defects.
(6) Purchase of insurance.
(7) Purchase of tools.

(8) Engineering or design costs.
(9) Technical assistance and training.
(10) Assistance for temporary or permanent improvements that do not alter environmental conditions and are limited to protection, repair or restoration activities necessary only to control or arrest the effects from disasters or imminent threats to public safety including those resulting from physical deterioration.
(11) Tenant-based rental assistance.
(12) Supportive services including, but not limited to, health care, housing services, permanent housing placement, day care, nutritional services, short-term payments for rent/mortgage/utility costs, and assistance in gaining access to local, State, and Federal government benefits and services.
(13) Operating costs including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training and recruitment and other incidental costs; however, in the case of equipment, compliance with § 50.4(b)(1) is required.
(14) Economic development activities, including but not limited to, equipment purchase, inventory financing, interest subsidy, operating expenses and similar costs not associated with construction or physical expansion of existing facilities; however, in the case of equipment purchase, compliance with § 50.4(b)(1) is required.
(15) Activities to assist homebuyers to purchase existing dwelling units or dwelling units under construction, including closing costs and downpayment assistance, interest buydowns, and similar activities that result in the transfer of title.
(16) Housing pre-development costs including legal, consulting, developer and other costs related to site options, project financing, administrative costs and fees for loan commitments, zoning approvals, and other related activities which do not have a physical impact.
(17) HUD's insurance of one-to-four family mortgages under the Direct Endorsement program, the insurance of one-to-four family mortgages under the Lender Insurance program, and HUD's guarantee of loans for one-to-four family dwellings under the Direct Guarantee procedure for the Indian Housing loan guarantee program, without any HUD review or approval before the completion of construction or rehabilitation and the loan closing; and HUD's acceptance for insurance of loans insured

under Title I of the National Housing Act; however, compliance with §§ 50.4(b)(1) and (c)(1) and 24 CFR 51.303(a)(3) is required.
(18) HUD's endorsement of one-to-four family mortgage insurance for proposed construction under Improved Area processing; however, the Appraiser/Review Appraiser Checksheet (Form HUD-54891) must be completed.
(19) Activities of the Government National Mortgage Association under Title III of the National Housing Act (12 U.S.C. 1716 *et seq.*).
(20) Activities under the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*).(21) Refinancing of HUD-insured mortgages that will not allow new construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance; however, compliance with § 50.4(b)(1) is required.
(22) Approval of the sale of a HUD-held mortgage.
(23) Approval of the foreclosure sale of a property with a HUD-held mortgage; however, appropriate restrictions will be imposed to protect historic properties.
(24) HUD guarantees under the Loan Guarantee Recovery Fund Program (24 CFR part 573) of loans that refinance existing loans and mortgages, where any new construction or rehabilitation financed by the existing loan or mortgage has been completed prior to the filing of an application under the program, and the refinancing will not allow further construction or rehabilitation, nor result in any physical impacts or changes except for routine maintenance; however, compliance with §§ 50.4 (b)(1) and (c)(1) and 51.303(a) is required.

(c) *Approval of policy documents.*
(1) Approval of rules and notices proposed for publication in the **Federal Register** or other policy documents that do not:(i) Direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing (other than tenant-based rental assistance), rehabilitation, alteration, demolition, or new construction; or (ii) Establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy.
(2) Approval of policy documents that amend an existing document where the existing document as a whole would not fall within an exclusion in this paragraph (c) but the amendment by itself would do so;

(3) Approval of policy documents that set out fair housing or nondiscrimination standards or enforcement procedures or provide for assistance in promoting or enforcing fair housing or nondiscrimination;
(4) Approval of handbooks, notices and other documents that provide operating instructions and procedures in connection with activities under a **Federal Register** document that has previously been subject to a required environmental review.
(5) Approval of a Notice of Funding Availability (NOFA) that provides funding under, and does not alter any environmental requirements of, a regulation or program guideline that was previously published in the **Federal Register,** provided that(i) The NOFA specifically refers to the environmental review provisions of the regulation or guideline; or(ii) The regulation or guideline contains no environmental review provisions because it concerns only activities listed in paragraph (b) of this section.
(6) Statutorily required and/or discretionary establishment and review of interest rates, loan limits, building cost limits, prototype costs, fair market rent schedules, HUD-determined prevailing wage rates, income limits and exclusions with regard to eligibility for or calculation of HUD housing assistance or rental assistance, and similar rate and cost determinations and related external administrative or fiscal requirements or procedures which do not constitute a development decision that affects the physical condition of specific project areas or building sites.

[61 FR 50916, Sept. 27, 1996, as amended at 62 FR 15802, Apr. 2, 1997; 63 FR 48990, Sept. 11, 1998; 68 FR 56127, Sept. 29, 2003]