ORAL ARGUMENT NOT YET SCHEDULED

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

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 15-1115, 15-1123 (consolidated cases)

RESPONDENTS' UNOPPOSED MOTION FOR VOLUNTARY REMAND WITH VACATUR OF SPECIFIC PORTIONS OF THE RULEMAKING AT ISSUE

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DATE: JULY 21, 2016

Respondents, the Environmental Protection Agency and Administrator Gina McCarthy (collectively "EPA"), respectfully move the Court to remand certain portions of the Final Rule titled "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements," 80 Fed. Reg. 12,264 (March 6, 2015) (the "Rule" or "Final Rule") with vacatur to EPA for further proceedings. The Final Rule was promulgated to implement the national ambient air quality standard for ozone that was promulgated in 2008 ("2008 NAAQS"). Among other things, the Final Rule revoked the earlier, less-stringent 1997 national ambient air quality standard for ozone ("1997 NAAQS"), and addressed anti-backsliding requirements imposed under the principles of Clean Air Act section 7502(e) for the revoked 1997 NAAQS and for the formerly-revoked and generally even less-stringent one-hour ozone standard promulgated in 1979 ("One-Hour NAAQS").[1]

EPA seeks to remand with vacatur portions of the Final Rule that address anti-backsliding requirements for the One-Hour NAAQS in areas that either were initially designated as attainment for the 2008 NAAQS, or that in the future are

[1] The 1979 ozone standard became known as the One-Hour NAAQS, because it limited the levels of ozone precursors in ambient air to 0.12 parts per million or less over a one-hour time period. In contrast, the 1997 and 2008 NAAQS limit ambient levels of ozone precursors to 0.08 and 0.075 parts per million over an eight-hour time period. An even more stringent eight-hour ozone NAAQS was promulgated in 2015, however that standard is not at issue in the consolidated cases.

redesignated as attainment for the 2008 NAAQS under CAA section 9407(d)(3)(E) (collectively "Remand Provisions"). *See* 40 C.F.R. § 51.1105(a)(3), (a)(4), (b); *id.* Part 51, App. S, Sec. VII(B). Those portions of the Final Rule are a subset of the provisions being challenged by Petitioners Sierra Club, Conservation Law Foundation, Downwinders at Risk, and Physicians for Social Responsibility – Los Angeles in the above-captioned consolidated Case 15-1123 (collectively "Environmental Petitioners"). While EPA intends to file a merits brief opposing most of the Environmental Petitioners' challenges, upon review of their brief, EPA determined that it is prudent to seek remand with vacatur of the Remand Provisions for further consideration and explanation, for the reasons explained below. The specific relief sought by EPA is set forth in the "Conclusion" section of this motion below.

After discussion with counsel for all of the parties to both consolidated cases, no Petitioner or Intervenor in either of the consolidated cases opposes this Motion.

I. BACKGROUND

A. Statutory Background

Congress first enacted the modern Clean Air Act in 1970, and substantially amended it in 1977 and 1990. Among other things, the Act establishes a comprehensive national program to protect public health and welfare from the

harmful effects of exposure to a series of ubiquitous air pollutants, including ozone (also known as smog). *See generally* 42 U.S.C. § 7401; Pub. L. No. 95-95, 91 Stat. 685 (1977). The Act requires EPA to identify and list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and whose "presence . . . in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408. EPA then must issue primary NAAQS for those pollutants, "the attainment and maintenance of which . . . allowing an adequate margin of safety, are requisite to protect the public health." *Id.* §§ 7409(b)(1)-(2), 7602(h).

States have primary responsibility for ensuring that air quality within their jurisdiction meets each NAAQS, and those with nonattainment areas must develop a State Implementation Plan ("SIP") that specifies, *inter alia*, how they will attain each NAAQS by the applicable deadlines. *Id.* §§ 7407(d), 7410(a); 7501-7514a. The contents of such plans and the requirements they must fulfill with respect to each NAAQS depend upon the designations and classifications of the various areas within their boundaries.

EPA must "complete a thorough review" of the criteria on which each NAAQS is based at five-year intervals and "make such revisions in such criteria and [NAAQS] as may be appropriate." *Id*. § 7409(d)(1). When a NAAQS is revoked after being superseded by a less stringent one, "anti-backsliding"

requirements are imposed under 42 U.S.C. § 7502(e) for "areas which have not attained that standard" at that time to ensure that their air quality does not deteriorate or "backslide." EPA has also chosen to apply this same policy when NAAQS are made *more* stringent, a choice that has been upheld by this Court. *South Coast Air Qual. Mgmt. Dist. v. EPA*, 472 F.3d 882, 899 (D.C. Cir. 2006) (hereafter "*South Coast*"); *NRDC v. EPA*, 779 F.3d 1119, 1122-23 (D.C. Cir. 2015); *NRDC v. EPA*, 777 F.3d 456, 471 (D.C. Cir. 2014). The One-Hour NAAQS has been superseded by three more-stringent ozone NAAQS to date—the 1997, the 2008 and the 2015 eight-hour ozone NAAQS.

B. Anti-Backsliding for the Revoked One-Hour NAAQS

On March 6, 2015, EPA issued the Final Rule, which imposed seventeen anti-backsliding measures for both the One-Hour and the 1997 NAAQS, including all of those required by this Court in the *South Coast* decision. 40 C.F.R. § 51.1100(*o*); 80 Fed. Reg. at 12,298/3 – 299/3. The Final Rule also provided that anti-backsliding requirements would not be required for areas initially designated attainment for the generally more-stringent 2008 NAAQS, and established two more alternative processes by which they later can be satisfied or "lifted" for other areas with respect to one or both of the One-Hour and 1997 NAAQS through EPA

notice-and-comment rulemaking.[2] Under the first process, States must satisfy the statutory requirements for redesignating an area to attainment for the 2008 NAAQS under CAA section 7407(d)(3)(E). Upon redesignation, the anti-backsliding requirements (if any) for the One-Hour or 1997 NAAQS also are lifted. Under the second process, States must satisfy the same Section 7407(d)(3)(E) criteria for redesignating an area to attainment, but must make this showing with respect to the revoked NAAQS for which they desire to lift anti-backsliding requirements (*i.e.*, the One-Hour or the 1997 NAAQS) (hereafter "Redesignation Substitute").[3] 80 Fed. Reg. at –12,301 - 302, –12,304/2 – 305/2.

II. PROVISIONS FOR WHICH REMAND IS SOUGHT

The Environmental Petitioners have challenged, among other things, EPA's definition of the circumstances under which anti-backsliding requirements will

[2] Anti-backsliding requirements are only satisfied or "lifted" in the sense that States no longer need to add outstanding anti-backsliding measures (if any) to their SIPs, and can seek to convert existing ones into contingency measures through a subsequent EPA notice-and-comment rulemaking. States must continue to implement all such measures as normal SIP components, however, unless and until EPA approves their conversion to contingency measures pursuant to CAA section 7410(*l*) based on a determination that such a conversion will not "interfere with any applicable requirement regarding attainment . . . or any other applicable requirement of [the CAA]." 80 Fed. Reg. at 12,304/3; 78 Fed. Reg. at 34,222 – 223.

[3] This process has been termed the "Redesignation Substitute", because all area designations and classifications for the One-Hour and 1997 NAAQS were revoked with those standards. Hence, areas cannot be formally "redesignated" to attainment.

apply (*i.e.*, in areas designated nonattainment for the 2008 NAAQS) and both of the methods by which anti-backsliding requirements may be lifted for the revoked One-Hour and 1997 NAAQS. Upon review of the Environmental Petitioners' brief, EPA has determined that it did not adequately address two of those issues, solely with respect to the One-Hour NAAQS. EPA therefore seeks remand with vacatur of those specific provisions, solely with respect to the One-Hour standard, because they concededly have insufficient support in the present administrative record.

More particularly, EPA seeks remand with vacatur of the portions of the Final Rule that address anti-backsliding requirements for the One-Hour NAAQS in areas that either were initially designated as attainment for the 2008 NAAQS, or that in the future are redesignated as attainment for the 2008 NAAQS under CAA section 9407(d)(3)(E) (collectively "Remand Provisions"). 40 C.F.R. §§ 51.1105(a)(3), (a)(4), (b); *id.* Part 51, App. S, Sec. VII(B). *See also* 80 Fed. Reg. at 12,314, 12,317/3 - 318/1. EPA does not seek remand of any portion of the Final Rule with respect to the 1997 or 2008 NAAQS, and does not seek remand of the Redesignation Substitute with respect to the One-Hour NAAQS.

ARGUMENT

III. VOLUNTARY REMAND WITH VACATUR IS APPROPRIATE TO CURE DEFICIENCIES IN THE FINAL RULE.

Remand with vacatur of the above-referenced portions of the Final Rule is appropriate because EPA believes it did not adequately describe in the Final Rule or in the rulemaking record the scientific and other factual bases for the Agency's determination that initial attainment, or future redesignation to attainment, of the generally far more stringent 2008 NAAQS ensures that areas are in actual attainment of the One-Hour NAAQS as well. Consequently, EPA also did not adequately respond to public comments objecting to the Remand Provisions with respect to the One-Hour NAAQS, including those that implicate this Court's decision in *NRDC v. EPA*, 643 F.3d at 322.

As this Court has stated, "[w]e commonly grant such motions [to remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). *See also Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"). "Administrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the

federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (*quoting Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)).

Moreover, the narrowly-defined Remand Provisions are severable, and no participating or interested parties will be prejudiced by their vacatur. "Whether a regulation is severable depends on the issuing agency's intent." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). *See also Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). The Final Rule and implementing regulations clearly identify all three methods for defining the application or satisfaction of anti-backsliding requirements as alternative and not inter-dependent in any way, and none of the Petitioners contends otherwise. *See* 80 Fed. Reg. at 12,299/3 – 301/1, 12,303/3 - 305, 12,314, 12,317/3 - 318/1; 40 C.F.R. §§ 51.1105(a)(3), (a)(4), (b); *id.* Part 51, App. S, Sec. VII(B). Furthermore, all three methods are structured such that their application (or lack thereof) to the One-Hour NAAQS has no influence on their application to the 1997 NAAQS, and *vice versa*. Vacating the Remand Provisions with respect to the One-Hour NAAQS therefore will not affect any other portion of the Final Rule, and will have no effect on anti-backsliding requirements for the 1997 NAAQS.

Moreover, no participating parties or interested persons would be prejudiced by vacatur of the Remand Provisions. EPA is not seeking to remand the Redesignation Substitute. Areas with air quality that has in fact attained the One-Hour NAAQS therefore would not be foreclosed from seeking to satisfy those requirements utilizing the Redesignation Substitute process.[4] The requested vacatur would simply remove the option of satisfying them through designating or redesignating an area to attainment with respect to the 2008 NAAQS. Accordingly, the specified Remanded Provisions should be remanded and/or vacated as described.

CONCLUSION

For the foregoing reasons, Respondents' motion for remand with vacatur should be granted. More specifically, EPA respectfully requests that the Court issue an order vacating 40 C.F.R. sections 51.1105(a)(3), (a)(4), (b) and 40 C.F.R. Part 51, App. S, Sec. VII(B) solely with respect to the One-Hour NAAQS (not with respect to the 1997 or 2008 NAAQS), and remanding those provisions to the Agency for further consideration.

[4] EPA already has approved a Redesignation Substitute with respect to the One-Hour NAAQS for the Houston-Galveston-Brezoria area in Texas, and recently proposed one for the Dallas-Fort Worth area. *See* 80 Fed. Reg. 63,429 (Oct. 20, 2015) (Houston-Galveston-Brezoria); 81 Fed. Reg. 33,166 (May 25, 2016) (Dallas-Fort Worth).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondents' Unopposed Motion for Voluntary Remand with Vacatur of Specific Portions of the Rulemaking at Issue was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

Date: July 21, 2016

/s/ Heather E. Gange
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