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1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

*Submitted electronically via Regulations.gov*

**RE: Public Interest Organizations’ comments opposing Ozone Reclassification State Implementation Plan Rule, 91 Fed. Reg. 35639 (June 12, 2026), Docket ID No. EPA-HQ-OAR-2025-0201**

Clean Air Task Force, Natural Resources Defense Council, Earthjustice, Sierra Club, Clean Wisconsin, Environmental Defense Fund, Center for Biological Diversity, and Clean Air Council (together, “Public Interest Organizations”) respectfully submit these comments to highlight the numerous and egregious legal deficiencies in EPA’s proposed action titled “Ozone Reclassification State Implementation Plan Rule,” 91 Fed. Reg. 35639 (June 12, 2026) (“Proposal”). EPA must abandon its unlawful Proposal.

As detailed below, the Proposal unlawfully reinterprets the Clean Air Act’s gradual classification scheme for ozone nonattainment areas in a way that is contrary to the plain language and the purpose of the statute. The Proposal would contravene the Act’s requirement that areas failing to meet health-based ambient air quality standards attain those standards as expeditiously as practicable by instead allowing states to defer implementation of any air pollution controls for years, all while ozone levels in many nonattainment areas across the country continue to increase and air quality deteriorates. The Proposal fails to explain how it is consistent with the Act’s language, structure, history, and purpose, fails to provide clarity on what nonattainment plan elements are or are not still required after reclassification, fails to grapple with the ongoing problem of both states and EPA missing deadlines that the Act assumed would be met in a timely fashion, and fails to acknowledge the drastic change in position that this Proposal represents.

For these and other reasons, EPA must abandon this illegal Proposal and should instead focus its efforts on timely implementation of the Act’s ozone requirements. Given the deteriorating ozone conditions in many nonattainment areas, now is the time for the agency and states to answer the Act’s call to attain the 2015 Ozone Standard as expeditiously as practicable. The health and wellbeing of the American people suffer the most when EPA and states sit on the sideline and point the finger at each other rather than grapple with the problems plaguing implementation of the Act’s graduated classification scheme. To protect the public health and environment, EPA must do more—not less—and must not abdicate its responsibility and mission by adopting this Proposal.

## BACKGROUND

### I. Ozone Pollution Harms Health and the Environment.

Though EPA set the current standard for ground-level ozone pollution over a decade ago, over 115 million Americans continue to breathe air that fails that standard today.<sup>1</sup> Those millions of people face elevated risk of ozone-caused harms to their health, including asthma attacks, permanent lung damage, cardiovascular and metabolic disease, and even early death.<sup>2</sup> Studies have shown that ozone may interfere with the development of the placenta during pregnancy and impair blood flow to the fetus.<sup>3</sup> As a result, most pregnancy complications occur more often among pregnant mothers exposed to more ozone, such as gestational hypertension, pre-eclampsia, still births, premature birth and maternal heart dysfunction.<sup>4</sup> Specifically, ozone spikes in the week prior to delivery increased the risk of still birth by 13-22%, meaning thousands of still births a year may be attributable to ozone.<sup>5</sup> In this study, average levels of ozone did not exceed the EPA's national standard. In addition, ozone induces neurotoxicity and may contribute to the risk of neurodegenerative diseases like Alzheimer's disease.<sup>6</sup>

In its 2020 Integrated Scientific Assessment for Ozone, EPA concluded that “[r]ecent studies support and expand upon the strong body of evidence, which has been accumulating over many decades, that short-term ozone exposure causes respiratory effects.”<sup>7</sup> Those effects can include decreases in lung function, asthma and chronic obstructive pulmonary disease

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<sup>1</sup> EPA, 8-Hour Ozone (2015) Designated Area/State Information, <https://www3.epa.gov/airquality/greenbook/jbtc.html> (last visited June 30, 2026) (2010 population located in current nonattainment areas). We hereby incorporate into these comments all sources cited herein, for inclusion in the docket. For convenience, we also attach certain sources.

<sup>2</sup> See National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65307-08 (Oct. 26, 2015); EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* 2-20 to -24, tbl.2-1 (Feb. 2013) (EPA-HQ-OAR-2008-0699-0405) (attached as Ex. 1); American Lung Assoc., *State of the Air: 2022 Report* at 24-25 (2022) (EPA-HQ-OAR-2021-0668-0270) (attached as Ex. 2); EPA, *EPA's “Good Neighbor” Plan Cuts Ozone Pollution—Overview Fact Sheet* at 4 (Mar. 2023), [https://www.epa.gov/system/files/documents/2023-03/Final\\_Good\\_Neighbor\\_Rule\\_Fact\\_Sheet\\_0.pdf](https://www.epa.gov/system/files/documents/2023-03/Final_Good_Neighbor_Rule_Fact_Sheet_0.pdf) (attached as Ex. 3).

<sup>3</sup> R. Hunter et al., *Gestational ozone inhalation elicits maternal cardiac dysfunction and transcriptional changes to placental pericytes and endothelial cells*, 196 *Toxicological Sciences* 2, 238-249 (2023), <https://doi.org/10.1093/toxsci/kfad092> (attached as Ex. 4).

<sup>4</sup> M. Garcia et al., *Early Gestational Exposure to Inhaled Ozone Impairs Maternal Uterine Artery and Cardiac Function*, 179 *Toxicological Sciences* 1, 121-134 (2021), <https://doi.org/10.1093/toxsci/kfaa164> (attached as Ex. 5); K.M. Rappazzo et al., *Ozone exposure during early pregnancy and preterm birth: A systematic review and meta-analysis*, 198 *Environ Res.* 111317 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8221456/> (attached as Ex. 6).

<sup>5</sup> P. Mendola et al., *Chronic and Acute Ozone Exposure in the Week Prior to Delivery Is Associated with the Risk of Stillbirth*, 14 *Int'l J. Environ Res Public Health* 731 (2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5551169/> (attached as Ex. 7).

<sup>6</sup> G. Bjørklund et al., *Ozone-induced Neurotoxicity: Mechanistic Insights and Implications for Neurodegenerative Diseases*, 2026 *Current Medicinal Chemistry* 1 (2026), <https://pubmed.ncbi.nlm.nih.gov/40641015/>.

<sup>7</sup> EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants*, at IS-1, EPA/600/R-20/012 (Apr. 2020), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=348522> (“2020 ISA”) (attached as Ex. 8).

exacerbations, and increases in respiratory-related hospital admissions and emergency room visits.<sup>8</sup>

For short-term exposure, EPA found that “[e]pidemiologic studies continue to provide evidence that increased ozone concentrations are associated with a range of respiratory effects, including asthma exacerbation, chronic obstructive pulmonary disease (COPD) exacerbation, respiratory infection, and hospital admissions and [emergency department] visits for combined respiratory diseases.”<sup>9</sup> Short-term exposure to ozone can have critical health implications. For instance, there is strong evidence of an association between out-of-hospital cardiac arrests and short-term exposure to ozone.<sup>10</sup> Both the daily average ozone level on the day of the cardiac event and shorter exposures up to three hours in duration correlated significantly with the likelihood of a cardiac event. This evidence augments the long-standing body of literature demonstrating the serious impacts from short-term exposure to ozone pollution.<sup>11</sup>

Short-term ozone exposure has also been linked to other cardiovascular effects. A large body of research provides robust evidence of the relationship between ozone and strokes, as well as some evidence for arrhythmias in those with pre-existing heart disease. A large meta-analysis of over 20 studies found a 2.45% increase in ischemic stroke rate per 10 parts per billion (“ppb”) increase in ozone.<sup>12</sup>

Long-term exposure to ozone likewise has critical health implications. EPA has concluded that there is “likely to be a causal relationship between long-term ozone exposure and respiratory effects.”<sup>13</sup> Studies have reported positive associations between long-term ozone exposure and new-onset asthma, and respiratory symptoms in children with asthma.<sup>14</sup> Indeed, following nearly 6,000 patients in six different cities over 10 years, using CT scans and lung function tests to assess lung health, researchers found that an increase of just 3 parts per billion (ppb) in ozone during those 10 years was associated with an emphysematous deterioration of lung tissue comparable to what would be seen from smoking a pack of cigarettes per day for 29 years.<sup>15</sup> The annual average ozone observed during those ten years was between 10 and 25 ppb.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at IS-8.

<sup>10</sup> Zhiqiang Zong et al., *Association between Short-Term Exposure to Ozone and Heart Rate Variability: A Systematic Review and Meta-Analysis*, 19 Int’l J. Env’t Res. & Pub. Health 11186 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9517606/> (attached as Ex. 9); Katherine B. Ensor et al., *A case-crossover analysis of out-of-hospital cardiac arrest and air pollution*, 127 Circulation 1192 (2013), <https://www.ncbi.nlm.nih.gov/pubmed/23406673/> (attached as Ex. 10).

<sup>11</sup> See 2020 ISA at IS-1

<sup>12</sup> Wan-Shui Yang et al., *An evidence-based appraisal of global association between air pollution and risk of stroke*, 175 Int’l J. Cardiology 2, 307-313 (2014), <https://pubmed.ncbi.nlm.nih.gov/24866079/>.

<sup>13</sup> 2020 ISA at IS-8 (internal quotation marks omitted).

<sup>14</sup> *Id.*

<sup>15</sup> M. Wang et al., *Association Between Long-term Exposure to Ambient Air Pollution and Change in Quantitatively Assessed Emphysema and Lung Function*, 322 JAMA 6, 546-556 (2019), <https://jamanetwork.com/journals/jama/fullarticle/2747669> (attached as Ex. 11).

Those harms are not equitably distributed. While ozone is harmful to healthy adults, it is more harmful to children, people with lung disease, those working or exercising outside, and older people.<sup>16</sup> People of color are more likely to be exposed to high levels of ozone and are more likely to suffer from chronic conditions that increase their susceptibility.<sup>17</sup> Black children are twice as likely to be hospitalized for asthma as white children and four times as likely to die from asthma.<sup>18</sup>

Ground-level ozone forms from precursor air pollution, such as nitrogen oxides (NOx) emitted by sources like power plants, industrial boilers, and cars.<sup>19</sup> In addition to harming human health, ozone pollution damages ecosystems, as EPA documented when it updated the ozone NAAQS in 2015.<sup>20</sup> Ozone impairs plant growth, damages the leaves of plants and trees, and reduces agricultural yields for numerous common and economically valuable plant and tree species.<sup>21</sup> “In terms of forest productivity and ecosystem diversity, ozone may be the pollutant with the greatest potential for region-scale forest impacts.”<sup>22</sup> NOx emissions, which contribute to ozone formation and are reduced to attain ozone NAAQS, themselves cause ecological harm when they fall to the earth’s surface as nitrogen deposition.<sup>23</sup> Excess nitrogen reduces soil and plant biodiversity, especially in low nutrient adapted ecosystems, and, when deposited to surface waters, causes acidification impacts and harmful algae blooms, which block sunlight from reaching underwater grasses and, when decomposing, suck oxygen from the water and create dead zones where fish and other aquatic species cannot survive.<sup>24</sup> For these reasons, regulation of ozone and its precursor NOx plays an important role in protecting and restoring treasured natural areas throughout the country, like national parks<sup>25</sup> and the Chesapeake Bay.<sup>26</sup>

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<sup>16</sup> American Lung Assoc., State of the Air 2025, Health Impacts of Air Pollution, <https://www.lung.org/getmedia/5d8035e5-4e86-4205-b408-865550860783/State-of-the-Air-2025.pdf> (attached as Ex. 12); see S.A. Korrick et al., *Effects of ozone and other pollutants on the pulmonary function of adult hikers*, 106 *Env’t Health Perspectives* 2, 93-99 (1998), <https://pubmed.ncbi.nlm.nih.gov/9435151/> (attached as Ex. 13).

<sup>17</sup> *Id.* at 27.

<sup>18</sup> EPA, Children’s Environmental Health Disparities: Black and African American Children and Asthma at 3, [https://www.epa.gov/sites/production/files/2014-05/documents/hd\\_aa\\_asthma.pdf](https://www.epa.gov/sites/production/files/2014-05/documents/hd_aa_asthma.pdf) (accessed Jul. 13, 2026) (attached as Ex. 14).

<sup>19</sup> EPA, *Ground-level Ozone Basics*, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (last accessed July 13, 2026) (attached as Ex. 15).

<sup>20</sup> EPA, *Regulatory Impact Analysis of the Final Revisions to the Nat’l Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/R-15-007, at ES-13 (2015), <https://www3.epa.gov/ttnecas1/docs/20151001ria.pdf> (attached as Ex. 16).

<sup>21</sup> EPA, *Air Quality Criteria for Ozone and Related Photochemical Oxidants*, EPA 600/R-05/004aF-cF, at 9-1 (2006), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=149923> (attached as Ex. 17).

<sup>22</sup> EPA, *supra* note 20, at 7-3.

<sup>23</sup> *Id.* at 7-2, 7-3.

<sup>24</sup> *Id.* at 7-6, 7-7.

<sup>25</sup> Nat’l Parks Conservation Ass’n, *Polluted Parks: How Air Pollution and Climate Change Continue to Harm America’s National Parks* at 2 (2024) (attached as Ex. 18) (“96% of parks have sensitive species and natural habitats harmed by sulfur and nitrogen deposition and ozone pollution.”).

<sup>26</sup> See EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment*, at 4-33 (Dec. 2010), <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document> (attached as Ex. 19); *Id.* at Appendix L: Setting the Chesapeake Bay Atmospheric Nitrogen Deposition Allocations, at L-23 (“the nitrogen deposition directly to the Bay’s tidal surface waters is a direct loading with no land-based management controls and,

EPA’s Clean Air Scientific Advisory Committee recently found that the current 2015 Ozone Standard of 70 ppb is inadequate, recommending the adoption of a more stringent standard between 55 to 60 ppb.<sup>27</sup>

## II. The 2015 Ozone Standard and its Stalled Implementation.

To protect public health and welfare, Congress directed EPA to establish national standards limiting ozone. 42 U.S.C. §§ 7408(a), 7409(b). After EPA sets or revises a standard and designates areas as failing to attain that standard, States must then develop and submit to EPA plans that will achieve and maintain the standard “as expeditiously as practicable but not later than” statutory deadlines, which are based on the severity of States’ ozone pollution levels. *Id.* §§ 7410(a), 7511(a)(1). Importantly, because prior statutory approaches that left implementation of ozone standards largely up to EPA and state exercises of discretion had failed to drive attainment, in 1990, Congress clamped down on such discretion and custom-made a detailed, step-by-step implementation approach specific to ozone standards. *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887-88 (D.C. Cir. 2006), *amended in other part on reh’g* 489 F.3d 1245 (D.C. Cir. 2007). Congress’s carefully crafted scheme provides for five “classifications” for ozone nonattainment areas, depending on the severity and persistence of the unhealthily elevated ozone pollution, with higher classifications required to do all the lower classifications had to do, plus more stringent measures. *See id.*; 42 U.S.C. § 7511a.

In 2015, EPA strengthened the health-based National Ambient Air Quality Standard (NAAQS) for ground-level ozone in the outdoor air to 70 ppb. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015). In 2022, EPA noted that 22 areas classified as in marginal nonattainment of the 2015 Ozone Standard had failed to attain by the applicable deadline, and those areas were accordingly “bumped up” in classification to moderate nonattainment. *See Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Marginal for the 2015 Ozone National Ambient Air Quality Standards*, 87 Fed. Reg. 60897 (Oct. 7, 2022).<sup>28</sup> And again, in

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therefore, needs to be linked directly back to the air sources and air controls as EPA’s allocation of atmospheric nitrogen deposition”) (attached as Ex. 20); EPA, Restore Clean Water Actions: Federal Water Quality Two-Year Milestones for 2022-2023 at 14 (Dec. 2024), [https://federalleadership.chesapeakebay.net/files/2024/2022-2023\\_Federal\\_2\\_Year\\_Milestones\\_Progress.pdf](https://federalleadership.chesapeakebay.net/files/2024/2022-2023_Federal_2_Year_Milestones_Progress.pdf) (noting EPA commitments to “[w]ork with states to develop State Implementation Plan (SIP) revisions to reduce NOx emissions” and “[w]ork with states and review SIPs that address infrastructure requirements, including interstate transport, for the 2015 ozone NAAQS”) (attached as Ex. 21).

<sup>27</sup> CASAC Review of the EPA’s Policy Assessment (PA) for the Reconsideration of the Ozone National Ambient Air Quality Standards (External Review Draft Version 2), EPA-CASAC-23-002 (June 9, 2023), [https://www.4cleanair.org/wp-content/uploads/CASAC\\_Review-Ozone\\_PA\\_Draft\\_2-060923.pdf](https://www.4cleanair.org/wp-content/uploads/CASAC_Review-Ozone_PA_Draft_2-060923.pdf); A copy of this report is attached to these comments (attached as Ex. 22).

<sup>28</sup> The areas in question are: Allegan County, Michigan (MI); Baltimore, Maryland (MD); Berrien County, Michigan; Chicago, Illinois-Indiana-Wisconsin (IL-IN-WI); Cincinnati, Ohio-Kentucky (OH-KY); Cleveland, Ohio; Dallas-Fort Worth, Texas (TX); Denver Metro/North Front Range, Colorado (CO) (Denver area); Greater Connecticut, Connecticut (CT); Houston-Galveston-Brazoria, Texas; Louisville, Kentucky-Indiana; Mariposa County, California; Milwaukee, Wisconsin; Muskegon County, Michigan; North Wasatch Front, Utah; Pechanga Band of Luiseno Mission Indians; Philadelphia-Wilmington-Atlantic City, Pennsylvania-New

2024, EPA found that multiple areas failed to attain by the August 3, 2024 attainment deadline, and those areas were consequently bumped up in classification to serious nonattainment. *See Findings of Failure To Attain and Reclassification of Areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin as Serious for the 2015 Ozone National Ambient Air Quality Standards*, 89 Fed. Reg. 101901 (Dec. 17, 2024).<sup>29</sup>

Ozone pollution remains a persistent problem in many nonattainment areas, and in some areas air quality is actually worsening. While some nonattainment areas have experienced modest improvements since 2019, many have seen little to no progress toward attaining the 2015 Ozone Standard, and several have recorded higher ozone levels today than they did six years ago. The table below compares some nonattainment areas' 2019 and 2025 ozone design values. Values highlighted in **bold red text** have both (1) a 2025 design value that exceeds the 2015 Ozone Standard and (2) a higher 2025 design value than in 2019, indicating that ozone air quality has deteriorated over time. The remaining areas shown in the table also continue to violate the standard and have experienced either no meaningful improvement or only limited improvement (less than a five percent reduction in design values) between 2019 and 2025.

These trends demonstrate that many nonattainment areas remain far from achieving the Act's goal of attaining the ozone standard as expeditiously as practicable. At the end of the comments is an Appendix of Figures that contains line graphs showing ozone design value trends for these and other nonattainment areas over recent years, illustrating the extent to which ozone levels have stagnated or worsened in many parts of the country.

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Jersey-Maryland-Delaware (PA-NJ-MD-DE); Phoenix-Mesa, Arizona; San Antonio, Texas; Sheboygan County, Wisconsin; St. Louis, Missouri-Illinois (MO-IL); and Washington, District of Columbia-Maryland-Virginia (DC-MD-VA). 87 Fed. Reg. at 60901, tbl.2.

<sup>29</sup> Specifically, Allegan County, MI; Berrien County, MI; Chicago, IL-IN-WI; Cleveland, OH; Milwaukee, WI; Muskegon County, MI; Sheboygan County, WI; and the Illinois portion of the St. Louis, MO-IL areas failed to attain the 2015 Ozone Standard. 89 Fed. Reg. at 101902.



| Nonattainment Area                    | 2019 Design Value (ppb) | 2025 Design Value (ppb) |
|---------------------------------------|-------------------------|-------------------------|
| Chicago, IL-IN-WI                     | 75                      | 79                      |
| Dallas-Fort Worth, TX                 | 77                      | 83                      |
| Denver Metro, CO                      | 78                      | 79                      |
| Greater Connecticut, CT               | 75                      | 73                      |
| Houston-Galveston-Brazoria, TX        | 81                      | 85                      |
| Las Vegas, NV                         | 73                      | 73                      |
| Los Angeles-South Coast Air Basin, CA | 108                     | 108                     |
| Milwaukee, WI                         | 74                      | 76                      |
| New York City, NY-NJ-CT               | 82                      | 80                      |
| Northern Wasatch Front, UT            | 77                      | 75                      |
| Philadelphia, PA-NJ-MD-DE             | 76                      | 73                      |
| Riverside County, CA                  | 89                      | 85                      |
| San Antonio, TX                       | 73                      | 75                      |
| San Diego County, CA                  | 82                      | 80                      |
| San Joaquin Valley, CA                | 88                      | 87                      |
| Sheboygan County, WI                  | 75                      | 77                      |
| Ventura County, CA                    | 76                      | 74                      |

As the table above shows, many nonattainment areas are exhibiting troubling air quality trends. At the same time, many of the areas in the table above either failed to submit, or submitted late, required Marginal and Moderate nonattainment planning and emissions-control measures. For example, in 2023, EPA found that numerous areas had failed to timely submit some or all required Moderate-area SIP revisions, including Chicago, Dallas–Fort Worth, Greater Connecticut, Houston–Galveston–Brazoria, Las Vegas, Milwaukee, Philadelphia–Wilmington–Atlantic City, San Antonio, and Sheboygan County. *See Findings of Failure To Submit State Implementation Plan Revisions for Reclassified Moderate Nonattainment Areas for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)*, 88 Fed. Reg. 71757 (Oct. 18, 2023). The widespread failure to timely submit required nonattainment plan elements is consistent with the stagnant or worsening ozone trends shown in the table above. Areas that delay required planning obligations and emission reductions are less likely to achieve the ozone reductions necessary to attain the 2015 Ozone Standard.

States are not the only actors responsible for delays in implementing the 2015 Ozone Standard. EPA itself has delayed actions necessary for the Clean Air Act's graduated classification scheme to function as Congress intended. For example, EPA determines whether an area attained the ozone standard using the design value from the year preceding the attainment date. Thus, EPA relied on 2020 design values to determine whether areas attained the August 3, 2021 Marginal attainment deadline (or September 24, 2021 for San Antonio). By mid-2021, those design values had been certified, and the underlying ozone data had been publicly available for months prior through EPA's monitoring tools. EPA therefore knew before the attainment date expired which areas would and would not attain the standard. Yet rather than promptly making the required determinations, EPA waited until October 7, 2022—more than a year after the attainment deadline—to issue attainment and reclassification determinations. That delay occurred even though EPA possessed all the information necessary to act and only ended after environmental organizations served notices of intent to sue and at least one lawsuit was filed seeking to compel EPA to perform its nondiscretionary duty.

EPA has similarly delayed issuing findings of failure to submit required nonattainment SIP revisions. For example, Moderate SIP revisions for areas reclassified under the 2015 Ozone Standard were due on January 1, 2023, yet EPA did not issue findings of failure to submit for many missing Moderate elements until October 2023. EPA had immediate knowledge of which states failed to submit required revisions by the deadline and could have issued those findings as soon as January 2, 2023. Instead, EPA allowed months to pass before acting, issuing the findings only after receiving a notice of intent to sue over its failure to perform this mandatory duty. These recurring delays demonstrate that implementation problems stem not only from state inaction but also from EPA's own failure to timely carry out its statutory responsibilities.

The air-quality trends shown above are particularly concerning because many of the same areas have also failed to timely submit planning and control measures that Congress required to reduce ozone precursor emissions and move nonattainment areas toward attainment. The overlap between persistent ozone violations and missed SIP obligations underscores the importance of EPA enforcing those requirements in a timely manner rather than allowing them to be deferred or disregarded.

## **DETAILED COMMENTS**

### **I. EPA's Proposal is Unlawful, Lacks Statutory Authority, and Undermines the Clean Air Act.**

#### **A. The Clean Air Act's Graduated Classification Scheme.**

EPA claims that the prior interpretation under its prior Ozone Reclassification Rule, 90 Fed. Reg. 5651 (Jan. 17, 2025) ("2025 Rule") required states to submit multiple plans for multiple classifications, but EPA's illegal Proposal is premised on a misleading framing of the Act as requiring discrete plans for discrete classifications. Instead, as described further in this



section, Section 182 of the Clean Air Act, 42 U.S.C. § 7511a (hereinafter “Section 7511a”) clearly requires submittal and implementation of nonattainment plan elements with various dates largely tied to the date of the area’s initial nonattainment designation, not discrete nonattainment plans that supersede one another.

When areas of the country are not attaining the 2015 Ozone Standard, the Clean Air Act has a “graduated classification scheme” where nonattainment areas are classified on a graduated scale from Marginal, Moderate, Serious, Severe, and Extreme. *Sierra Club v. EPA*, 47 F.4th 738, 741 (D.C. Cir. 2022). Under that scheme, each time a nonattainment area fails to attain the ozone standard by the required attainment date, the areas are reclassified to a higher classification by operation of law, and the requirements of higher classifications build upon the requirements of lower classifications. 42 U.S.C. § 7511(b)(2); *Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 460 (D.C. Cir. 2014) (“[A]reas that fail to attain the NAAQS by the statutory deadline are automatically reclassified to the next highest classification.”). In other words, “[u]nder that [graduated classification] scheme, areas that fail to meet attainment deadlines face increasingly strict sets of mandatory controls.” *Sierra Club*, 47 F.4th at 741. So, as an area continues to have poor air quality, a state must impose additional and more rigorous requirements in its state implementation plan (“SIP”) to control the area’s air pollution to attain the standard, on top of requirements imposed by prior classifications.

The 1990 Amendments to the Clean Air Act introduced the current graduated classification scheme, thus “abandon[ing] the discretion-filled approach of two decades prior in favor of more comprehensive regulation.” *S. Coast Air Quality Mgmt. Dist. v. E.P.A.*, 472 F.3d 882, 887 (D.C. Cir. 2006). Under the now-abandoned approach, EPA had broad discretion to implement controls to attain national standards, but that approach utterly failed. For example, the number of nonattainment areas had increased from 70 to 90 over the two decades prior. *Id.* Therefore, “[n]o longer willing to rely upon EPA’s exercise of discretion, Congress adopted a graduated classification scheme that prescribed mandatory controls that each state must incorporate into its SIP.” *Id.*

The clearest illustration of Congress’s intent that the graduated classification scheme operates cumulatively, meaning that lower classifications like Marginal provide the foundation for later requirements, is the Act’s express incorporation of lower-classification obligations into higher-classification provisions. The statute does not treat each classification as a stand-alone regulatory regime. Instead, it requires areas in higher classifications to satisfy the requirements that apply to lower classifications as well.

For example, Section 7511a(b) provides that areas classified as Moderate “shall ... make the submissions described under subsection (a) of this section (relating to Marginal Areas), and shall also submit” the additional Moderate-area plan revisions. 42 U.S.C. § 7511a(b). Likewise, Section 7511a(c) requires areas classified as Serious to “make the submissions described under subsection (b)” —which themselves incorporate subsection (a)—in addition to submitting Serious requirements. *Id.* § 7511a(c). In this way, each successive classification expressly incorporates

the requirements of the preceding classifications, creating a cumulative, nested structure in which Marginal requirements form the baseline for all higher classifications.

This structure reflects Congress’s understanding that lower-classification elements are necessary predicates to the operation of higher-classification requirements. Because Moderate and Serious obligations can depend on the completion of Marginal and Moderate submissions, respectively, the statute necessarily contemplates that those foundational requirements will already have been satisfied when an area is subject to higher-classification obligations, whether by initial designation or reclassification. The Act’s graduated scheme thus operates not as a set of independent tiers, but as a sequential progression of regulatory requirements.

That Congress intended ozone implementation to take a cumulative approach is confirmed by its decision to use similar language to implement a cumulative approach—which EPA has acknowledged—to implementing nonattainment planning requirements for the PM<sub>2.5</sub> NAAQS under Subpart 4. Section 7513a(b)(1) makes clear that a state with a PM<sub>2.5</sub> Serious nonattainment area must submit the Serious area plan “in addition to the provisions submitted to meet the requirements (...) relating to Moderate areas.” 42 U.S.C. § 7513a(b)(1). This is functionally identical language to that under Subpart 2, requiring an ozone nonattainment area for Moderate, Serious, and Severe areas shall “make the submissions described under [the provision relating to the preceding, lower classification], *and shall also* submit the applicable implementation plan” for the higher reclassification. EPA’s own implementation of Section 7513a(b)(1) confirms that it views the PM<sub>2.5</sub> NAAQS nonattainment requirements under the Act as cumulative. For example, with respect to the Fairbanks, Alaska nonattainment area for the 2006 PM<sub>2.5</sub> NAAQS, the state submitted the Moderate area plan right before the area was reclassified to Serious and continued to supplement its Moderate area submission years after reclassification. EPA assessed and approved the Moderate area plan as meeting the statutory Moderate area requirements, while in that approval also noting the expectation that the State would conduct further analysis of potential controls as part of the Serious area plan, correctly reflecting that those requirements are cumulative and not extinguished upon reclassification. Air Plan Approval; AK, Fairbanks, 82 Fed. Reg. 42457 (Sept. 8, 2017).

Thus, similar to the cumulative structure of Section 7513(a) for the PM NAAQS, Section 7511a’s cross-referential structure for the ozone NAAQS confirms that the Marginal requirements are not merely the least stringent controls, but the statutory baseline upon which all subsequent planning and control obligations depend, including for areas that are initially classified at one level and subsequently reclassified higher later. Likewise, just as Marginal requirements precede and enable Moderate obligations, the statute makes clear that Moderate submissions, in turn, are the necessary predicate to the development and implementation of Serious nonattainment elements.

Another illustration of how the graduated classification scheme operates cumulatively and under the assumption that lower-level classifications are foundational—and thus must be implemented sooner—is that almost none of them are tied to attainment dates. For example,

while the Marginal, Moderate, and Serious elements frequently refer to the initial nonattainment designation date to set submission deadlines, they never tie themselves to an attainment date. Section 7511a references attainment dates only a handful of times, and when it does, those references merely set the outer bounds of the timeline covered by a requirement. This is to ensure that, even as attainment dates change, nonattainment areas still timely submit their lower level classification requirements to ensure emission reductions occur as soon as possible. In sum, the obligation to submit the various classification's nonattainment plan elements is not tied to the attainment date.

The subsections below explain how the Act's lower classification requirements form the foundation for subsequent requirements, consistent with the Act's text and purpose. This discussion is illustrative rather than exhaustive, and is intended to show how the Act's graduated classification scheme operates. Specifically, it shows how lower classification elements are meant to be submitted earlier in the process than higher classification requirements for areas later reclassified by operation of law or by voluntary reclassification.

As a threshold matter, many of the Act's graduated classification requirements and deadlines refer to the initial date of nonattainment designation. So, for example, a nonattainment area that began as a Marginal classification has a three-year deadline to attain the national ozone standard. 42 U.S.C. § 7511(a)(1) (table providing attainment dates for each classification level). Accordingly, Moderate areas have six years, Serious areas have nine years, Severe areas have fifteen years, and Extreme have twenty years. *Id.*; *see also* 40 C.F.R. § 51.1303(a) (setting attainment dates for 2015 Ozone Standard). Similarly, SIP submission deadlines are keyed to the date of designation as nonattainment. *See, e.g.*, 42 U.S.C. § 7511a(b)(2)(A)(ii); *see also, e.g.*, 40 C.F.R. § 51.1310(a)(1).

## **1. “Marginal Areas.” 42 U.S.C. § 7511a(a).**

**Emissions Inventories.** Under the “Marginal Areas” requirements of Section 7511a, all nonattainment areas—regardless of whether they are initially classified as Marginal or a higher level—must submit an emissions inventory within 2 years of nonattainment designation. *Id.* § 7511a(a)(1). As EPA explained in its preamble promulgating the regulations implementing the 2015 Ozone Standard, “states with areas designated nonattainment have: 2 years from the effective date of a nonattainment designation to submit SIP revisions addressing emissions inventories (required by CAA section 182(a)(1).” Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements, 83 Fed. Reg. 62998, 63000 (Dec. 6, 2018); *see also* 40 C.F.R. § 51.1315(a) (emission inventories “shall be submitted no later than 24 months after the effective date of designation.”). All nonattainment areas shall also submit periodic updates to their emissions inventories regardless of classification. 42 U.S.C. § 7511a(a)(3); *see also* 40 C.F.R. § 51.1315(b).

**Emissions Statements.** States must develop an emissions reporting program for regulated sources, which the Act's Marginal Areas section refers to as the “emission statement”

requirement. All nonattainment areas regardless of classification must submit this requirement within 3 years of nonattainment designation. 42 U.S.C. § 7511a(a)(3)(B).

**New Source Review (NSR) Permitting.** States must implement a permit program for the construction and operation of new or modified major stationary sources within 2 years of designation regardless of classification. 42 U.S.C. § 7511a(a)(2)(C); *see also* 40 C.F.R. § 51.1314 (“For each nonattainment area, the state shall submit a nonattainment NSR plan or plan revision for a specific ozone NAAQS no later than 36 months after the effective date of the area’s designation of nonattainment or redesignation to nonattainment for that ozone NAAQS.”); *see generally* 40 C.F.R. § 51.165 (general requirements for nonattainment permit programs).

**Marginal Offset Requirement.** New and modified sources that require construction permits must offset their ozone precursor emissions by a ratio of 1.1 to 1.0. 42 U.S.C. § 7511a(a)(4). This means, for example, any source seeking a permit that will increase emissions of an ozone precursor by 1 ton will need to demonstrate an offset of 1.1 tons elsewhere (either at the facility or obtaining offset credits). The NSR permitting requirement is the vehicle to implement this offset requirement.

The Marginal Area requirements explained above serve as the foundation for the graduated classification scheme. By directing that these requirements apply to each area designated nonattainment and tying their deadlines uniformly to designation, Congress ensured they would be implemented as threshold prerequisites before classification-specific obligations come due. In other words, later classification requirements cannot function until the above requirements are met because they provide a baseline through inventory and reporting requirements from which future progress is measured. And the permit program is necessary to ensure new and modified facilities are considered in the overall goal of reducing emissions to meet the national standard, including compliance with the offset requirement.

The Act’s staggered deadlines, such as requiring Marginal program elements to be in place within 2 to 3 years, confirm that Congress expected Marginal measures to be completed first and to serve as inputs into higher-classification planning. Note that the Marginal deadlines line up with the Marginal attainment deadline, which is also 3 years after nonattainment designation. Thus, the foundational nature of these Marginal requirements in the graduated classification scheme is why they are all tied to the nonattainment designation date. It’s also why all areas, regardless of initial classification, must submit them first and in accordance with the statutory schedule, under EPA’s implementing regulations. Before the instant Proposal, EPA’s practice and regulations understood that these Marginal Area requirements are foundational and must occur first in the Act’s scheme. *See, e.g.*, 40 C.F.R. 51.1315(a) (“For each nonattainment area, the state shall submit a base year inventory as defined by § 51.1300(p) to meet the emissions inventory requirement of CAA section 182(a)(1). This inventory shall be submitted no later than 24 months after the effective date of designation.”)

In sum, the statute’s text, structure, and internal cross-references make clear that the Marginal requirements are not merely the least stringent controls: They are the predicate conditions that enable the calculation, implementation, and enforcement of higher-classification obligations.

## 2. “Moderate Areas,” 42 U.S.C. § 7511a(b).

**Reasonable Further Progress (“RFP”) Plan.** Under the “Moderate Areas” requirements of Section 7511a, all nonattainment areas initially classified as Moderate or higher must, within 3 years of initial nonattainment designation, submit a plan demonstrating how they will reduce their baseline VOC emissions by at least 15 percent over a six-year period beginning in the year of their initial nonattainment designation. 42 U.S.C. § 7511a(b)(1)(A); *see also* 40 C.F.R. § 51.1310(a)(1) (“For each area classified Moderate or higher pursuant to § 51.1303, the state shall submit a SIP revision no later than 36 months after the effective date of designation as nonattainment for the 2015 Ozone Standard that provides for RFP as described in paragraphs (a)(2) through (4) of this section.”). To illustrate, under the 2015 Ozone Standard, EPA issued initial nonattainment designations in August 2018. By August 2021, areas initially classified as Moderate or higher must submit plans demonstrating how they will achieve a 15 percent reduction in ozone precursor emissions by August 2024, compared with the appropriate baseline. Because RFP reductions are defined as a percentage of “baseline emissions,” and because the Act assigns the creation of those emissions inventories to Marginal areas in Section 7511a(a)(1), the statute makes the Marginal inventory a necessary predicate to this Moderate planning obligations. Accordingly, the Act presupposes lower classification elements are already implemented by the time an area is bumped up to a higher classification.

In addition to the 15-percent emission reduction over the first six years, Section 7511a(b)(1)(A) also requires that nonattainment plans “shall provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter.” So, to the extent that a 15-percent emissions reduction is not sufficient to attain by the attainment date, the plan must include further emission reductions.

**Reasonably Available Control Technology (“RACT”).** For areas initially classified as Moderate or higher, they must submit RACT requirements within 2 years of nonattainment designation. 42 U.S.C. § 7511a(b)(2); *see also* 40 C.F.R. § 51.1312(a)(2) (“For a RACT SIP required pursuant to initial nonattainment area designations, the state shall submit the RACT SIP for each area no later than 24 months after the effective date of designation for a specific ozone NAAQS.”). Areas subject to this Moderate requirement must implement RACT within 5 years of initial designation. 40 C.F.R. § 51.1312(a)(3).

**Gasoline Vapor Recovery.** For areas initially classified as Moderate or higher, within 2 years of initial designation, they must submit SIP revisions to incorporate a requirement for gasoline dispensing systems to rely on gasoline vapor recovery mechanisms to control primarily

fugitive ozone precursor emissions at gas stations and other dispensing locations. 42 U.S.C. § 7511a(b)(3).

**Motor Vehicle Inspection and Maintenance Plan (“I/M”).** For areas initially classified as Moderate or higher, they must immediately submit a SIP revision that provides for a vehicle inspection and maintenance program. 42 U.S.C. § 7511a(b)(4). This requirement is often referred to as “Basic I/M.”

**Moderate Offset Requirement.** Same concept as the Marginal offset, except the ratio of offsets is increased to 1.15 to 1.0, meaning a 1-ton increase in emissions for a new or modified source requiring a permit will need to demonstrate a 1.15-ton reduction in emissions elsewhere (either on- or off-site). 42 U.S.C. § 7511a(b)(5)

The Moderate Area requirements explained above are the first set of robust emission reduction requirements imposed upon nonattainment areas by the Act, other than Marginal offset requirement. These Moderate emission reduction requirements lay the foundation for an area to achieve lower ozone levels and come into compliance with the national ozone standard. The RFP plan requires an explanation as to how an area will achieve a 15 percent reduction in ozone precursor emissions. The RACT requirements ensure technically feasible and cost reasonable controls are implemented. And the gasoline vapor recovery and vehicle inspection requirements ensure that mobile source emissions of ozone precursors are reduced, too. The Act’s deadlines to submit these elements exemplify the foundational role Moderate requirements play in the graduated classification scheme.

The relationship between Marginal and Moderate illustrates how the Act assumed Marginal requirements would be submitted first, or at least in tandem, with Moderate requirements (for those initially classified as Moderate). For example, the higher-classification offset provision for Moderate areas does not independently establish permitting requirements. Instead, it modifies the offset ratios within the NSR framework previously created under Section 7511a(a)(2) for Marginal areas. Thus, the Act’s structure presumes the Marginal NSR program is already in place.

The Act’s text and structure confirms that even in Serious areas, Moderate requirements would be due on the timeline the Act expressly requires in the Moderate area provisions. For areas classified as Serious, Congress required that the State “shall ... make the submissions described under subsection (b)” —the Moderate requirements— “and shall also submit” the additional Serious elements. 42 U.S.C. § 7511a(c). This formulation on its face requires Serious nonattainment areas to meet the requirements that apply to Serious areas as well as those that apply to Moderate areas and leaves unaltered the due dates for the requirements that apply to Moderate areas.

### **3. Areas Initially Classified at a Higher Level Compared to Areas that Start at a Lower Level and Are Subsequently Reclassified to Higher Classifications.**

Another illustration of the importance of the graduated classification scheme is how the Act treats areas that are initially classified at a higher level. Because all of Section 7511a(a), (b), (c), (d), and (e) submission deadlines refer back to the initial date of nonattainment designation, areas that are initially classified at a higher level must submit a multitude of requirements within the first two to four years of nonattainment designation. For example, areas that start out classified as Serious will have to submit the following:

Immediately following nonattainment designation:

- Motor vehicle inspection and maintenance program, 42 U.S.C. § 7511a(b)(4).

Within one-and-a-half years of nonattainment designation:

- Enhanced monitoring program for ozone and ozone precursors, *id.*, § 7511a(c)(1).

Within two years of nonattainment designation:

- Emission inventory, *id.* § 7511a(a)(1);
- New source review permitting program, *id.* § 7511a(a)(2)(C);
- Emission statements, *id.* § 7511a(a)(3)(B);
- Reasonably available control technology, *id.* § 7511a(b)(2);
- Gasoline vapor recovery program, *id.* § 7511a(b)(3);
- Enhanced vehicle inspection and maintenance programs, *id.* § 7511a(c)(3); and
- Alternative clean fuel vehicle program, *id.* § 7511a(c)(4)(B).

Within three years of nonattainment designation:

- Reasonable further progress plan, *id.*, § 7511a(b)(1).

Within three-and-a-half years of nonattainment designation:

- Clean fuel vehicle program, *id.* § 7511a(c)(4).

Within four years of nonattainment designation:

- Attainment demonstration, *id.*, § 7511a(c)(2)(A); and
- Reasonable further progress plan demonstration, *id.*, § 7511a(c)(2)(B).

Within six years of nonattainment designation:

- Transportation control plan demonstration, *id.* § 7511a(c)(5).

As the above shows, areas that start out classified as Serious submit all of their Marginal, Moderate, and Serious requirements within the first four years of nonattainment designation (except for the transportation control plan demonstration due within six years).



Areas that start out lower, such as Marginal, and are subsequently reclassified up to Serious via mandatory reclassification if they fail to timely attain, will not be able to comply with the deadlines as written in the statute. For example, consider an area that started out as Marginal in 2018, gets reclassified in 2021 to Moderate, then gets reclassified to Serious in 2024. Since the Serious element deadlines refer back to initial nonattainment designation, the area would have had to submit the bulk of the Serious elements by 2022 (4 years after 2018). Since that date has passed, EPA has limited authority to shift those Serious element deadlines forward to a date occurring after reclassification to Serious. Contrary to EPA's Proposal, Section 7511a(i) cannot be used to retroactively nullify or extend missed deadlines.

There are now situations where an area was reclassified to Moderate, given a deadline in the future, but rather than meet that deadline (or even try to meet it), a state submits nothing and is eventually reclassified to a higher level. The Act's graduated classification scheme did not envision states would miss their deadlines.

As described in the next section, the Act clearly prescribes how past-due deadlines must be resolved. EPA's longstanding interpretation, adopted since the 1990 Amendments, under which states remain obligated to submit requirements tied to missed deadlines because those deadlines were valid and attainable, faithfully implements the Act's consequences for states that fail to comply with these requirements. By contrast, EPA's Proposal nullifies the Act's clear requirements and their attendant consequences for failure to meet them, effectively rewarding states for missed deadlines and worsening air quality by wiping the slate clean and postponing those obligations until a later date.

The Proposal's new interpretation is obviously inconsistent with the Act's text, especially comparing its treatment of areas initially classified at higher levels. It makes no sense for the Act to hold initially-classified-as-Serious areas to a standard that requires them to submit all-but-one of their requirements within four years (by 2022) and then do the opposite for areas that start at Marginal and are eventually bumped up to Serious via reclassification. Under EPA's new interpretation, current Serious areas that started out as Marginal could effectively submit nothing for at least six years (the time it takes to be bumped up twice via mandatory reclassification) and have their failures to submit any required elements—i.e., their failure to undertake any effort to control the harmful levels of ozone pollution—excused. Thus the subset of nonattainment areas that started out as Serious have submitted almost everything by the fourth year of nonattainment, and the other subset of Serious areas have submitted nothing within six years under EPA's new interpretation. That outcome is not consistent with the Act's text, purpose, or structure, as described in more detail in the following sections.

## **B. EPA's Proposal Conflicts with the Clear Requirements of the Act.**

EPA's proposal to extinguish lower classification requirements upon reclassification plainly conflicts with the Clean Air Act's statutory requirements for several reasons. As described previously, the Act's requirements for ozone nonattainment are plainly cumulative.

Therefore, the text of the statute does not support EPA's proposed interpretation that the lower classification requirements are extinguished or delayed upon reclassification. A clear example of the cumulative nature of Section 7511a's planning requirements is EPA's own example of the baseline emissions inventory requirement for Marginal areas under Section 7511a(a)(1), and Moderate areas under Section 7511a(b). 42 U.S.C. §§ 7511a(a)(1), (b). Per the statute, the deadline for submitting the emissions inventory is tied not to an area's classification, but the date of the area's initial nonattainment designation. The Act under Section 7511a(a)(3) further requires periodic updates to the emissions inventory on a 3-year cycle. This means that for an area initially designated as Marginal, the state has continuing obligations to submit the emissions inventory required under the Marginal area requirements of the Act even after the area has been reclassified to Moderate and above. EPA itself agrees with this plain reading, as demonstrated by 40 C.F.R. 51.1315(a). Thus, the text of the Act itself demonstrates the cumulative nature of the ozone nonattainment planning requirements that cannot be extinguished by virtue of reclassification.

Fundamentally, the Act establishes default statutory deadlines for ozone nonattainment plan submission that are set in reference to the date of the original nonattainment designation. Dispositively, the Act's text does not change the due dates for requirements under lower classifications if an area is subject to those requirements by virtue of its higher classification. The core issue that both the 2025 Rule and the present Proposal are trying to resolve is what are the States' and EPA's legal obligations if the former does not timely submit an ozone nonattainment plan for an area's current classification, and the area is subsequently reclassified. EPA egregiously and misleadingly frames the current Proposal as the "logical consequence of what the text and structure of CAA Section 182 provide with respect to the effect of reclassification." 91 Fed. Reg. at 35644. However, the Act is clear as to what must happen if a State misses its nonattainment planning deadlines. Under such circumstances, mandatory sanctions are triggered under Section 179, 42 U.S.C. § 7509, as is the obligation for EPA's promulgation of a Federal Implementation Plan (FIP) under Section 110(c), 42 U.S.C. § 7410(c)

The Act further prescribes the way in which a State and EPA can avoid those consequences relating to a State's failure to submit a nonattainment plan. In order to relieve EPA's FIP obligation, Section 7410(c) dictates that the State must first correct its failure to submit by actually submitting a plan, and then EPA must actually approve that submission. Regarding mandatory sanctions, Section 7509 gives a State 18 months after EPA's finding that it has failed to submit a nonattainment plan to then submit a nonattainment plan and thereby stop the imposition of sanctions. 42 U.S.C. § 7509(a)(4). The Act does not contain, nor does EPA identify, any exception under Subpart 2 and Sections 7410(c) and 7509 with respect to the applicability of sanctions or the requirement for FIPs in the context of reclassification. EPA cannot rewrite the Clean Air Act where the plain language of the statute specifies both the circumstances under which a FIP and sanctions must be imposed, and under which those consequences may be mooted out.

Pursuant to the interpretative principle of *expressio unius est exclusio alterius*, the Act's explicit inclusion of the mechanisms to stop imposition of a FIP and sanctions shows that another unwritten and unsupported mechanism is not permitted. *Alpern v. Ferebee*, 949 F.3d 546, 550 (10th Cir. 2020) (“[T]he expression of one item of an associated group or series excludes another left unmentioned.”). The requirements and deadlines in the Clean Air Act represent a “specific, unequivocal command.” *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014) (citing *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008))). It is not an interpretation that EPA offers by introducing a new means of mooted out the FIP and sanctions obligations for States that fail to submit lower classification ozone nonattainment plans. It is a nullification of the plain language of Sections 110(c) and 179. “Where the language of the statute is plain, it is also where the inquiry should end.” *WildEarth Guardians v. Jackson*, 870 F.Supp.2d 847, 851 (N.D. Cal. 2012) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

The Act thus prescribes straightforward and clear consequences to a State missing its ozone nonattainment plan submission deadline, but EPA's present Proposal unlawfully overrides those consequences by interpreting reclassification to moot out the FIP and sanctions obligations, and in the process, defangs the Clean Air Act's powerful tools that motivate States to meet the nonattainment plan deadlines.

Similarly, the Proposal's interpretation that overdue lower classification requirements are extinguished upon reclassification effectively abrogates the statutory attainment deadlines. Section 7511(a)(1) prescribes that the attainment date for each ozone nonattainment area classified under Subpart 2 “shall be as expeditiously as practicable *but not later than*” the statutory deadlines. 42 U.S.C. § 7511(a)(1) (emphasis added). The Act thus plainly dictates that primary goal is for nonattainment areas to attain as soon as possible, and that the attainment deadline for each classification is an outer boundary. This is also true for mandatorily reclassified areas, as Section 7511a(i) gives EPA some authority to adjust plan submission and implementation deadlines for such areas,<sup>30</sup> but explicitly prohibits EPA from adjusting attainment deadlines, which necessarily includes the requirement to attain as expeditiously as practicable.

However, EPA's Proposal actively thwarts the statutory requirements both for nonattainment areas to attain as expeditiously as practicable in the first instance, and if that is not practicable, then to attain the standard no later than the attainment date. By extinguishing overdue lower classification elements upon reclassification, EPA's Proposal functionally treats the higher classification's attainment date as *the* date by which the nonattainment area must attain (while deferring obligations to develop and implement control requirements that would

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<sup>30</sup> Section 7511a(i), 42 U.S.C. § 7511a(i), does not authorize EPA to adjust nonattainment plan submission and implementation deadlines for areas voluntarily reclassified under Section 7511(b)(3). 42 U.S.C. § 7511(b)(3). These areas are thus similarly subject to the Act's mandate under Section 7511(a)(1) that they attain as expeditiously as practicable but no later than the relevant attainment dates. 42 U.S.C. § 7511(a)(1).

facilitate timely attainment). The statutory design of both the reclassification scheme under Subpart 2 and the sanctions and FIP consequences work together to ensure that States are motivated to implement emission reductions that reduce pollution in the nonattainment area so that the ozone NAAQS are attained. However, by establishing a framework in which a State could discharge its obligation to submit lower classification elements with no consequences, EPA disincentivizes States to implement emission reductions that would help an area achieve attainment as “expeditiously as practicable but no later than” the lower classification’s attainment date. EPA’s Proposal simply leaves States with no regulatory incentive to develop and implement control measures that would enable attainment by that attainment date, and certainly provides no impetus to reach attainment sooner. The proposed interpretation thus “entirely fail[s] to consider an important aspect of the problem”<sup>31</sup> that would result in delaying the public health protections of the ozone NAAQS, and unlawfully abrogates and undermines the attainment dates and requirements of the Act.

Additionally, EPA’s claim Section 7511a(i) supports its legal interpretation that overdue lower classification requirements are extinguished upon reclassification is not the best reading of the Act. Section 7511a(i) clearly speaks to EPA’s authority to adjust nonattainment plan submission and implementation deadlines for mandatorily reclassified areas. EPA asserts that 182(i) is “clear” and “unequivocal[.]” in specifying that a nonattainment area can only be subject to one classification at a time, and thus the applicable requirements are only those for the reclassification. 91 Fed. Reg. at 35645. The Agency places too much weight on Section 7511a(i)’s reference to the “requirements of subsections (b) through (d) of this section as may be applicable to the area as reclassified,” truncating the provision to support its flawed interpretations. 91 Fed. Reg. 35641. This cited phrase is a lead-in clause to the remainder of the provision, which when read in totality, makes clear that the mandatorily reclassified areas must meet the requirements of the applicable classification, including the relevant submission and implementation deadlines, *except* to the extent EPA adjusts those deadlines pursuant to its authority under Section 7511a(i). Additionally, as previously described, each of subsections (b) through (e) under Section 7511a expressly require that a State “shall also submit” the nonattainment plan for the preceding lower classification. 42 U.S.C. §§ 7511a(b) – (e). These provisions make no exception about substance or timing for reclassified areas, thus the only work that Section 7511a(i) is doing is to allow EPA to adjust certain deadlines for mandatorily reclassified areas.<sup>32</sup>

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<sup>31</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>32</sup> If certain deadlines applicable only at the newly applicable higher classification have already passed for the higher classification by the time an area is mandatorily reclassified, EPA could choose to adjust those deadlines using its Section 7511a(i), 42 U.S.C. § 7511a(i), authority as appropriate. However, nothing in Section 7511a(i) authorizes EPA to adjust plan submission deadlines that applied by the time an area was reclassified, but that the area has now missed by virtue of failing to meet those deadlines. As with the situation of a state failing to timely submit the lower classification plan elements before the area is reclassified, the Act prescribes the FIP and sanctions consequences and remedies for a reclassified area missing the deadlines which became due after reclassification. Further, EPA’s new interpretation contravenes Congress’s intent both by giving EPA discretion to put off the mandatory deadlines

EPA asserts that Section 7511a(i)'s reference to Section 7511(b)(2), 42 U.S.C. 7511(b)(2), which in turn references Table 1, all mean that a reclassified area can only be subject to one classification at a time, and thus can only be subject to the applicable requirements of the nonattainment area's current classification. There is no question that an area is legally classified as a single classification at a given time, and these provisions make clear that a reclassified area must meet the requirements newly applicable upon reclassification. Of course, by the Act's plain text, the new classification incorporates the requirements of all lower classifications without varying the due date for those requirements. 42 U.S.C. § 7511a(b)-(e). And there is nothing in Section 7511a(i) or Section 7511(b)(2) that suggests that States may evade the applicable requirements for a certain classification by failing to submit them and waiting for reclassification. Instead, the "logical consequence of what the text and structure of CAA section 182 provide with respect to the effect of reclassification", 91 Fed. Reg. at 35644, is not what EPA proposes, but rather, the Act is clear that there are mandatory sanctions and FIP consequences for failing to submit the requirements under any lower classification, *and* the State is required to submit the nonattainment plan associated with the reclassification. Under this statutory construct, an ozone nonattainment area is indeed only subject to a single classification at a time with its applicable requirements (which include the requirements under all lower classifications), and if it fails to meet those applicable requirements before reclassification, faces the attendant consequences. As previously discussed, if a State wishes to dispose of those consequences, it must do so through the statutorily prescribed means of submitting the overdue nonattainment plan that EPA can approve as meeting the Act.

EPA claims that the prior interpretation under the 2025 Rule required states to submit multiple plans for multiple classifications, but EPA misleadingly frames the issue as discrete plans being required for discrete classifications. The Act's text and the prior, correct interpretation envision that a State actually and timely submit a nonattainment plan, which by the statutory text includes various elements due by varying deadlines that run from the date of designation—not one unified submission for a given classification. If a State is in a position where it must submit multiple plans for the same element, that is only because the State missed its prior deadlines to submit the plan for the lower classification element. In this case, the sanctions and FIP consequences must attach, which cannot be mooted out except for the State submitting an approvable nonattainment plan for the lower classification. There is no illogical gap or paradox in still requiring that submission. The emission reduction measures from the lower classification will help to improve air quality, in conjunction with emission reduction measures associated with the higher classification nonattainment plan. For example, if the Section 172(c)(9), 42 U.S.C. § 7502(c)(9) (hereinafter "Section 7502") failure to attain contingency measures for a lower classification are never submitted when they are originally due, and the requirement is then extinguished upon reclassification, then the only contingency measures that EPA's Proposal would require are those associated with the higher classification. This means that the lower classification contingency measures are never in place despite the

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Congress imposed as part of its well-established intent to curb EPA discretion and by delaying the pollution reductions that Subpart 2 is supposed to expeditiously and inexorably drive.

Act's clear requirement that they go into place for an area that has factually failed to attain, and the area loses measures that would necessarily provide emission reductions towards improving air quality as expeditiously as practicable but no later than the new, reclassified attainment date.

Similarly, there is no gap to resolve in still requiring the overdue attainment demonstration for the lower classification.<sup>33</sup> It is true that such attainment demonstration cannot factually show attainment for an area that has failed to attain and has been reclassified. But, rather than concluding that this requirement and all others are extinguished upon reclassification, the best reading of the Act is that the failure to submit the attainment demonstration triggers the obligation to implement mandatory sanctions and a FIP. The question is then what must happen in order to remedy a State's failure to submit a lower classification attainment demonstration. Sections 110(c) and 179(a) both describe that mandatory sanctions and FIP obligations must be imposed unless the State corrects the "deficiency." Neither provision specifies that the deficiency must be remedied in precisely the same way that the State would have met the obligation originally had it timely submitted the nonattainment plan. Thus, in the context of Subpart 2 and its reclassification scheme, EPA can require that the deficiency of not having timely submitted a lower classification attainment demonstration is corrected by the approvability of a higher classification attainment demonstration. In other words, the attainment demonstration is a requirement that can be met by the same element for the higher classification.

The purpose of an attainment demonstration is that all of the other elements in the nonattainment plan are sufficient to achieve attainment of the NAAQS by the attainment date. So, an approvable higher classification attainment demonstration can reasonably encompass the statutory purpose of this element, unlike the other nonattainment plan elements for the reasons previously discussed. Allowing the higher classification attainment demonstration to cure the deficiency of the lower classification attainment demonstration, and still requiring all other overdue elements, would do far less violence to the purpose and text of the Act. EPA thus fails to consider "the alternatives that are within the ambit of the existing policy,"<sup>34</sup> such as allowing an approvable higher classification attainment demonstration to cure the deficiency of an overdue lower classification attainment demonstration.

Other provisions of the Act make clear that Congress specifically addressed the circumstances under which the attainment demonstration can be dismissed because it "would be impossible to implement,"<sup>35</sup> yet Congress did not provide similar instruction for overdue ozone attainment demonstrations after reclassification. For example, Section 179B(a) directs EPA to approve a nonattainment plan with an otherwise deficient attainment demonstration if the State meets the provision's requirements for showing that the attainment plan would be adequate to attain and maintain the relevant NAAQS but for international emissions. Congress understood

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<sup>33</sup> As described, *infra*, section IV.A, EPA improperly interprets the RACM requirement as tied to the relevant classification's attainment date. Lower classification RACM, just as with RACT and other emission reduction measures, can still improve air quality for a reclassified nonattainment area.

<sup>34</sup> *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020).

<sup>35</sup> 91 Fed. Reg. at 35645.

and acknowledged through this provision that an area could attain but for international emissions out of a State's control, and that the attainment demonstration for such area could not factually show attainment because of those international emissions. Thus, Congress chose to explicitly excuse the otherwise unapprovable attainment demonstration for these areas from the mandatory sanctions and FIP obligations that disapproval of an attainment demonstration triggers.

Similarly, under Section 7511a(j)(2), Congress recognized that the portion of a State located in a multi-State ozone nonattainment area could fail to provide an attainment demonstration because the other States in the nonattainment area failed to timely implement the applicable measures required under Subpart 2. For this situation, Congress chose to explicitly excuse the application of mandatory sanctions within the relevant portion of the multi-State nonattainment area for failure to submit the attainment demonstration.

Both of these provisions show that Congress chose to specify the circumstances under which the otherwise required disapproval, FIP, and sanctions consequences do not attach to an attainment demonstration. Congress notably did *not* specify that FIP and sanctions consequences associated with failure to submit an attainment demonstration or any other nonattainment plan element would be excused upon an area's reclassification, and EPA may not create such a relief valve mechanism out of whole cloth.

### **C. EPA's Proposal Contravenes the Act's Purpose and Structure.**

The purpose of the 1990 Amendments to the Act was to attain national ozone standards "as expeditiously as practicable." 42 U.S.C. § 7511(a)(1); *Sierra Club*, 21 F.4th at 817. And the Act's primary purpose is to, among other things, "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). As noted above, the 1990 Amendments further this purpose by abandoning the "discretion-filled approach of two decades prior in favor of more comprehensive regulation." *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 887. The graduated classification scheme restricts discretion and, as an area fails to attain the national ozone standard, the scheme increases the urgency of achieving the standard by imposing progressively more emission reductions and planning requirements for nonattainment areas.

"An interpretation of Subpart 2 so at odds with its structure and manifest purpose cannot be sustained." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 486 (2001). Yet, EPA's Proposal does exactly that. By interpreting the Act in a way that obviates the requirement to submit past-due elements for lower classifications in areas unable to attain a national ozone standard, EPA's Proposal turns the Act's carefully crafted graduated classification scheme on its head. Instead of a scheme that assumes prior classification elements are submitted and implemented by the time an area is reclassified to a higher classification, *supra* DETAILED COMMENTS § I.A., EPA's Proposal would allow states to delay submission and implementation of lower classification elements for years and years. This delay means requirements aimed at controlling and reducing ozone precursor emissions can be put off for years, thus undermining



the goal of attaining the national ozone standard. EPA's Proposal also violates congressional intent and weakens public health protection by undermining the Act's central purpose of safeguarding health and welfare because delaying required emission controls prolongs exposure to harmful ozone pollution—especially in areas already failing to attain air quality standards.

The Proposal betrays the intent of the 1990 Amendments by creating a regime where lower classification elements are essentially discretionary for many years. As courts have explained, the purpose of the 1990 amendments was to sharply curb discretion in the Act's implementation. *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 887. EPA's Proposal has the same flaws as the failed discretionary framework by eliminating consequences for failure to submit missing nonattainment SIP elements, thereby creating a structure that obviates the need to submit these elements for lower classifications prior to submitting higher classification requirements. EPA's proposed approach will have the same damaging effects as the prior failed regime, which Congress expressly rejected in adopting the 1990 Amendments.

EPA's approach undermines the function of statutory attainment dates. The Act ties specific planning and control obligations to the period leading up to each classification's attainment deadline (Years 0-3 for Marginal, Years 4-6 for Moderate, etc.). By allowing those obligations to be deferred and reset upon reclassification, EPA severs the connection between attainment dates and the measures designed to achieve them. Attainment dates thus lose their practical significance, contrary to Congress's imposition of graduated restrictions.

EPA's Proposal removes incentives for timely action and conflicts with Congress's directive that attainment occur as expeditiously as possible. By treating higher-classification deadlines as replacements rather than added obligations, the agency ignores the urgency built into the graduated classification scheme. The Act's scheme is meant to ratchet up restrictions and planning obligations over time as an area continues to violate the national standard. Because reclassification typically occurs when an area fails to meet the standard by a statutory deadline, EPA's proposed approach effectively rewards states that failed to meet or even submit lower-level requirements despite stagnant or worsening air quality, undermining the Act's purpose and structure. This new approach means reclassification, whether by operation of law or voluntarily, becomes a mechanism for deferral of pollution control requirements and air quality improvements rather than an escalation of efforts to reduce ozone precursor emissions. That new approach abrogates Congress's intent.

EPA's decision to undermine the Act's purpose is especially concerning because many nonattainment areas across the country are recording increases in ozone pollution levels. As shown in the Background section, nonattainment areas in Texas, Wisconsin, Illinois, and northern Indiana are recording worse ozone levels today than they were a few years ago. *Supra* BACKGROUND § II. And many other nonattainment areas in Michigan, Colorado, Utah, Nevada, California, and states in the Northeast have had stagnant ozone levels violating the 2015 Ozone Standard with no notable improvement over the past few years. *Id.* Now is not the time to fully gut the Act's graduated classification scheme; now is the time to fully implement the Act's



requirements and start making progress towards meaningful ozone precursor emission reductions.

EPA's Proposal defeats the 1990 Amendment's intent to reduce discretion and gamesmanship. It does so by incentivizing states to do nothing and be rewarded for doing nothing. Consider a hypothetical: State A is designated Marginal nonattainment in Year 0 and must submit a SIP with Marginal elements within two years. When that deadline arrives, State A submits nothing, and EPA issues a finding of failure to submit shortly thereafter.<sup>36</sup> Meanwhile, because the state has taken no steps to reduce emissions, air quality has stagnated or worsened.

The finding of failure to submit starts both a sanctions clock and a two-year deadline for EPA to issue a federal implementation plan. But by that point, the Marginal attainment date is only one year away. When the area inevitably fails to attain by the Marginal deadline, EPA reclassifies the area by operation of law to Moderate.<sup>37</sup> Under EPA's new interpretation, the missed Marginal requirements simply disappear and are folded into a later Moderate SIP submission. As a result, the original basis for the failure finding, sanctions, and FIP obligation is effectively erased, allowing the state to avoid any planning or emission-reduction requirements during the entire Marginal period. This is the opposite of the outcome envisioned by the Act's text, purpose, and structure.

The same cycle can then repeat at least two more times because the Moderate and Serious periods are also three years long. With its next NSIP elements due 18 months after reclassification to Moderate, State A submits nothing again. This triggers another finding of failure to submit, only to have those obligations again reset upon reclassification to Serious before sanctions or a FIP can take effect. By continuing this pattern through successive reclassifications, a state could reach Severe nonattainment nearly a decade after its nonattainment designation without ever implementing the Act's required planning measures or emission reductions, undermining both the statute's structure and its deadlines.

Another way EPA's Proposal violates the Act and the purpose of the 1990 Amendments is that it nullifies the two main enforcement mechanisms of the Act: sanctions and FIPs. These results are impermissible, in part, because they end up rendering sanctions in Section 7509 and the FIP obligations in Section 7410(c) meaningless for the majority of the Act's graduated classification scheme.

Typically, if an area fails to submit a SIP revision, the imposition of sanctions within 18 months (and stricter sanctions beginning at the 24-month mark) creates a strong incentive for a state to submit its missing SIP revision. For example, as EPA's Proposal itself notes, the 11 States that EPA found to have failed to submit their 2015 Moderate ozone nonattainment plans all subsequently made their overdue submissions so that the sanctions clock for each State was

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<sup>36</sup> *Supra* BACKGROUND § II (discussion about EPA delay in issuing finding of failure to submit for Moderate nonattainment elements)

<sup>37</sup> *Supra* BACKGROUND § II (discussion of EPA delay in issuing attainment determinations)

then terminated. *See* 91 Fed. Reg. 35648 fn. 51. Under EPA's new interpretation, sanctions would not take effect until the Severe stage. In practice, this means it could take more than 12 years from the initial nonattainment designation before any sanctions are imposed—and even then, they may be nullified upon reclassification to Extreme. Continuing the illustration above, State A would have 18 months to submit a Severe SIP (by year 10.5), and sanctions would not begin until 18 months after that (around year 12). Thus, EPA's new interpretation renders meaningless the Act's use of sanctions as a motivating tool to get states on track to meeting planning obligations, reducing ozone precursor emissions, and hopefully attaining the national ozone standard as expeditiously as practicable.

EPA's new interpretation undermines the ability to issue FIPs at all, let alone durable FIPs. Like sanctions, EPA has up to two years to issue a FIP based on a finding of failure to submit required SIP revisions, meaning the first time EPA will likely be able to issue a FIP is around the same time that sanctions can take effect (year 12). Even if EPA issued a FIP the day after issuing a finding of failure to submit Marginal, Moderate, or Serious requirements, that FIP could last less than a year as the nonattainment area will be reclassified by operation of law for failure to comply with the national ozone standard by the applicable attainment date.<sup>38</sup> So whether EPA issues a FIP quickly or not, either way, no FIPs will have any effect or meaningful reduction in emissions by the time it is rendered obsolete by EPA's new interpretation.

Under EPA's new interpretation, nonattainment areas could potentially see no reductions in design values until Year 14. Under the above illustration, if EPA cannot issue a durable FIP (or State A finally implements required controls) until Year 12, then it won't be until Year 13 where those controls have a meaningful reduction on ozone precursor emissions. And because an area's compliance with a national ozone standard is based on design values – the average of the last 3 year's fourth highest ozone recording—it isn't until the Year 14 design value (average of Years 12, 13, 14) where an area will see a meaningful reduction in its ozone levels. Thus, EPA's new interpretation could allow a state to kick the can down the road so far that it likely could not come into compliance with a national ozone standard until 14 years after its nonattainment designation date. A baby born at the time of the nonattainment designation could become a teenager before the state has done anything to reduce pollution.

EPA presents this outcome as a feature—not a bug—of its new position. EPA touts its new interpretation as a way to shield states from the Act's typical consequences of their failure to submit nonattainment elements and their failure to attain the national ozone standard. *See* 91 Fed. Reg. at 35645-48 (under its Proposal, areas that fail to submit Marginal, Moderate, etc. elements by their deadlines are rewarded for that failure upon reclassification to a higher level by resetting

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<sup>38</sup> This hypothetical assumes that a FIP would have to give way if a prior finding of failure to submit is undone by EPA's illegally retroactive Proposal. One problem here is that EPA simply fails to identify or grapple with the myriad of implications flowing from its changed interpretation of the Act. For example, the Proposal is completely silent on what its new interpretation would mean for FIPs that are issued pursuant to a finding of failure to submit that could be nullified under its new interpretation. Would the FIP stay valid since FIPs are akin to SIPs? Or would the FIP disappear along with the finding of failure to submit? EPA does not say, illustrating its arbitrary and capricious conduct.

deadlines). EPA seeks to extend its abrogation of the statute by proposing to void any consequences for states that have failed to timely submit Marginal or Moderate elements for the 2015 Ozone Standard. *Id.* at 35648. This illegal and inequitable action is compounded by EPA's own failure to identify the prior agency actions that will be retroactively nullified by its Proposal. *Id.*

The continuing delays allowed by EPA's new interpretation are irreconcilable with Congress's directive that attainment occur "as expeditiously as practicable." EPA's interpretation allows states to postpone meaningful action for a decade or more, even as air quality stagnates or worsens. In effect, EPA's interpretation makes it practically impossible for either sanctions or FIPs to operate as Congress intended for over a decade. Because each tool is triggered on a timeline longer than the period before the next reclassification, both are systematically overtaken before they can have any practical effect.

EPA's Proposal also defeats the Act's structure and purpose by converting what Congress designed as a cumulative scheme into a series of resets. Each successive classification is supposed to impose additional, more stringent requirements in response to failure. Instead, EPA's Proposal effectively erases the Act's time-dependent obligations altogether. By allowing earlier requirements to disappear upon reclassification, EPA transforms an escalating framework into a treadmill. As a result, a decade could go by with no meaningful progress towards attaining a national ozone standard. More broadly, EPA's new approach renders the Act's deadlines effectively optional. If a missed deadline can be erased by the passage of time and reclassification, then the statutory requirement to submit SIP elements "within" a specified period has no independent force. Deadlines become advisory rather than mandatory, contrary to the Act's text, and assuredly a result contrary to Congress's plain intent.

EPA's new interpretation also creates inequities between states in a way that conflicts with the Act's purpose. A state that complies with lower classification requirements on time must undertake planning, impose permitting obligations, implement controls and emission reductions, and incur implementation costs. Meanwhile, under EPA's new interpretation, a state that ignores those requirements faces no equivalent consequences because its obligations are later wiped away by reclassification for continuing violations of a national ozone standard. EPA's interpretation creates perverse incentives not merely for inaction, but for strategic delay in implementing emission controls. As a result, that compliance is penalized and noncompliance is rewarded—an outcome Congress did not intend.

EPA's new interpretation unlawfully inverts the logic of escalation embedded in the Act's graduated classification scheme. That scheme is designed to increase regulatory stringency in response to failure to attain standards. Under EPA's approach, however, each instance of failure instead results in delay and reset, such that continued nonattainment reduces regulatory urgency rather than increases it. By interpreting an escalation mechanism in a way that produces deescalation, EPA's new interpretation results in incoherence and abrogates the Act's structure and purpose. And the canon against surplusage cautions against an interpretation of a statute that

causes it “to have no consequence[s].” *Nielsen v. Preap*, 586 U.S. 392, 414 (2019). “The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *City of Chicago, Illinois v. Fulton*, 592 U.S. 154, 159 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

## **II. EPA’s Proposed Approach to How Elements from Lower and Higher Classifications Interact Is Unlawful and Arbitrary and Capricious.**

### **A. The Proposal’s New Position That Lower Classification Elements are Subsumed by Higher Classification Elements is Unlawful and Arbitrary.**

EPA must comply with principles of reasoned decision-making. Courts “apply the same standard of review under the Clean Air Act as ... under the Administrative Procedure Act.” *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 941 (D.C. Cir. 2021), *rev’d and remanded on other grounds sub nom; West Virginia v. EPA*, 597 U.S. 697 (2022) (quotation omitted); *see also* 42 U.S.C. § 7607(d)(1)(C). In other words, an agency action may not be arbitrary and capricious. An agency rule is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,” or reached a “decision counter to the evidence before the agency”. *State Farm*, 463 U.S. at 43. An agency must also “examine the relevant data and articulate a satisfactory explanation for its action.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)(quoting *State Farm*, 463 U.S. at 43). The Proposal has failed these requirements, including for reasons given above.

EPA offers very little rationale for its sudden change in interpretation. One rationale it does provide is its position that prior classification elements are “subsumed” into later classification elements. 91 Fed. Reg. at 35645. But as described more fully above, *supra* § I.A, the Act’s graduated classification scheme is structured so that key lower classification elements become due sooner than later classification elements. For example, the Marginal elements are foundational to the Act’s graduated classification scheme and provide the baseline for which future emissions reductions are tracked. Later requirements such as the Moderate and Serious RFP plans and milestones cannot be implemented unless this Marginal area requirement is complied with first. For this reason, the requirement to submit emissions inventories is not “subsumed” by later plans but must instead be submitted first. The Act recognizes the importance of timing by requiring this to be submitted within two years of the area’s nonattainment designation.

The temporal importance of submitting lower classification elements earlier in the timeline than higher classification elements is demonstrated by the Act’s treatment of areas that start out at a higher classification. For example, if an area is initially classified as Moderate or Serious or higher, it must still submit emissions inventories and other Marginal elements within the first two to three years of the planning process. Likewise, an area that starts out as Serious would still have to submit some of its Moderate elements sooner than the Serious ones. Having Marginal and Moderate elements on the books sooner is consistent with the Act’s structure and

purpose. EPA's own implementing regulations for ozone standards reflect this structure, and EPA's Proposal arbitrarily conflicts with those regulations (a conflict EPA's Proposal further arbitrarily does not address).

EPA's Proposal cannot be reconciled with reasoned decisionmaking because it imposes more stringent requirements on areas initially designated Serious than on areas that become Serious only after years of failing to attain. An area classified as Serious at initial designation must submit emissions inventories within two years. Yet an area that begins as Marginal, is reclassified to Moderate after failing to attain, and is later reclassified to Serious after another failure may avoid the obligation to submit an emission inventory for many years. The Proposal thus rewards repeated nonattainment by delaying compliance obligations and penalizes areas that begin with a higher classification. EPA provides no rational explanation for that disparity. Because the Proposal treats identically classified Serious areas differently based solely on the path by which they reached that classification, it is arbitrary and capricious.

EPA's failure to propose regulatory text further underscores the arbitrary and inadequately reasoned nature of this rulemaking. Although EPA proposes a significant change to how nonattainment planning requirements operate following reclassification, the agency provides no regulatory language showing how its new interpretation would be implemented in practice. As a result, the public cannot meaningfully evaluate the full legal and practical consequences of the Proposal. The absence of regulatory text is particularly problematic because EPA seeks not merely to establish future deadlines but to alter the legal effect of previously missed statutory and regulatory deadlines. Without concrete regulatory language, commenters are left to speculate about the Proposal's operation and scope, depriving them of a meaningful opportunity to comment on important aspects of the rule. EPA's failure to disclose the actual mechanisms by which it intends to implement its Proposal therefore both reflects the absence of reasoned decisionmaking and impairs the notice-and-comment process required by the Administrative Procedure Act.

EPA's Proposal is deficient because it fails to consider obvious alternatives that would address the concerns identified in the Proposal without rewriting the Act's graduated classification scheme. The Proposal is premised largely on practical difficulties arising from missed SIP submission deadlines, delayed EPA findings, and the administrative burdens associated with multiple classifications. But EPA never explains why those implementation challenges require extinguishing or delaying statutory obligations from lower classifications.

Obvious alternatives exist, including continued implementation of the existing framework, timely issuance of findings of failure to submit, more prompt promulgation of FIPs, use of Section 7511a(i) on a case-specific basis, or revisions limited to future submission deadlines rather than missed deadlines that have already passed. EPA fails to meaningfully evaluate alternatives to blowing up the entire graduated classification scheme.

Similarly, EPA's Proposal fails to adequately explain its departure from its longstanding implementation of the Act since the 1990 Amendments. The agency previously interpreted the Act to require submission of lower-classification nonattainment elements notwithstanding subsequent reclassification and promulgated regulations implementing that interpretation. EPA also approved SIP submissions and administered the ozone nonattainment program on that basis for many years. For example, when Texas previously requested a voluntary reclassification under the 1997 ozone standard for the Houston nonattainment area from Moderate to Severe, EPA responded that "reclassification would not provide a basis for extending submission deadlines for SIP elements unrelated to the attainment demonstration, that were due for the area's moderate classification."<sup>39</sup> EPA correctly rejected the idea that such a reclassification suddenly relieved the state from submitting other SIP elements that are not tied to attainment demonstration: "Texas has not been released from the obligation to comply with SIP submission deadlines for other moderate area requirements not related to the attainment demonstration." Clean Air Act Reclassification; Texas, 73 Fed. Reg. 56983, 56993 (Oct. 1, 2008). EPA's logic in that previous action remains applicable here, but EPA's Proposal provides no reasoned explanation justifying its change in position.

Although an agency may revise its implementation of a statute, it must acknowledge the change and provide a reasoned explanation for concluding that its prior approach was mistaken or unworkable. *Fox Television Stations*, 556 U.S. at 515. EPA does neither. Instead, the Proposal largely identifies administrative inconveniences associated with implementing the existing framework while failing to explain why the prior interpretation was legally or factually wrong. Administrative convenience cannot substitute for reasoned decisionmaking. *Ashland Expl., Inc. v. FERC*, 631 F.2d 817, 822 (D.C. Cir. 1980) ("administrative convenience" can only be a basis for action if "no fundamental injustice is caused."); *accord Gulf Oil Corp. v. Hickel*, 435 F.2d 440, 446 (D.C. Cir. 1970); *cf. Ill. Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997) ("[E]ven assuming, *arguendo*, that the [agency's action] marginally increases administrative convenience, this [action] comes at a huge cost."), *decision clarified on reh'g, Illinois Public Telecommunications Ass'n v. F.C.C.*, 123 F.3d 693 (D.C. Cir. 1997).

EPA's Proposal is internally inconsistent too. On the one hand, EPA acknowledges that higher classifications incorporate and build upon requirements applicable to lower classifications. On the other hand, EPA proposes to treat the failure to submit those lower-classification requirements as legally insignificant once reclassification occurs. These positions cannot be reconciled. If lower-classification requirements are foundational components of the Act's graduated classification scheme—as the Act's text, structure, and EPA's prior practice recognize—then the failure to submit those requirements necessarily remains relevant after reclassification. EPA never explains how requirements can simultaneously remain part of the

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<sup>39</sup> Letter from William L. Wehrum, Acting Assistant Administrator, EPA, to Kathleen Hartnett White, Chairman, TCEQ, dated May 21, 2007; EPA-R06-OAR-2007-0554-0003 at pg. 1 (attached as Ex. 23).

statutory framework while missed deadlines associated with those same requirements become effectively irrelevant. This unresolved contradiction renders the Proposal arbitrary.

Similarly, EPA rests its Proposal on a claim that Section 7511a's requirements are not "cumulative." *E.g.*, 91 Fed. Reg. at 35644. Yet it correctly acknowledges the "additive nature of [Section 7511a]'s structure." *Id.* at 35645. For EPA to hold these two incompatible views about the same statutory provision simultaneously is arbitrary. At the very least, EPA's failure to confront or explain how it can take this inconsistent position is arbitrary.

EPA's Proposal ignores the consequences of delayed implementation for air quality and public health. The Proposal applies specifically to areas that have failed to attain the ozone standard and therefore require additional emission-reduction measures. Yet EPA does not meaningfully examine how delaying, eliminating, or resetting lower-classification requirements will affect ozone concentrations in areas already experiencing persistent nonattainment. Nor does EPA explain why relaxing compliance obligations for areas with worsening or stagnant air quality is consistent with Congress's directive that attainment occur as expeditiously as practicable. The Proposal creates a nonsensical feedback loop where delay means worse air quality, and worse air quality means reclassification, but reclassification then allows more delay, so more delay means no improvement in air quality.

Notably, at least one other federal agency criticized the harmful health and environmental consequences of EPA's Proposal and sought further clarity from EPA on what SIPs would be affected by EPA's Proposal, yet EPA has failed to do so.<sup>40</sup> EPA's refusal to analyze the foreseeable effects and impacts of its Proposal is arbitrary. Moreover, that EPA refusal, coupled with EPA's denial of requests for extensions of the comment period, unlawfully and arbitrarily deprives the public, including Commenters, of a full and fair opportunity to comment on the Proposal.

As explained in the Background section, many nonattainment areas are seeing worsening air quality trends with design values for ozone increasing rather than decreasing over time. These trends could get even worse by EPA's new interpretation, which would further delay much-needed ozone precursor emission reductions in those areas and other planning obligations. By failing to evaluate the environmental and public health consequences of its Proposal, EPA has ignored a central aspect of the problem.

These harmful consequences of EPA's Proposal are compounded by the Agency's actions elsewhere rescinding or delaying regulations that provide for significant emission reductions of ozone precursors. Notably, EPA in the context of those deregulatory actions waves away states' and other local entities' concerns regarding the emissions impacts of these actions

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<sup>40</sup> See Word document comments [A5] and [A6] and comment responses thereto on EPA-HQ-OAR-2025-0201-0032 (attached in Word format as Ex. 24); *see also id.* Word document comments [A2] and [A4] and comment responses thereto (commenters asking EPA to provide information about numbers of areas and states affected by EPA's Proposal, and EPA directing those commenters to generic EPA databases).



on ozone nonattainment, instead suggesting that there are other tools to address these impacts under the ozone NAAQS program. For example, in response to states' and local governments' reliance interest concerns regarding the loss of criteria pollutant emission reductions associated with EPA's rescission of its vehicle greenhouse gas standards, EPA asserted that such considerations did not justify retaining the standards "particularly because the EPA has additional, express statutory authorities to address criteria pollutant emissions relevant to NAAQS attainment."<sup>41</sup> Similarly, in addressing the impact of increased ozone precursor emissions resulting from EPA's proposed delay of its Tier 4 criteria pollutant standards, EPA sought to minimize states' and metropolitan planning organizations' reliance interests by suggesting that "mobile-source standards are just one consideration among many involved in planning to attain the NAAQS and related obligations."<sup>42</sup>

However, for the reasons described in this comment, EPA is itself taking a sledgehammer to nonattainment planning for the ozone NAAQS. As EPA has in part justified its deregulatory actions elsewhere on the basis that the ozone NAAQS program will adequately address the emissions impacts of those actions, EPA's present Proposal contradicts and undermines its representations in those actions. EPA's Proposal is thus arbitrary and capricious and cements a regime where ozone pollution is both *increased* through other deregulatory actions, and at the same time the necessary actions to achieve attainment under the ozone NAAQS program are significantly disincentivized and delayed. EPA arbitrarily fails to grapple with, let alone acknowledge, how its present Proposal will further undermine implementation of the ozone NAAQS in light of its other actions that by their own terms will increase emissions, and fails to explain how the ozone NAAQS will be timely achieved per Congress's mandate given this tapestry of deregulation and delay.

**B. The Proposal to Allow a Lower Classification's Nonattainment Plan Elements to Satisfy the Higher Classification's Elements Is Both Unlawful and Arbitrary.**

EPA's Proposal to consider a state's fulfillment of a lower classification's element as satisfying the same required element for the higher classification if the area is subsequently reclassified is contrary to law and arbitrary and capricious. Tellingly, EPA in the first instance cites no statutory authority in support of this aspect of the Proposal and provides no explanation of how it conforms with statutory requirements.<sup>43</sup> Regardless, there is no colorable interpretation that the statute could accommodate it.

Additionally, EPA's Proposal to allow a lower classification element to satisfy the same required element for a higher classification is inconsistent with EPA's Proposal to extinguish any

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<sup>41</sup> Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686, 7708 (Feb. 18, 2026).

<sup>42</sup> Revision of Tier 4 Criteria Pollutant Standards, Part 1: Amendments to Phase-In Schedule for Light-Duty and Medium-Duty Vehicles, 91 Fed. Reg. 28463, 28475 (May 18, 2026).

<sup>43</sup> EPA's failure to explain its legal authority for this aspect of the Proposal violates Administrative Procedures Act Section 553(b).



outstanding lower classification requirements after an area is reclassified. EPA (incorrectly) justifies the latter Proposal by asserting that “the applicable requirements’ referenced in CAA Section 182(i) can only be those associated with one nonattainment classification.” But EPA’s Proposal to allow a lower classification element to satisfy the same element for a higher classification necessarily means that that an element can in fact be associated with multiple nonattainment classifications. As previously described, EPA’s own example of the baseline emissions inventory is clearly contemplated by the Act to be a cumulative requirement tying back to the initial designation and continuing after reclassification. Accordingly, this aspect of EPA’s Proposal is arbitrary and capricious considering its position elsewhere, as well as contrary to law for the reasons described above.

### **III. EPA’s Proposal Violates the Prohibition on Retroactive Rulemaking and That Retroactive Aspect of Its Proposal Is Arbitrary.**

As a general rule, federal agencies may not promulgate retroactive rules absent express congressional authorization. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law.”). Consistent with that principle, the Administrative Procedure Act authorizes agencies to prescribe only rules that have a “future effect” on regulated activity. 5 U.S.C. § 551(4). The D.C. Circuit has consistently applied this bar against retroactive rulemaking in the Clean Air Act context, holding that the Clean Air Act contains no language suggesting Congress intended to give EPA the “unusual ability to implement rules retroactively.” *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002).

EPA’s Proposal to moot any FIP or sanctions clocks once an area has been reclassified, *see* 91 Fed. Reg. at 35648, acts as a retroactive rule because it would alter the past legal consequences of past actions. A rule is impermissibly retroactive where it “takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994); *see also Nat’l Min. Ass’n v. Dep’t of Lab.*, 292 F.3d 849, 859 (D.C. Cir. 2002). Simply put, if a rule “alter[s] the *past* legal consequences of past actions,” it is retroactive. *Bowen*, 488 U.S. at 219, (Scalia, J., concurring)) (differentiating between a retroactive rule that alters the past legal consequences of past actions—which triggers the APA’s prohibition on retroactive rulemaking—and a rule that alters only the future legal consequences of past actions); *see also Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011) (“A rule that ‘alter[s] the past legal consequences of past actions’ is retroactive; a rule that alters only the ‘future effect’ of past actions, in contrast, is not.” (citing *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006)) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring))).

Here, EPA’s Proposal retroactively alters the legal consequences attached to a state’s past failure to submit nonattainment SIPs by the applicable statutory deadlines. Under the Clean Air Act’s ozone implementation framework, a state’s failure to submit a nonattainment SIP triggers a finding of failure to submit, which in turn results in mandatory statutory consequences, including a FIP and sanctions clocks. *See supra* DETAILED COMMENTS §§ I.B, I.C. The present Proposal

would moot or nullify those consequences after the triggering event—namely, a state’s past failure to submit a SIP—has already occurred, thereby attaching different legal consequences to completed past events. The Proposal would retroactively eliminate previously imposed legal consequences, such as already-running FIP and sanctions clocks, that attached to states as a result of *past* failures to submit SIPs. That is precisely the type of retroactive rulemaking prohibited absent clear congressional authorization—the Proposal would “alter[] the *past* legal consequences of *past* actions.” *Bowen*, 488 U.S. at 219, (Scalia, J., concurring) (emphasis added). The consequences EPA proposes to eliminate are not merely procedural requirements; they are statutory mechanisms designed to compel emission reductions and protect communities exposed to unhealthy ozone levels. By removing those consequences after the underlying SIP failures have already occurred, EPA would also alter the legal significance of completed past events. As discussed above, *supra* DETAILED COMMENTS §§ I.B, EPA cannot alter FIP and sanctions clocks absent the express mechanism laid out in Section 7410(c) of the Act. Because neither the Clean Air Act nor any other statute expressly authorizes EPA to adopt such retroactive rules, the Proposal is unlawful.

Even if EPA could issue a retroactive rule this context, it provides no adequate justification for retroactivity. EPA does not provide a reasoned explanation for why retroactive application is necessary or permissible, particularly given the heightened scrutiny courts apply to retroactive rules. *Bowen*, 488 U.S. at 208-09 (“Retroactivity is not favored in the law.... Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.”). This is also apparent in EPA’s lack of consideration of reliance interests or settled expectations in those prior actions. Further, EPA does not adequately consider or adopt limiting principles to reduce the legal and practical burdens created by retroactive effects. This obscurity is compounded by the fact that EPA itself is not aware of the scope of the actions that could fall under the purported retroactivity of its Proposal and provides no analysis of the scope of past actions that would be covered and rendered void by this Proposal, thus depriving the public of a fair opportunity to comment on EPA’s Proposal and creating regulatory mayhem. *See, e.g.*, 91 Fed. Reg. at 35648 (“EPA is soliciting public comment on the implementation impacts of this rule that may be informative for the Agency.”).

#### **IV. EPA’s Prior Regulations Regarding the Attainment Demonstration, Reasonably Available Control Measures, and the Clean Data Policy Further Undermine and Are Constructively Reopened by EPA’s Proposal.**

EPA’s proposed regulatory revisions reflect a “change in the regulatory context” for several of its prior rules, therefore constructively reopening them. *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1214. A constructive reopening occurs by “significantly [altering] the stakes of judicial review,” *id.* at 1227, of regulations as the result of a revision that “could not have been reasonably anticipated.” *Env’tl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006). Specifically, the Proposal constructively reopens the following regulations:

- 2025 Rule as to the attainment demonstration and Reasonably Available Control Measures (RACM)
- EPA’s codification of RACM requirements for the 2008 Ozone Standard at 40 C.F.R. 51.1112, and for the 2015 Ozone Standard at 40 C.F.R. 51.1312
- EPA’s codification of its Clean Data Determination (CDD) policy for the 2008 ozone NAAQS at 40 C.F.R. 51.1118, and for the 2015 Ozone Standard at 40 C.F.R. 51.1318

As described further below, EPA’s Proposal highlights and exacerbates the illegality of these regulations. EPA must therefore decline to finalize its Proposal and must amend these regulations so that states and EPA are incentivized to timely implement the ozone NAAQS under Subpart 2 and thereby properly effectuating Congress’s intent for this program.

#### **A. EPA’s Prior Regulations and Interpretations Regarding The Ozone Attainment Demonstration and RACM.**

EPA’s Proposal constructively reopens the 2025 Rule’s elimination of any overdue attainment demonstration and RACM requirements for a lower classification after an area has been reclassified. This aspect of the rule was codified at 40 C.F.R. 51.1403(a)(2). While the 2025 Rule excused only a few nonattainment SIP requirements for an area that is subsequently reclassified, EPA’s current Proposal to eliminate *all* of them constitutes “extensive changes...[that] significantly alter[ed] the stakes of judicial review” of that prior rule. *Kennecott*, 88 F.3d at 1226–27. The limited exemptions in the 2025 Rule “may not have been worth challenging,” *id.* at 1227, because EPA framed its prior rule as a limited gap filling policy and correctly retained all of the other lower classification requirements for states that failed to timely submit them even when an area is reclassified. However, EPA’s present Proposal gives the prior rule “a new significance,” *id.* by severely undermining public health by abrogating both the Act’s clear statutory requirements for ozone nonattainment and the attendant consequences for states that fail to meet those requirements.

As EPA states in the proposed rule, it now believes “that the previously identified gap is not a gap at all,” and “there is no ambiguity in the statute to resolve through a policy decision regarding which elements of the prior classification continue to apply and which do not.” 91 Fed. Reg. at 35644. Based on EPA’s new interpretation that the applicable nonattainment planning requirements for a reclassified area are *only* those associated with the higher status after reclassification, EPA’s position now is that the best reading of the statute is one that gives effect to all nonattainment plan provisions without distinction between those that are practicable and impracticable. This position constructively reopens the 2025 Rule as to the attainment demonstration and RACM.

EPA’s present Proposal fails to consider available alternatives in how states can meet an overdue, lower classification attainment demonstration. In the 2025 Rule, EPA rebutted commenters’ concerns about excusing the lower classification attainment demonstration and RACM requirements leading states to avoid being held accountable under the CAA by claiming that for areas that fail to attain, states must implement contingency measures. 90 Fed. Reg. at

5668. However, EPA’s present Proposal does away with this safeguard, as it would no longer require a state to submit and implement contingency measures for a lower classification if the area has been reclassified and the state failed to submit the contingency measures before then. Because EPA’s prior 2025 rule was premised on an assumption that contingency measures for a lower classification would serve as a safeguard against gamesmanship for states failing to timely submit nonattainment plans, including RACM, the current Proposal changes the calculus for petitioners in seeking judicial review and constructively reopens the previous excusal of overdue RACM upon reclassification. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025-26 (finding constructive reopener of 1994 SSM regulation by virtue of subsequent rule revisions that changed available remedies) (D.C. Cir. 2008).

EPA’s Proposal also constructively reopens the RACM requirement under EPA’s implementing regulations for the 2008 Ozone Standard at 40 C.F.R. 51.1112, and for the 2015 Ozone Standard at 40 C.F.R. 51.1312(c). Both provisions identically tie RACM to the attainment demonstration, and generally constrain this requirement to measures that advance attainment.<sup>44</sup> EPA’s position in the 2025 Rule regarding the dismissal of overdue RACM for the lower classification upon reclassification was premised on its view that both Section 7502(c)(1), 42 U.S.C. § 7502(c)(1), and its implementing regulations for the ozone NAAQS link RACM to the attainment demonstration and applicable attainment date, and its policy (which has never been codified) that RACM must advance the applicable attainment date by one year. 90 Fed. Reg. at 5668. Therefore, in EPA’s view, it was “illogical” to require a state to submit a RACM analysis for the former classification after an area is reclassified because the lower classification’s attainment date could not factually be advanced. *Id.*

EPA reiterates in its present Proposal that it stands by the 2025 Rule’s identification of a problem as to how to treat overdue lower classification requirements that are “impossible to implement at the higher classification level.” 91 Fed. Reg. at 35645. However, EPA now seeks to reframe its prior gap-filling policy of excusing lower level RACM upon reclassification as a statutory interpretation issue. *Id.* Accordingly, EPA’s Proposal constructively reopens the question of what is *statutorily* required for RACM.

For the reasons described previously, the text and purpose of the ozone classification scheme of the Act is that states timely submit and implement lower classification nonattainment plan requirements, and if they and EPA miss the relevant deadlines and an area is reclassified, those requirements continue to apply as do any consequences for failing to meet them. Accordingly, the best reading of the Act is that if a state fails to submit an approvable attainment demonstration and RACM for an area that is subsequently reclassified, those elements associated with the lower classification continue to be required and are not extinguished. EPA’s interpretation of RACM as tied to the applicable attainment date is neither rooted in nor tenable under the clear requirements of the statute. Notably, Section 7502(c)(1), 42 U.S.C. § 7502(c)(1),

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<sup>44</sup> 40 C.F.R. 51.1312(c) specifies that RACM for the 2015 Ozone Standard provide for attainment of the “applicable ozone NAAQS...by the applicable attainment date.”

requires implementation of RACM “as expeditiously as practicable... and to provide for attainment of the [NAAQS].” Nothing in the text of the statute suggests that the requirement to impose all RACM is predicated upon any particular attainment deadline. Indeed, the requirement that RACM be provided “as expeditiously as practicable” evinces Congress’s temporal intent as it relates to these measures, and there is no indication in Section 7502(c)(1) that a particular attainment date is a relevant factor. By contrast, other nonattainment plan elements under Section 7502(c) *do* specify that they are linked to an area’s attainment by “the applicable attainment date,” *see e.g.* Section 7502(c)(6), 42 U.S.C. § 7502(c)(6), requiring enforceable emission limitations and other measures as may be necessary or appropriate to provide for attainment by the applicable attainment date, Section 7502(c)(9), *id.* § 7502(c)(9), requiring contingency measures to be undertaken if an area fails to attain by “the attainment date applicable” under the Act.

Congress thus knew how to specify the nonattainment plan elements it wanted to tie to a particular attainment date and chose not to for RACM under Section 7502(c)(1), 42 U.S.C. § 7502(c)(1). The definition of RACM provides further textual support for the conclusion that it is separate from, and in addition to, the requirement to timely attain. Section 7502(c)(1) defines RACM in terms of a required level of pollution control technology—specifically, plans must provide for RACM, “including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology.” “Reasonably available control technology” is a minimum level of pollution control, based on the lowest emission limit that a particular source can achieve using reasonably available technology—not on what will or will not advance attainment. *Navistar Int’l Transp. Corp. v. EPA*, 941 F.2d 1339, 1343 (6th Cir. 1991); *NRDC v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988). Additionally, while RACT is a statutory subset of RACM, EPA correctly does not apply the same constraints regarding advancing attainment by a particular attainment date to its implementation of the ozone RACT requirement. The best reading of Section 7502(c)(1) is that *both* ozone RACM and RACT are required independent of an applicable attainment date.

Thus, Congress plainly viewed RACM (of which RACT is a subset) as a requirement that states impose specific pollution controls that exists independent of the requirement to timely attain. The best reading of Section 7502(c)(1) is that all RACM must be implemented as expeditiously as practicable, regardless of whether it advances the attainment date, and certainly regardless of whether it advances the attainment date by one year.<sup>45</sup> Section 7502(c)(1) further

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<sup>45</sup> Courts have previously upheld EPA’s interpretation of RACM as tied to and expediting the applicable attainment date as reasonable under the now-overturned *Chevron* framework. *See e.g. Sierra Club v. EPA*, 294 F.3d 155, 162-63 (D.C. Cir.) (2002). However, EPA’s interpretation of RACM is unworkable and cannot constitute the best reading of the Act. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). EPA’s interpretation renders RACM a dead letter, as it reduces it to an analytical exercise redundant of the attainment demonstration the statute already requires. EPA’s nullification of RACM is apparent in reclassified areas that were reclassified close in time to the applicable attainment date, because under those circumstances basically no reasonably available control measures can speed attainment by a year. As a result of EPA’s interpretation, no RACM is ever required, and it beggars belief that the **primary** requirement Congress imposed for nonattainment areas under Part D so infrequently results in any emission reductions.

states that RACM shall provide for attainment of the NAAQS (again, not by an applicable attainment date), making clear that attainment is overall purpose of RACM. Nothing in the Act suggests, however, that EPA can obviate such purpose if a measure that is otherwise reasonably available (e.g. based on cost and feasibility) will not itself achieve attainment. Section 7502(c) is clear that RACM need not itself advance attainment, as Congress provided that states must implement other measures under Section 7502(c)(6) that do not constitute RACM, such as economic incentives, as may be appropriate or *necessary* to provide for attainment by the applicable attainment date. Thus, RACM (and RACT, as a subset) must constitute control measures that are reasonably available even if they do not themselves advance attainment, and any shortfall for achieving attainment by the applicable attainment date should be made up through other measures.

Additionally, Section 7502(c)(1)'s requirement that RACM provide for attainment of the NAAQS supports the conclusion that any overdue RACM for the lower classification is still required for a reclassified area. Because a reclassified ozone nonattainment area is still by definition obligated to attain the standard, any emission reductions associated with the lower classification RACM will necessarily "provide for attainment of the [NAAQS]." EPA's Proposal would instead contravene the text and purpose of the statute by delaying or altogether excusing emission reduction measures that would at least contribute towards attainment. Thus, it gives new significance to the Agency's prior, general positions tying RACM to the applicable attainment date, as codified both in 40 C.F.R. 51.1312(c) and 40 C.F.R. 51.1403(a)(2), by expanding them to a "blanket exemption" and subjecting the public to "a more onerous task in effecting compliance" with the ozone NAAQS. *Sierra Club v. EPA* at 1026. By constructively reopening these regulations, EPA must not finalize its Proposal and instead amend its regulations to make clear that RACM is not tied to a particular attainment date, and that accordingly any unfulfilled obligations for lower classification RACM remain required after an ozone nonattainment area is reclassified.

As described previously, the text and the purpose of the Act support the best reading of the ozone classification scheme as a cumulative one, and that *all* requirements for the lower classification are still due after reclassification, to the extent they were previously not timely submitted and implemented. To allow otherwise would completely disincentivize states from ever timely submitting the required ozone nonattainment plan elements, as they could simply wait to be reclassified and excused from their prior statutory obligations, and such an outcome flagrantly undermines the indisputable purpose of the Act's ozone implementation requirements in requiring attainment as expeditiously as practicable and in protecting public health.

## **B. EPA's Clean Data Policy.**

EPA's Proposal also constructively reopens the Agency's Clean Data Policy for the ozone NAAQS, codified for the 2008 standard at 40 C.F.R. 51.1118, and for the 2015 standard at 40 C.F.R. 51.1318. Under EPA's Clean Data Policy, for a nonattainment area that can demonstrate attainment of the standard based on air quality monitoring data and other available

information before implementing CAA nonattainment measures, the EPA interprets the requirements of the CAA that are specifically designed to help an area achieve attainment to be suspended for so long as air quality in the area continues to meet the standard. These suspended measures include attainment demonstrations, RACM,<sup>46</sup> reasonable further progress (RFP) demonstrations, emissions limitations and control measures as necessary to provide for attainment, and contingency measures.

Importantly, under the Clean Data Policy, these measures are suspended until either the area is redesignated to attainment under 42 U.S.C. § 7407(d)(3)(E) (hereinafter “Section 7407”) at which point the suspended nonattainment plan requirements no longer apply, or EPA determines the area has violated the ozone NAAQS, at which point the area is again required to submit the previously suspended plan elements. EPA’s Proposal now is a “change in the regulatory context” that constructively reopens the Clean Data Policy. *Kennecott*, 88 F.3d at 1214. Under EPA’s Clean Data Policy regulations, if EPA issued a determination that an ozone nonattainment area attained the standard and suspended the relevant nonattainment planning requirements, and the area subsequently failed to attain the NAAQS and was accordingly reclassified, the state per the 2025 Rule would again be required to submit the previously suspended nonattainment plan requirements. Under EPA’s current Proposal, however, because those now-live requirements were for the lower classification and were not submitted prior to reclassification due to their suspension, the subsequent reclassification extinguishes the obligation on the state to submit those nonattainment plan elements.

This means that for such an area, EPA’s Clean Data Policy in conjunction with its current Proposal abrogates the statutory responsibility to submit and implement the vast majority of nonattainment plan elements legally required to ensure an area attains the NAAQS, and deprives the public of the protections it is entitled to under the NAAQS by delaying or altogether obviating measures that would improve harmful air quality. The Clean Data Policy thus highlights and exacerbates the illegality of EPA’s present Proposal, as a daisy chain of both would allow a state to go many years without submitting or implementing ozone nonattainment plan requirements for an area, with no consequences for air quality that does not attain the NAAQS.

The Clean Data Policy itself attempts a safeguard against worsening air quality by reviving suspended nonattainment plan requirements if the area violates the NAAQS, but EPA’s Proposal squashes this safeguard by excusing the applicable requirements for the lower classification. The Clean Data Policy is strong evidence of why EPA cannot legally finalize its proposed reconsideration of the 2025 Rule without rendering Subpart 2’s carefully designed restrictions on EPA discretion utterly nugatory,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 484 (2001). But, EPA’s Proposal is also a “change that could not have reasonably anticipated” at

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<sup>46</sup> EPA’s Clean Data Policy does not suspect RACT requirements and they continue to apply even when EPA has made a Clean Data Determination for an area, underscoring that Section 7502(c)(1), 42 U.S.C. § 7502(c)(1), plainly requires that both RACM and RACT are intended to be implemented regardless of whether they advance the applicable attainment date.

the time it adopted the Clean Data Policy, and “eliminate[s] the only effective constraints that EPA originally placed” on the policy. *Sierra Club v. EPA*, 551 F.3d at 1025-26 (finding constructive reopener of prior regulation based on subsequent modifications that gave that rule new significance). Therefore, EPA’s Proposal constructively reopens its Clean Data Policy for the ozone NAAQS as codified in regulations.

The fact that the Clean Data Policy in conjunction with EPA’s present Proposal seriously risks undermining the ozone NAAQS program highlights that the Clean Data Policy is also contrary to the text and purpose of the Act. As EPA itself has acknowledged, the Clean Data Policy does not serve to alter an area’s nonattainment designation, as an area’s nonattainment designation can only be legally changed to attainment through EPA’s redesignation that meets the requirements of Section 7407(d)(3)(E), 42 U.S.C. § 7407(d)(3)(E). This provision includes five rigorous requirements that all must be met before EPA can redesignate a nonattainment area to attainment, and these requirements reflect Congress’s intent that a redesignation be done with merit and with strong assurances that air quality will maintain attainment of the NAAQS, so that the people living in the area are not deprived of the protections of nonattainment planning. It is *only* after an area is redesignated to attainment under Section 7407(d)(3)(E) that it is no longer subject to the nonattainment planning requirements. However, the Clean Data Policy provides an extra-statutory mechanism for also not subjecting an area to nonattainment planning requirements, though its status legally remains as nonattainment.

As an initial matter, there is no legal basis in the Clean Air Act for the Clean Data Policy. Rather, the statutory redesignation requirements underscore why the Clean Data Policy is illegal. For example, Section 7407(d)(3)(E)(iii) prohibits EPA from redesignating an area unless EPA determines that the improvement in air quality is due to permanent and enforceable emission reductions, including from implementation of the SIP. This requirement ensures that a consequential redesignation to attainment is not based on temporary factors such as favorable meteorology or short-term changes in an industry’s operational behavior due to supply or demand. Such a safeguard is important because if air quality worsens and violates the NAAQS after the redesignation due to the temporary factors reverting to baseline, a redesignated area no longer has the benefit or consequence of nonattainment status and the associated planning requirements to ensure actual attainment of the NAAQS.

But EPA’s Clean Data Policy undermines these statutory requirements and safeguards. There is no requirement in EPA’s regulations for the Clean Data Policy to be applied only when attainment has been achieved due to permanent and enforceable reductions, nor are there any other regulatory constraints on EPA at all in determining that an area qualifies for the policy, let alone constraints similar to the statutory ones for redesignation. The Clean Data Policy suspends requirements “related to attainment” of the ozone NAAQS on the theory that the area is already attaining without such measures in place. However, under the normal implementation of the Act without this policy, if area attains the NAAQS at a point in time due to temporary conditions, measures such as RACM, RFP, and contingency measures would ensure there are important emission reduction measures in place providing permanent and enforceable improvements in air



quality that would remain even when the temporary conditions change. In enacting the redesignation requirements, Congress clearly intended for attainment of the NAAQS to be durable and sustaining. But, under EPA's Clean Data Policy, the resulting reality after temporary conditions change is that there are no permanent and enforceable nonattainment plan requirements to improve air quality other than RACT, which under the terms of EPA's own policy is not related to attainment of the ozone NAAQS.

The best reading of the Clean Air Act is therefore that the only route for absolving an area of any nonattainment obligations is redesignation to attainment under Section 7407(d)(3)(E). A state may seek redesignation for a nonattainment area at any time, and if air quality is indeed attaining the NAAQS and all other requirements for redesignation are met, then that is the mechanism by which a state will no longer be required to implement nonattainment planning elements. Additionally, an area seeking redesignation to attainment must meet Section 175A, 42 U.S.C. § 7505a (hereinafter "Section 7505a), maintenance plan requirements, which further demonstrates why EPA's Proposal and the Clean Data Policy are unsupported by law. Section 7505a(d) requires that a maintenance plan include contingency provisions to assure that the state will promptly correct any violation of the NAAQS that occurs after redesignation. The statute further specifies that such contingency provisions "shall" include a requirement that a state will implement "all measures with respect to the [nonattainment pollutant] that were contained in the [nonattainment plan] for the area before redesignation."

The clear intent of this provision is that a redesignated area that backslides to nonattainment will be remediated in part by the measures in the nonattainment plan that were intended to help the area attain the NAAQS in the first place. However, EPA's Proposal in conjunction with the Clean Data Policy would produce a result where there would not be such adequate measures in the maintenance plan. For example, a state could fail to submit the nonattainment plan requirements for a Moderate area, and upon reclassification to Serious, the Moderate plan obligations would be extinguished. EPA could determine that a Moderate area qualifies for the Clean Data Policy and suspends most of the Serious nonattainment plan requirements. If the state submits a redesignation request at this point, under EPA's present Proposal and Clean Data Policy, EPA could approve the redesignation without ever requiring most nonattainment planning elements for the area. If the redesignated area subsequently violates the NAAQS, which is conceivable given there are very few measures in the SIP itself at this point to reduce air pollution and EPA chooses to repeal its own Federal measures that might otherwise provide reductions, there are few if any requirements in the nonattainment plan to serve as contingency provisions that would help bring the air quality back to attainment, nor is EPA under a mandatory legal obligation to redesignate the area to nonattainment.

This loophole cannot have been Congress's intent in promulgating the rigorous framework of Subpart 2. A faithful application of the Clean Air Act instead requires that states timely adopt and implement nonattainment plans that include enforceable measures that will reduce ozone pollution or otherwise face specific consequences that will also help the area reach attainment. If those measures prove insufficient and an area is reclassified, those measures still

provide emission reduction benefits both for public health and towards the next attainment date. EPA's Proposal, however, problematically disrupts this clear statutory scheme by disincentivizing states to meet their nonattainment plan submission obligations by the relevant deadlines by absolving them of the attendant consequences, and the Clean Data Policy further exacerbates this problem by extra statutorily suspending the submission obligations in the first instance. The only way to solve these issues of EPA's own making is that instead of finalizing this Proposal, EPA must both rescind the Clean Data Policy and require that any overdue lower classification elements remain required after an area is reclassified.

## **V. EPA Proposal Treatment of Reliance Interests Is Arbitrary.**

Serious reliance interests are entitled to legal protection. When agencies change their position or prior policies, they must consider the reliance interests that have arisen from those prior positions. *FDA v. Wages & White Lion*, 604 U.S. 542, 568 (2025); *Dept. of Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-31 (2020) (“DHS”); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-222 (2016); *Fox Television Stations*, 556 U.S. at 515. Agencies must both be “cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account,” and also provide “[a] reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Encino Motorcars*, 579 U.S. at 221-22. (internal quotation marks omitted).

EPA classifies the reliance interests implicated by its Proposal as “minimal, if any.” 91 Fed. Reg. at 35643. EPA asserts that because its proposed action is “deregulatory”—requiring less of states compared to the status quo—reliance interests “do not weigh heavily.” *Id.* EPA notes that states are not precluded from making SIP submissions under its Proposal. *Id.* EPA further asserts that it is “not aware of situations in which members of the public would have made decisions in reliance on the leftover SIP elements policy.” *Id.* Nevertheless, EPA “specifically solicit[s] comments” on whether any reliance interests exist that it failed to consider *Id.*

EPA's analysis of reliance interests is flawed and incomplete, rendering it arbitrary and capricious. *State Farm*, 463 U.S. at 43 (action arbitrary and capricious where agency “entirely failed to consider an important aspect of the problem”). As an initial matter, EPA wholly disregards the purpose of the Clean Air Act to “protect and enhance the quality of the Nation's air resources so as to promote public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). EPA's anemic reliance interest analysis proceeds as though the nonattainment SIP requirements in the Clean Air Act are a papermaking exercise devoid of real world impact. Per EPA's characterization, any deregulatory action that eliminates or delays the submittal of a nonattainment plan element is a boon, saving states the effort of putting pen to paper. 91 Fed. Reg. at 35643 (describing Proposal as “reliev[ing] the State of SIP submittal obligations that were previously imposed on the States”). But the nonattainment plan requirements set forth in 42 U.S.C. §§ 7502 and 7511a are critical life-saving measures designed to bring areas into attainment with health based ambient air quality standards.

The Clean Air Act requires the EPA to establish a primary NAAQS for ozone at a level “requisite to protect the public health.” 42 U.S.C. § 7409(b)(1). For areas designated as not meeting these health-based standards—those with unhealthy air—the Clean Air Act requires imposition of a series of progressively more stringent pollution control requirements to ensure that the areas attain the NAAQS “as expeditiously as practicable,” and no later than certain specified dates. 42 U.S.C. § 7511a(a)(1). This language bespeaks the urgency of implementing remedial actions. “By imposing a first-order obligation to attain the NAAQS ‘as expeditiously as practicable,’ Congress made clear that the States could not procrastinate until the [outside statutory] deadline approached.” *Wisconsin v. EPA*, 938 F.3d 303, 317 (D.C. Cir. 2019).

Members of the public living in ozone nonattainment areas reasonably rely on the timely development and implementation of regulatory measures designed to improve air quality under 42 U.S.C. §§ 7502 and 7511a. As in *DHS*, the actions taken in reliance on the existing regime are fundamental: Residents of nonattainment areas have built their lives around a Clean Air Act structure designed to produce progressive improvements in air quality through implementation of stricter pollution controls leading to safe levels of ambient air contamination. *Cf.* 591 U.S. at 31 (describing the basic life actions—purchasing homes, starting businesses, marrying and having children—taken in reliance on the DACA program and necessitating consideration in analyzing reliance interests). The affirmative decision to remain in or to relocate to a nonattainment area—purchasing homes, starting businesses, marrying and having children—on the expectation that the Clean Air Act will function as intended to produce salutary air quality is a serious reliance interest. EPA failed to meaningfully evaluate how its current Proposal—which will indefinitely delay the development and implementation of critical pollution control measures in ozone nonattainment areas—affects the investment back expectations of these nonattainment area residents in progressively improving air quality overlooks an “important aspect of the problem.” *State Farm*, 463 U.S. at 43.

Additionally, EPA wholly failed to consider the reliance interests of local governments, which rely on nonattainment classifications to guide transportation planning, zoning, and capital investments. The Clean Air Act contains multiple requirements that increase with higher classifications of nonattainment. For example, Marginal ozone nonattainment areas have an offset requirement for VOCs and NO<sub>x</sub> of 1.1:1. 42 U.S.C. § 7511a(a)(4) & (f). This increases to 1.15:1 for Moderate ozone nonattainment areas, *id.* § 7511a(b)(5), 1.2:1 for Serious ozone nonattainment areas, *id.* § 7511a(c)(10); and potentially 1.3:1 and 1.5:1 for Severe and Extreme ozone nonattainment areas, depending on whether emission control requirements are in place. *Id.* § 7511a(d)(2) & (e)(1). Municipalities structure development strategies and permitting frameworks around classification status. EPA’s Proposal disrupts this planning. Under EPA’s Proposal, areas would be reclassified to progressively higher levels of ozone nonattainment without needing to submit critical SIP elements or be subject to EPA FIPs. Consequently, nonattainment areas will experience increases in classification—entailing greater offset requirements—without the benefit of the emission reductions from other SIP requirements, interfering with municipal planning. EPA fails to assess how its Proposal disrupts municipalities’ planning interests.

## **VI. EPA's Refusal to Analyze the Impacts of Its Proposal on Children's Health Is Arbitrary.**

EPA's basis for refusing to analyze how its Proposal to weaken protections against harmful ozone air pollution would affect children's health is arbitrary. 91 Fed. Reg. 35649. EPA's refusal is solely premised on the claim that its Proposal "does not concern an environmental health risk or safety risk," meaning "this action does not concern human health." *Id.* But EPA's claim is unsupported and unsupportable. Its Proposal pertains exclusively to implementation of primary national ambient air quality standards for ozone. Congress required EPA to establish such standards—and for EPA and states to implement such standards—precisely because ozone air pollution harms human health. *See supra* Background § I (citing Clean Air Act and copious scientific evidence).

In defining the key term "environmental health risk or safety risk," Executive Order 13045 expressly covers air pollution: "'Environmental health risks and safety risks' mean risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breath [*sic*], the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to)." Exec. Order 13045, § 2-203, Protection of Children From Environmental Health Risks and Safety Risks, 62 Fed. Reg. 19885, 19885 (Apr. 23, 1997). The Proposal thus plainly concerns human health, specifically aspects of human health that are influenced by environmental factors. Moreover, ozone air pollution disproportionately affects children, as EPA has repeatedly acknowledged. *See, e.g.*, 80 Fed. Reg. at 65310-11.

\* \* \*

For these reasons, the undersigned organizations urge EPA to abandon its illegal Proposal and focus its efforts on timely implementation of the Act's ozone requirements. Given the deteriorating ozone conditions in many nonattainment areas, now is the time for the agency and states to answer the Act's call to attain the 2015 Ozone Standard as expeditiously as practicable. The health and wellbeing of the American people suffer the most when EPA and states sit on the sidelines rather than grapple with the problems plaguing implementation of the Act's graduated classification scheme. To protect the public health and environment, EPA must do more—not less—and must not abdicate its responsibility and mission by adopting this Proposal.

Sincerely,

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## APPENDIX OF FIGURES





