UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-9546

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner – Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondent – Appellees

On Petition for Review of Final Action of the U.S. Environmental Protection Agency

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CORRECTED **PETITIONER'S OPENING BRIEF**

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CORPORATE DISCLOSURE STATEMENT

The Center for Biological Diversity ("Center") has no parent companies, and there are no publicly traded companies that have any ownership interest in the Center.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to 10th Circuit Rule 28.2(C)(4), the following is a glossary of the acronyms used in this brief:

EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
SIP	State Implementation Plan

INTRODUCTION

This Clean Air Act direct appeal challenges the United States Environmental Protection Agency's ("EPA") approval of a Colorado state implementation plan ("SIP"). Colorado's SIP is the collection of EPA-approved regulations and directives used by Colorado to keep concentrations of dangerous pollutants in the ambient air below EPA's National Ambient Air Quality Standards ("NAAQS"). The NAAQS apply to a specific set of air pollutants which can endanger public health or welfare, including ground-level ozone, which people often refer to as "smog."

While ozone in the stratosphere, i.e., the ozone layer, is critical to protecting people from harmful ultraviolet rays, ground-level ozone is a dangerous air pollutant that attacks the lungs and other parts of the body, contributing to respiratory problems, cardiovascular issues, and premature deaths. *See* 80 Fed. Reg. 65,291, 65,302–17 (Oct. 26, 2015). The evidence is also suggestive of a causal relationship between exposure to ozone and adverse reproductive and developmental effects, including adverse birth outcomes. *Id*. at 65,338. Children, the elderly, people with respiratory conditions like asthma, and people who work or recreate outdoors are most at risk from ozone. *See id*. at 65,322. Ozone also damages commercial crops and other vegetation, harming the economy and diminishing ecosystem services—

the life-sustaining services that ecosystems provide to people for free, like clean air, clean water, and carbon sequestration. *Id*. at 65,372–73, 65,377–78. Oil and gas development is a large cause of ozone pollution.[1]

In 2015, EPA adopted a more protective NAAQS for ozone. *Id*. at 65,294. EPA lowered the allowable level of ozone in the ambient air because EPA deemed it necessary to protect public health and welfare across the country. *Id*.

Upon adopting the new NAAQS, EPA determined that a large part of Colorado had levels of ozone pollution that exceeded the NAAQS, rendering this region a "nonattainment area" called the Denver Metro / North Front Range nonattainment area ("Denver Metro Nonattainment Area"). 83 Fed. Reg. 25,776, 25,792 (June 4, 2018). This came as no surprise, because this area also continues to fail to meet the former, less-stringent ozone NAAQS from 2008.[2] 87 Fed. Reg. 60,926, 60,929 (Oct. 7, 2022). The Denver Metro

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[1] *See* EPA, Basic Information about Oil and Natural Gas Air Pollution Standards (accessed Oct. 25, 2022), https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/basic-information-about-oil-and-natural-gas; *see also* Colorado Department of Public Health and Environment, Denver Metro Area/North Front Range Nonattainment Area 2017 Emission Inventory, Summary (June 18, 2020) (identifying oil and gas sources as the largest source category for volatile organic compounds, one of the types of pollution that results in ozone), ROA, Vol. I, at 0029–30.

[2] For reasons not relevant to this case, the Clean Air Act allows for multiple NAAQS for the same pollutant which are implemented largely in parallel to

Nonattainment Area includes eight counties and part of another that, all together, are home to over 3.3 million Coloradans. EPA, Green Book: 8-Hour Ozone (2015) Designated Areas by State/County/Area (Sept. 30, 2022), https://www3.epa.gov/airquality/greenbook/jbcty.html.

When EPA designated the Denver Metro Nonattainment Area in violation of the more protective 2015 ozone NAAQS, the Clean Air Act required Colorado to update its SIP. 42 U.S.C. § 7502. The Act imposed additional obligations on Colorado to set the Denver Metro Nonattainment Area on a path towards attainment of the NAAQS. *See id*. §§ 7502(c)(5), 7503, 7511a. Pursuant to these obligations, Colorado was required to obtain EPA's approval for Colorado's permitting program for new or modified sources of air pollution that will emit ozone-causing pollution in the Denver Metro Nonattainment Area. *Id*. §§ 7502(c)(5), 7503. EPA's approval of these revisions is the subject of this direct appeal.

EPA, however, did not include the language of the permitting program it approved in the docket for its proposed rule. Accordingly, the public, including the Center, was forced to guess at the specific language of the permitting program they were supposed to be commenting on. Colorado has

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each other until the nonattainment area comes into compliance, that is "attainment," with the older, less protective NAAQS.

made many changes to the language of the regulations that form its permitting program over the more than half a century that the Clean Air Act's cooperative federalism system has been in place. Some of this language has been adopted into the Colorado SIP, but some of it has not. *See, e.g.*, ROA, Vol. 2, at 0991–92 (the "cross out" is the way EPA indicates to the public, including both regulated entities and environmental groups, which language from Colorado's state regulations is in the SIP and which language is not in the SIP).

EPA's refusal to provide the actual language of the Colorado permitting program that is in the federally approved SIP deprived the public of the opportunity to provide meaningful comments on the entirely of the permitting program approved by EPA, contrary to basic principles of administrative law. EPA's refusal was also counter to a goal of having the public help EPA through comments to ensure that Colorado's permitting program is legal and effective at reducing dangerous ozone levels. It is especially important that the public be given a full and fair opportunity to comment on EPA's action here, where EPA's decision has grave consequences for the severe and long-lasting ozone problem in Colorado.

In addition, EPA approved Colorado's permitting program despite gaping loopholes in the program that allow the permitting agency in Colorado, the Air Pollution Control Division ("Division"), to ignore large amounts of air

pollution when making permitting decisions. The permitting program as approved disregards "temporary emissions" associated with activities like construction and drilling of oil and gas wells when determining how stringent the permit for a new source of air pollution must be. The permitting program also disregards emissions from internal combustion engines on vehicles, which contribute sizeable emissions in contexts like oil and gas development. The permitting program treats these emissions as if they do not exist at a critical step of the permitting process. Meanwhile, the air pollution that results from activities like drilling for oil and gas continues to perpetuate Colorado's dangerous ozone problem.

BASIS OF JURISDICTION

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1) to review EPA's final action entitled "Air Plan Approval; Colorado; Denver Metro/North Front Range Nonattainment Area; Nonattainment NSR Permit Program Certification for the 015 8-Hour Ozone Standard." 87 Fed. Reg. 29,232 (May 13, 2022); ROA, Vol. I, at 0004. The approval that this action challenges is specific to Colorado. Thus, venue is appropriate in the Tenth Circuit. 42 U.S.C. § 7607(b)(1).

To demonstrate Article III standing, the Center must establish that at least one of its members has standing to sue in his or her own right, that the Center seeks to protect interests which are germane to its organizational purposes, and that the participation of individual members is not needed. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Individuals have standing if they suffer an injury-in-fact that is both fairly traceable to EPA's action and redressable by the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

EPA's actions injure members of the Center in Colorado. These members suffer injury due to the ozone pollution that will not be adequately regulated under Colorado's deficient permitting program for the Denver Metro Nonattainment Area.

Scott Silber, a member of the Center, lives in Boulder, Colorado and enjoys outdoor activities such as jogging, biking, hiking, and climbing, yet he developed asthma that is aggravated by poor air quality. Silber Decl. ¶¶ 3–5 (Ex. 1). Mr. Silber often must restrict or avoid those activities altogether due to concerns about air quality. *Id.* ¶ 5. This is problematic because air quality often deteriorates during the day, and he has to plan accordingly so as not to be caught biking home in unhealthy air. *Id.* ¶¶ 9, 11. In addition to the loss of recreational and exercise opportunities, Mr. Silber regularly incurs significant

expenses, as he must maintain medications to treat his asthma on his person, including EpiPens. *Id.* ¶¶ 7–8. Poor air quality due to air pollution from Colorado thus injures Mr. Silber's health, recreational opportunities, and aesthetic enjoyment of Colorado's great outdoors.

Richard Reading, another member of the Center, also suffers injuries due to ozone pollution from Colorado which impacts his running, bicycling, gardening, and dog walking in Denver, Colorado. Reading Decl. ¶¶ 5–6 (Ex. 2). Dr. Reading, a wildlife biologist, suffers from serious asthma and loses his freedom to exercise outdoors when air quality is poor. *Id.* ¶ 4, 6. Dr. Reading's asthma problems lessen when he leaves the poor air quality of the Denver region, but worsen when he returns home. *Id.* ¶ 6. Unhealthy ozone levels in the Denver area impose significant costs on Dr. Reading in the form of costs for doctor and urgent care visits, medication, air filters for his home recommended by his doctor, and the use of sick and vacation time to recover from asthma attacks. *Id.* ¶ 7. Dr. Reading closely follows air quality reports and limits his activity when there are air quality alerts, and even so has occasionally had to stop running or biking due to breathing problems. *Id.* ¶ 8. Dr. Reading is well aware of the many negative impacts caused by ozone pollution such as decreased lung function, asthma, bronchitis, emphysema,

and permanent scarring of the lungs, particularly for sensitive groups, including himself. *Id.* ¶ 11.

All these injuries are concrete, actual or imminent, and fairly traceable to EPA's actions. EPA's failure to provide the regulatory language it was approving in the docket and its approval of a plan that disregards important sources of emissions for permitting purposes both harm the public, including the Center's members. A favorable decision from this Court would redress these injuries by vacating this approval and remanding to EPA to provide a meaningful public comment period and to make Colorado's permitting program more effective by closing its loopholes, as discussed further below.

The Center also meets the requirements for organizational standing in this case. Protecting its members from air pollution is directly germane to the Center's mission, Burd Decl. ¶¶ 3–7 (Ex. 3), and this case does not require the participation of any of the Center's members.

STATEMENT OF THE ISSUES

1. Whether EPA violated the requirements of the Administrative Procedure Act and impaired the ability of the public, including the Center, to provide meaningful comment on all parts of the SIP submittal by failing to include the actual language of the Colorado

permitting program it was approving in the docket for the rulemaking.

2. Whether EPA acted contrary to law by approving Colorado's permitting program, despite the program's exclusion of "temporary emissions" and emissions from internal combustion engines on vehicles from the consideration of whether new and modified sources in the Denver Metro Nonattainment Area are major sources, when these exclusions are unauthorized and result in a Colorado permitting program that is weaker than the federal requirements allow.

STATEMENT OF THE CASE

I. Clean Air Act

Section 109 of the Clean Air Act requires EPA to establish primary and secondary NAAQS for a specific set of pollutants that includes ground-level ozone. 42 U.S.C. §§ 7408–7409. The primary standard must be set at the level which protects public health with "an adequate margin of safety." *Id.* § 7409(b)(1). The secondary standard must be set at the level requisite to protect public welfare, which includes effects on vegetation, crops, soils, water, wildlife, visibility, and climate. *Id*. §§ 7409(b)(2), 7602(h). The Clean

Air Act requires EPA to review the NAAQS at five-year intervals and to make revisions as needed to protect public health and welfare. *Id*. § 7409(d).

After EPA promulgates or revises a NAAQS, it must identify which areas of the country are in compliance with the NAAQS and which are not. *Id*. § 7407(d). Areas where air quality fails to meet the NAAQS are designated as "nonattainment" areas. *Id*. Ozone nonattainment areas can be classified as marginal, moderate, serious, severe, or extreme, with dates by which the areas must come into attainment with the NAAQS that range from three to twenty years after designation. 42 U.S.C. § 7511(a)(1). These classifications change over time if a nonattainment area's air quality fails to improve or worsens. *Id*.

Once EPA sets a NAAQS and designates areas as nonattainment or attainment, the Clean Air Act requires states to develop SIPs to achieve or maintain the standard. *Id*. § 7410. States are required to submit their SIPs to EPA. *Id*. EPA then reviews and is required to approve or disapprove them, depending on whether they comply with all relevant requirements of the Clean Air Act. *Id*. § 7410(k)(1)–(4).

The Clean Air Act contains specific requirements for SIPs that pertain to nonattainment areas, with additional requirements specific to ozone nonattainment areas. *Id*. §§ 7502, 7503, 7511a. Among other obligations, states are required to implement a permitting program that applies to new

sources of air pollution, or modifications of existing sources, within a nonattainment area. *Id*. §§ 7502(c)(5), 7503. This permitting program is commonly referred to as the "Nonattainment New Source Review" program.

Crucially, the nonattainment area permitting program only needs to apply to "major" sources of air pollution within the nonattainment area, not "minor" sources. *See id*. To determine whether a source is major or minor before construction, a source's actual or potential emissions, which is referred as the "potential to emit," are tallied up to determine whether those emissions will exceed a specific emissions threshold, which takes the form of tons of pollution emitted per year. 40 C.F.R. § 70.2. If the source's "potential to emit" pollution is above the emissions threshold, the source is considered major, and it must apply for a major source permit. *Id*. Major sources in nonattainment areas are subject to a variety of stringent protective measures, like compliance with the lowest achievable emission rate and offsetting of their pollution. On the other hand, permits for minor sources contain "only the barest of requirements." *Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020) (quoting *Luminant Generation Co. v. EPA*, 675 F.3d 917, 922 (5th Cir. 2012)).

II. The Ozone NAAQS

In 2015, due to the serious health impacts caused by ozone pollution even when it was below the existing standards, EPA strengthened the national ozone standards. 40 C.F.R. pt. 50 (2020). EPA revised the ozone NAAQS, reducing the allowable level from 75 parts per billion to 70 parts per billion because of extensive scientific evidence indicating ozone has a significant negative impact on public health and welfare. 80 Fed. Reg. at 65,294, 65,302–17. The 2015 ozone NAAQS is designed to protect public health and welfare from the wide array of harms perpetrated by ozone pollution, including worsened asthma symptoms, increased hospital admissions and emergency department visits for respiratory causes, and premature mortality. *See id*.

Unfortunately, EPA has an abysmal "track record" with regard to SIPs designed to bring the Denver Metro Nonattainment Area into attainment with the ozone NAAQS. On July 3, 2018, EPA approved a SIP for the Denver Metro Nonattainment Area when the area was a "moderate" nonattainment area for the 2008 ozone NAAQS. 83 Fed. Reg. 31,068 (July 3, 2018). In doing so, EPA determined that the Denver Metro Nonattainment Area would come into compliance, that is "attain," the 2008 ozone NAAQS by its moderate area attainment date. *Id*. at 31,069. EPA was demonstrably wrong. Thus, on November 14, 2018, EPA published notice that the Denver Metro

Nonattainment Area had failed to attain the 2008 ozone NAAQS by its moderate attainment date, which "bumped up" the area to a serious nonattainment area. 83 Fed. Reg. 56,781, 56,784 (Nov. 14, 2018).

Further, EPA illegally delayed taking final action to approve or disapprove the serious nonattainment area SIP for the Denver Metro Nonattainment area for the 2008 ozone NAAQS. Thus, the Center and others had to sue EPA for this illegal delay. *See Center for Biological Diversity et al., v. EPA*, 22-cv-03309-RS (N.D. Cal.) Dkt. #23, First Amended Complaint, ¶ 56. That case is ongoing. Meanwhile, on October 7, 2022, EPA published notice that the Denver Metro Nonattainment Area had failed to attain the 2008 ozone NAAQS by its serious attainment date which "bumped up" the area to a severe nonattainment area. 87 Fed. Reg. at 60,926.

Additionally, on October 7, 2022, EPA finalized its determination that the Denver Metro Nonattainment Area failed to meet the 2015 ozone NAAQS by its required attainment date. 87 Fed. Reg. 60,897. This means that the area is "bumped up" from a "marginal" to a "moderate" nonattainment classification for the 2015 ozone NAAQS.

III. Colorado's SIP Revisions

On July 27, 2020 Colorado submitted its SIP revisions for the Denver Metro Nonattainment Area permitting program for the 2015 ozone NAAQS to EPA for approval. 86 Fed. Red. 60,434 (Nov. 2, 2021); ROA, Vol. I, at 0001. On November 2, 2021, EPA published in the Federal Register a proposed rule which proposed to approve Colorado's July 27, 2020 submittal. *Id.* Despite the comments submitted by the Center on December 2, 2021—ROA, Vol. II, at 1560–65—EPA published its final approval of the SIP submittal in the Federal Register on May 13, 2022. 87 Fed. Reg. at 29,232; ROA, Vol. I, at 0004.

STANDARD OF REVIEW

The standard of judicial review of final action by EPA under the Clean Air Act derives from the federal Administrative Procedure Act. *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013). The standard is whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

An action is arbitrary and capricious if it has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . ." *Motor Vehicle Mfrs.*

Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The duty of a court reviewing an agency action under the arbitrary or capricious standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). The reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *State Farm*, 463 U.S. at 55. The grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. *Id.* at 40. Additionally, "[i]f the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision making . . . it may not simply affirm." *Olenhouse,* 42 F.3d at 1575.

In addition, the familiar *Chevron* test for deciding statutory interpretation has two steps. Under step one, if a statute is not ambiguous, "the agency must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Nat Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). However, under *Chevron* step two, EPA's interpretation of ambiguous statutory provisions must be rejected if, among other things, "the agency has

[not] offered a reasoned explanation for why it chose that interpretation." *Vill. of Barrington v. Surface Transp. Bd.,* 636 F.3d 650, 660 (D.C. Cir. 2011).

SUMMARY OF THE ARGUMENT

The Center respectfully requests that the Court remand this matter to EPA and require EPA to hold a new public comment period after it puts the actual language of the regulatory provisions it is proposing to approve in the docket. This will enable the public to access the language while they are reviewing the proposed rule and drafting comments. EPA does not dispute that it did not include the language for the permitting program in the docket for the rulemaking during the public comment period. Instead, EPA argues that the public should have undertaken complicated and time-consuming research to identify the language on which we were supposed to be commenting during the public comment period for the proposed rule, even while acknowledging that research would not have produced all of the actual relevant regulatory language at issue.

The flaws in this approach are apparent from EPA's own response to comments. EPA admits that one of the two online resources it would have the public consult to identify the regulatory language, an EPA webpage about Colorado's SIP, had not been updated at the time of the comment period. In

other words, it was wrong. The second resource EPA identifies, a "Clean Air Act Elements Table," provides a citation to the state regulations that make up the permitting program but does not make clear what version of those regulations Colorado submitted for EPA's approval in the action below. Neither resource contains the specific regulatory language.

This lack of transparency impairs the public's ability to provide full public comment on EPA's action and requires speculation about what regulatory language the public is commenting on. It also has longer-term consequences. The Clean Air Act enables members of the public to bring "citizen" lawsuits against private polluters to enforce the requirements of their permits issued under the Act. The Clean Air Act also provides members of the public with the opportunity to comment on Title V Operating Permits. In both of these contexts, the requirements of the SIP that was in place at the time the permit was issued, or the time of the alleged violation apply, not the most recent version of the SIP. It can be extraordinarily difficult to identify which specific SIP requirements were in place and when, inhibiting the public's ability to engage with these opportunities, which advance the goals of the Clean Air Act. Including the regulatory language in the docket of the rulemaking that approves that language would ameliorate this difficulty.

The Court must also overturn EPA's approval of Colorado's permitting program for the Denver Metro Nonattainment Area because the program improperly disregards certain types of emissions. The permitting program does not require these emissions to be counted towards a new or modified source's total emissions for purposes of determining whether the source is a major source because its emissions exceed the major source threshold. One type of emissions that the permitting program improperly excludes from this consideration are "temporary emissions" associated with common activities like construction of the source or drilling of oil and gas wells. The permitting program similarly disregards emissions from internal combustion engines on any vehicle.

These exemptions are not authorized by the EPA regulations that implement the Clean Air Act, which function as a floor that prevents states from adopting more lax requirements. Accordingly, Colorado's permitting program allows more pollution than is authorized by the Clean Air Act and the federal regulations that should govern EPA's approval decision making process. The federal regulations do specifically provide that two other types of emissions can be excluded when determining whether a source is major for permitting purposes. However, the types of emissions enumerated above, such as temporary emissions, do not fall within those two narrow categories

that are specifically excluded. The presence of these two specific exemptions but no others indicates that the regulations do not include any additional, implicit exclusions.

In practice, the illegal exclusion of temporary emissions and emissions from engines on vehicles from the determinations of whether a source is major or minor has grave consequences for air quality in Colorado. The Denver Metro Nonattainment Area is home to thousands of oil and gas well pads. These facilities are all permitted as minor sources because Colorado disregards the ozone-causing emissions that result from them before they begin producing oil and gas. These ignored emissions come from activities like drilling, "fracking," and construction of oil and gas wells, as well as emissions from the engines used in those activities. The consequence is that Colorado has not permitted a single well pad in Colorado as a major source, while the Denver Metro Nonattainment Area continues to exceed the 2015 and 2008 ozone NAAQS to the detriment of the millions of people who are exposed to this potentially deadly pollution.

ARGUMENT

I. The Court must remand this matter to EPA and require EPA to hold a new public comment period after it puts the regulatory provisions it is proposing to approve in the rulemaking docket.

When proposing to approve Colorado's permitting program for new and modified major sources in the Denver Metro Nonattainment Area, EPA held a public comment period but did not provide the public with the regulatory language that makes up the program that EPA was asking the public to comment on. Further, as evinced by its response to the Center's comments on this issue, EPA provided the public with little to no direction as to how to identify the actual regulatory language that the public was supposed to be commenting on. The resources EPA did expect the public to dig up during the public comment period contained erroneous and incomplete information, which EPA even acknowledges.

The notice and comment requirements of the federal Administrative Procedure Act applied to EPA's rulemaking because certain Clean Air Act-specific rulemaking requirements only apply to an enumerated set of EPA actions, which does not include SIP approvals. 42 U.S.C. § 7607(d). At its most fundamental level, the Administrative Procedure Act requires that before an agency promulgates a rule, it must provide general notice of the rule and "give interested persons an opportunity to participate in the rule making." 5 U.S.C.

§ 553(b)–(c). Further, "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment . . ." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

EPA does not contest that the language of the SIP revisions it approved was not provided to the public in the docket during the public comment period. In its response to the Center's comments in the final rule, EPA asserts that the public had access to the provisions of Colorado's permitting program that it approved through other means outside of the docket or the proposed rule. 87 Fed. Reg. at 29,233; ROA, Vol. I, at 0005. EPA demands that the public undertake complicated and time-intensive research, using online resources that are not even hinted at in the proposed rule, to figure out what the agency is doing.

EPA immediately undercuts itself in its response to comments, noting that the first such resource that it expected the public to rely upon to identify the specific regulatory language under review, an EPA webpage, had not been updated and was not accurate during the public comment period. *Id*. EPA admits that the resource "had not yet been updated at the time of our proposed rulemaking to reflect the revisions to Colorado's [Nonattainment New Source Review permitting] program that were approved by EPA in 2019

at 84 FR 18991 (May 3, 2019)." *Id*. at 29,233, n.2; ROA, Vol. I, at 0005. EPA then directs the public to the Federal Register notice just quoted, *id*., expecting that the public would disregard the contents of EPA's webpage and identify the error. However, the public would need to dig even further, because that Federal Register notice also failed to include the specific regulatory language that EPA approved. *See* 84 Fed. Reg. 18,991 (May 3, 2019); ROA, Vol. I, at 0722–24.

The other resource EPA mentions in its response to comments, the Clean Air Act Elements Table, suffers from a similar defect. 87 Fed. Reg. at 29,233; ROA, Vol. I, at 0005. This resource also is not clear enough to provide the public with an opportunity to provide meaningful comments on the regulatory language EPA is approving. The table—available at ROA, Vol. I, at 0021—provides the citation to the state regulations that comprise the permitting program, 5 CCR 1001-5, Pt. D, §§ I–VI, but, again, it does not make clear what version of those regulations were submitted to EPA for approval, much less actually provide the regulatory language.

Further, the table mentions a prior version of 5 CCR 1001-5, Pt. D, § V.A.3 that was previously approved by EPA on January 25, 2016. EPA's proposed rule, however, makes no mention of this. The public had no way of knowing if EPA was approving the version of this provision that was last

approved on January 25, 2016. Without the actual regulatory language, the public was forced to guess at the regulatory language the public was commenting on and its consequences, depriving the public of the opportunity to provide meaningful feedback on the full extent of the SIP submission.

In addition, EPA states in the proposed rule approving Colorado's permitting program that it "will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system)." 86 Fed. Reg. at 60,434; ROA, Vol. I, at 0001. EPA will not even consider documents in support of comments when the commenter inserts a hyperlink with a specific URL, so all EPA has to do is click on it. Meanwhile, in its response to comments in the final rule, EPA demands that the public undertake complicated and time-consuming research to find the contents of the regulatory language that EPA is approving. This double standard is especially egregious because the Clean Air Act requires EPA to approve or disapprove SIPs and hold a public comment period, while members of the public who submit comments are providing a voluntary public service.

It would not have been a herculean task for EPA to have provided the public with the SIP-approved regulatory language during the public comment period. EPA has provided the Court with this language. ROA, Vol. II, at 0981–

1058. The Center assumes, but it is only an assumption, that the language in ROA, Vol. II, 0981–1058 is the Colorado permitting program approved into the SIP at the time of EPA's approval. It seems a rather modest request for the Court to order that EPA provide this regulatory language in the docket during a public comment period.

Next, EPA argues in its response to comments that it was not approving Colorado's permitting program in the action on appeal, such that it did not need to include the language of that program. 87 Fed. Reg. at 29,233; ROA, Vol. I, at 0005. Instead, EPA's argument goes, it approved Colorado's certification that the existing permitting program Colorado already had in place met the Clean Air Act requirements that resulted from the Denver Metro Nonattainment Area's failure to meet the 2015 ozone NAAQS. *Id*. This is a mischaracterization of EPA's action and the requirements of the SIP approval process.

EPA's regulations provide that:

> The requirements for nonattainment NSR for the ozone NAAQS are located in § 51.165. 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.

40 C.F.R. § 51.1314.

EPA's position in its response to comment runs counter to the regulatory requirements—states are required to submit SIPs to EPA for approval, not certifications. EPA's approval applies to the SIP itself, which is comprised of regulatory language that was not in the docket during the public comment period.

Finally, EPA's approach of omitting the regulatory language on which it is taking action also has longer-term consequences for the ability of the public to participate meaningfully in federal and state actions that affect air pollution. EPA admits that its omission of this language is not an isolated incident but instead represents agency practice. 87 Fed. Reg. at 29,233; ROA, Vol. I, at 0005. This impairs the ability of the public to participate in at least two types of proceedings. The Clean Air Act enables members of the public to bring citizen lawsuits against private polluters to enforce the requirements of their air pollution permits. 42 U.S.C. § 7604. The Clean Air Act also provides members of the public with the opportunity to comment on Title V Operating Permits, which certain polluting facilities must obtain once they begin operating. 42 U.S.C. § 7661a(b)(6).

In both contexts, it is the requirements of the SIP that was in place at the time the permit was issued, or at the time the violation occurred, that apply,

not the requirements in the most recent SIP version. *See, e.g.*, *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 665–66 (W.D.N.Y. Apr. 28, 2003) (holding that, in a citizen suit, the plaintiff cannot enforce a state regulation in the SIP retroactively). It is extremely difficult and time-consuming, if not impossible in some cases, for members of the public to track down the specific language and regulatory requirements in the SIP that were in place when actions were taken, like major modifications at a source of air pollution. As demonstrated by EPA's response to comments and the discussion above, it is even difficult to identify the most recent version of a SIP submission at the time EPA approves it, much less a version that was in place years, even decades, earlier. However, if EPA puts the regulatory language it is proposing to approve into the docket, which is accessible via regulations.gov, this problem is eliminated.

For example, in *Sierra Club v. EPA*, this Court held that the determination of whether a source modification is major or minor is a question that is relevant whenever a Title V permit is renewed, even if that renewal takes place years later. 964 F.3d 882, 885–86 (10th Cir. 2020). In that case, the owner of the relevant source modified the source between 1997 and 1999. *Id*. at 887. The State of Utah determined that those modifications were minor modifications, rather than major, and incorporated that

determination into the original Title V permit in 1998. *Id*. The plaintiffs challenged the classification of the modifications as minor in 2015, when Utah renewed the Title V permit. *Id*. The case was not resolved by this Court until 2020. In this and similar cases, identifying the prior permitting requirements that prevailed in older versions of the SIP to participate effectively in the matter is extraordinarily difficult when EPA does not make the SIP requirements it is approving available during comment periods.

The same problem prevails in citizen enforcement cases under the Clean Air Act. For instance, *National Parks Conservation Association v. Tennessee Valley Authority* was a citizen suit in which environmental groups alleged that a coal-burning power plant had made a major modification but failed to get a major source permit for that modification in violation of, *inter alia*, the Tennessee SIP. 618 F.Supp.2d 815, 819 (E.D. Tenn 2009). The *National Parks Conservation Association* case was filed in 2001, 618 F.Supp.2d at 819, and decided in 2010 based on activities which occurred at the power plant in 1988. *Nat'l Parks Conservation Ass'n v. TVA*, 2010 U.S. Dist. LEXIS 31682 (E.D. Tenn. 2010). At the summary judgment stage, the parties submitted the Tennessee rules, known as TAPCR, which existed during the 1988 activities as documents in the case. *See, e.g.,* 618 F.Supp.2d at 827 (TAPCR 1200-3-9-.01(4)(b)(4)(i) submitted as Docs 129-4, 136-6). These were the version of

TAPCR in effect and part of the Tennessee SIP in 1988 when the activity alleged to be a major modification occurred. *Id*. at 822, n.2 ("According to Defendant, the copy of Tennessee regulations submitted as an exhibit in this case [Doc. 129-5] are those that were 'in effect at the time of the activities at issue in this proceeding took place in 1988.' [Doc. 129-3 at 4.] Plaintiffs have also submitted a copy of the Tennessee regulations. [Doc. 136-7.]").

II. The Court must overturn EPA's approval of the Colorado's permitting program because the program ignores dangerous pollution from certain sources.

EPA stated that it was approving Colorado's permitting program pursuant to Clean Air Act sections 110, 172, and 173. 86 Fed. Reg. at 60,434; ROA, Vol. I, at 0001. 40 C.F.R. § 51.1314, which requires compliance with the requirements in 40 C.F.R. § 51.165, are the regulations which implement these statutory provisions. 86 Fed. Reg. at 60,435; *id*. at 60,435, n.12; ROA, Vol. I, at 0002. EPA claimed that the Colorado permitting program "fulfills the specific minimum SIP requirements of 40 CFR 51.165" and is "in accordance with requirements of sections 172(c)(5) and 173" of the Clean Air Act. 86 Fed. Reg. at 60,436; ROA, Vol. I, at 0003. EPA's claim is incorrect because Colorado's permitting program allows more pollution than what is authorized in 40 C.F.R. § 51.165.

Specifically, EPA approved exemptions in the Colorado permitting program for "temporary emissions," as well as emissions from internal combustion engines sitting on, but not powering, a vehicle. None of these exemptions are authorized in 40 C.F.R. § 51.165. Thus, because Colorado's permitting program allows more pollution than is authorized under 40 C.F.R. § 51.165, in an area which already has potentially deadly levels of air pollution, the Court must overturn EPA's approval of Colorado's permitting program.

A. EPA must disapprove the Colorado permitting program because it improperly excludes "temporary emissions" from the determination of whether a source is a major source for permitting purposes.

The version of 5 CCR 1001-5, Part D, II.A.25.f in EPA-R08-OAR-2018-0593-003 provides:

> Emissions caused by indirect air pollution sources (as defined in Section I.B.24. of Part A of this regulation), emissions from internal combustion engines on any vehicle, and emissions resulting from temporary activities, such as construction or exploration, shall be excluded in determining whether a source is a major stationary source.

Id. at 11; ROA, Vol. II, at 1066. It would appear, although as explained above it is not clear, that this is part of the permitting program that EPA approved in

this rulemaking. EPA, however, was required to disapprove the SIP submittal because this is different from, and less stringent than, EPA's permitting program rules for ozone SIPs, that is 40 C.F.R. § 51.165.

Determining whether a source is a major stationary source or only a minor source is critical to addressing ozone pollution in the Denver Metro Nonattainment Area. While permitting of major sources requires numerous stringent protective measures such as compliance with the lowest achievable emission rate and offsetting of the pollution that will come from the major source, minor source permitting "entails 'only the barest of requirements.'" *Sierra Club v. US EPA*, 964 F.3d 882, 886 (10th Cir. 2020).

Specifically, 40 C.F.R. § 51.165, which is referenced by 40 C.F.R. § 51.1314, and the Clean Air Act do not allow of the exclusion of emissions resulting from temporary activities such as construction or exploration when determining if a source is a major source. The definition of "potential to emit," which is the basis of determining if a source is a major source, does include an exclusion for secondary emissions. 40 C.F.R. § 51.165(a)(1)(iii). EPA's regulations also specifically address when fugitive emissions can be excluded in determining when a source is major for permitting purposes. So, in addition to the fact that the plain language of EPA's regulations does not include an exclusion for temporary emissions, the inclusion of these two

exclusions in the federal regulations indicates that additional exclusions were not intended.

As the Supreme Court has explained:

> In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, 16 U. S. C. § 1539 (1976 ed.), creates a number of limited "hardship exemptions," none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only "hardship cases" Congress intended to exempt. Cf. *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974).

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).

The temporary activities exclusion makes Colorado's SIP submittal for the permitting program less protective than EPA's regulations. Therefore, EPA was required to disapprove the SIP submittal.

The illegal exclusion of "temporary emissions" from the determination of whether a source is a major source is not a theoretical concern. The Division has issued literally thousands of minor source permits in the ozone nonattainment area for oil and gas well pad facilities. For every one, when determining if the well pad facility is a major source requiring a major source

permit, the Division ignores what the Division refers to as "pre-production emissions." *See, e.g.*, ROA, Vol. II, at 1571 (the Division's facility-wide emission summary for a source being issued a minor source permit in the Denver Metro Nonattainment Area does not include "temporary emissions" from activities such as drilling, fracking, and completion). Presumably, the Division's justification for this is that the temporary activity is eligible for the exclusion in II.A.25.f, quoted above. This has resulted in the Division never issuing a major source permit for an oil and gas well pad, and the Denver Metro Nonattainment Area being a severe nonattainment area for the 2008 ozone NAAQS and also failing to attain by its marginal attainment date for the 2015 ozone NAAQS.

In its response to comments, EPA argued for the first time that the exclusion of temporary emissions in the Colorado permitting program is allowable because "secondary emissions" are excluded from the definition of potential to emit, and the potential to emit pollution is used to determine if a source is a major source. 87 Fed. Reg. at 29,234; ROA, Vol. I, at 0006. EPA goes on to correctly point out that the definition of secondary emissions includes "emissions which would occur because of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself." *Id.* EPA uses

this definition to justify approving Colorado's approach of disregarding temporary emissions. *Id.*

But the definition of secondary emissions does not include the word "temporary" or any other word indicating a timing consideration. In fact, the first sentence of the definition of secondary emissions makes clear that some construction emissions are not secondary emissions even though common sense informs us that construction is normally a temporary activity. The first sentence says: "**Secondary emissions** means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself." 40 C.F.R. § 51.165(a)(1)(viii) (emphasis added). Thus, the plain language of the definition of secondary emissions establishes that emissions that occur as a result of construction, but that do come from the major stationary source itself, are not secondary emissions.

Specific examples may help to clarify. If one is building a factory and an offsite cement processing plant is set up to create cement to build the factory, emissions from the offsite cement processing plant would be secondary emissions and thus not counted in calculating the potential to emit of the factory when determining whether the factory is a major source. This is so because the emissions from the offsite cement processing plant are emissions

that occur as a result of the construction of the major stationary source, that is the factory, but do not come from the major stationary source, which is, again, the factory.

However, a core problem in Colorado leading to the Denver Metro Nonattainment Area having one of the worst ozone problems in the country, and one example of why EPA's reliance on the definition of secondary source fails, is that the Colorado permitting program excludes emissions from construction of oil and gas well pads as temporary emissions. But these emissions do not fall under the definition of secondary emissions. For example, typically oil and gas is extracted in Colorado with a process called hydraulic fracturing, which is often referred to as just "fracking." Fracking involves drilling a well and then forcing a combination of liquids and sand down the well to fracture geologic formations underground, which creates a passage for the oil and gas to flow back up to the well. The oil and gas includes volatile organic compounds, which cause ozone pollution. In this situation, the volatile organic compounds come from the well, which is the source itself, not an offsite support facility or anything else. Thus, because these emissions, even if they are temporary, come from the major stationary source itself, that is the well, the emissions do not qualify as secondary

emissions based on the plain language of the definition of secondary emissions. Therefore, EPA's justification in its response to comments fails.

EPA goes on to say in its response to comments that "[Nonattainment New Source Review] permitting concerns continuous operating emissions of a stationary source and not temporary emissions, or emissions associated with construction." 87 Fed. Reg. at 29,234; ROA, Vol. I, at 0006. EPA provides no citation for this assertion because there is none. Rather, EPA is trying to create a nonexistent exception out of whole cloth. *See generally Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (Clean Air Act governs construction of a pollutant source). As explained above, the very definition of secondary emissions provides that the emissions that occur as a result of construction that come from the major stationary source itself, such as an oil and gas well, are not secondary emissions and thus are not excluded from the potential to emit used to determine if a source is a major source. *See* 40 C.F.R. § 51.165(a)(1)(viii).

Further, regulatory evidence that the permitting program must cover emissions during the construction of a major source can be found in EPA's regulations when EPA, rather than a state, is the permitting authority. These regulations are found, in part, in 40 C.F.R. Part 51, Appendix S. Section IV.B of Appendix S includes an exemption which allows "emissions resulting from the

construction phase of a new source" to avoid the applicability of two, but only two, conditions of the five conditions which must be met in order for a major source to get a permit. Thus, if emissions from the construction phase are exempt from two conditions but not exempt from the other three conditions, the permitting program that EPA referred to as Nonattainment New Source Review in its response to comments must cover emissions from the construction phase of a major source.

EPA itself makes it perfectly clear that its statement in the response to comments—that the permitting program does not concern emissions from the construction phase—is incorrect by including an air permit EPA itself issued for an offshore windfarm (although EPA Region 1 issued the permit, rather than EPA Region 8, who wrote the response to comments). ROA, Vol. I, at 0764. It would seem obvious that windfarms themselves do not emit air pollution during continuing operations. Thus, EPA issued that permit to address emissions during the construction phase and emissions of engines on vehicles, that is boats serving the offshore windfarm.

Beyond the clear plain language of the regulations and the example of EPA issuing a permit, EPA's approval of allowing unfettered emissions which are temporary, such as emissions during the construction and fracking of oil and gas wells, undercuts the very purpose of the Clean Air Act. The core of the

Clean Air Act is that EPA sets NAAQS, which are the maximum allowable levels of certain pollutants in the public's air. "The Act then shifts the burden to States to propose plans adequate for compliance with the NAAQS." *EPA v. EME Homer City Generation L.P.*, 134 S. Ct. 1584, 1594 (2014). By ignoring pollution during the construction of sources and other temporary emissions, Colorado's proposed plan is inadequate for compliance with the NAAQS. This is especially problematic for many of the NAAQS which are based on short averaging times. For example, for both of the pollutants nitrogen dioxide and sulfur dioxide, the NAAQS is based on a one-hour averaging time. EPA chose to use a one-hour averaging time because the science clearly showed that short-term exposures to these pollutants, even for as little as five-minutes, can cause adverse health impacts. *See e.g.* 75 Fed. Reg. 35,520, 35,524 (June 22, 2010). By allowing unpermitted emissions during construction and other "temporary" activities which can last days, weeks, or months, Colorado's SIP is not adequate for compliance with the NAAQS and people's health and very lives are jeopardized.

B. EPA must disapprove the Colorado permitting program because it improperly excludes emissions from internal combustion engines on a vehicle from the determination of whether a source is a major source for permitting purposes.

Similarly, the Clean Air Act and 40 C.F.R. § 51.165 do not include an exclusion for emissions from internal combustion engines on any vehicle. Note the key word here is "on" a vehicle. With the use of the word "on," this provision can be used to ignore emissions from internal combustion engines used for fracking, completion, and other activities, so long as the engine is sitting on a vehicle such as a flat-bed truck. To be clear, the Center is not challenging the exclusion of emissions from an engine whose purpose is to propel a vehicle.

Again, in practice, the Division does indeed ignore emissions from engines used in fracking, competition, and other activities in determining if a source must get a major source permit. Presumably, this is based on this additional exclusion that Colorado created but which does not exist in EPA's regulations. Thus, the Court must reverse EPA's action in approving exemptions in the Colorado permitting program that are not authorized by the governing regulations or the statute.

5 CCR 1001-5, Part D, II.A.23.f also appears to create the same exclusions for temporary construction or exploration activities and internal

combustion engines on any vehicle, but applied to the context of determining if a modification of a major source is a major modification or a minor modification. This section provides:

> Emissions caused by indirect sources of pollution, emissions from internal combustion engines on any vehicle, and emissions resulting from temporary construction or exploration activities shall be excluded in determining whether a major modification will occur.

ROA, Vol. II, at 1062.

For the same reasons as discussed above, the Court must overturn EPA's approval of this unauthorized exemption into Colorado's permitting program.

With regard to the exemption for "engines on any vehicle," in 5 CCR 1001-5, Part D, II.A.25.f, EPA's response to comment misses the mark because EPA's response is based on a specifically defined term which does not actually appear in Part D, II.A.25.f. EPA stated:

> The exclusion of emissions from internal combustion engines on any vehicle at Section II.A.25.f of Regulation 3, Part D is appropriate since mobile source emissions from **nonroad mobile** and on-road mobile sources are not considered as part of the operating emissions of a stationary source.

87 Fed. Reg. at 29,234 (emphasis added); ROA, Vol. I, at 0006. EPA goes on to discuss the definition of "nonroad engine" which is found in 40 C.F.R. § 1068.30 and Colorado's 5 CCR 1001-5, Part A, 1.B.31.b.(iii) . But the term

"nonroad engine," with its specifically defined meaning, does not appear in Colorado Regulation No. 3, Part D, II.A.25.f. Rather, that regulation uses the phrase "internal combustion engines on any vehicle." EPA could certainly have suggested to Colorado that Colorado rewrite Part D, II.A.25.f. to use the term "nonroad engine." But Part D, II.A.25.f. does not use that term, and EPA cannot pretend otherwise.

CONCLUSION

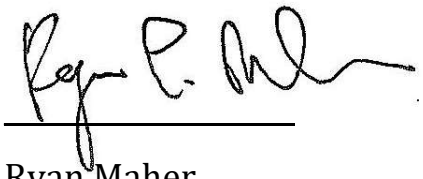
The Court should remand this matter back to EPA so that EPA can hold a new public comment period, during which EPA gives the public access, via the rulemaking docket, to the actual language of Colorado's permitting program that EPA is proposing to approve. The Court should also vacate the final rule, but only with respect to EPA's approval of the unauthorized exclusion of temporary emissions and emissions from engines on vehicles from the consideration of whether a source is major or has had a major modification.

ORAL ARGUMENT STATEMENT

The Center believes that oral argument would be useful in this case because it presents two issues of first impression, and it is relatively rare that Clean Air Act cases are litigated in this Court.

Dated: November 3, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 3, 2022, I electronically filed this *CORRECTED* PETITIONER'S OPENING BRIEF with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all Counsel of Record.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) All required privacy redactions have been made per 10th Cir. R. 25.5;

(2) If required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, and according to the program are free of viruses.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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Dated: November 3, 2022

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