Case No. 22-9546

ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ON PETITION FOR REVIEW OF AGENCY ACTION

RESPONDENTS' BRIEF

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STATEMENT OF PRIOR OR RELATED CASES

The United States Environmental Protection Agency is not aware of any prior or related cases.

GLOSSARY

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

INTRODUCTION

The Clean Air Act directs the United States Environmental Protection Agency ("EPA") and States to regulate the construction or modification of stationary sources of air emissions under a program of cooperative federalism. The component of the Clean Air Act presented in this case is known as New Source Review. The New Source Review program establishes requirements for the preconstruction permitting of proposed new and modified stationary sources of pollution.

The Denver Metro/North Front Range area of Colorado ("Denver Metro Area") is not attaining the national ambient air quality standard for ozone that EPA revised in 2015. EPA designated the Denver Metro Area as a marginal nonattainment area for the 2015 ozone standard. This designation required that Colorado adopt a nonattainment New Source Review permit program that meets the Clean Air Act regulatory requirements associated with its marginal ozone nonattainment status under the 2015 ozone standard.

Colorado previously adopted and EPA previously approved a nonattainment New Source Review permit program to meet prior ozone standards. Instead of preparing a new program to meet Clean Air Act

requirements for the 2015 ozone standard, Colorado can, if appropriate, submit a revision to its State Implementation Plan ("SIP") that certifies that its existing nonattainment New Source Review permit program will also meet the regulatory requirements for the more recent 2015 ozone standard. Colorado submitted such a SIP certification to EPA.

EPA determined that Colorado's previously approved nonattainment New Source Review permit program met the permit program requirements associated with the marginal nonattainment designation under the 2015 ozone standard for the Denver Metro Area. Therefore, EPA approved Colorado's SIP certification of the nonattainment New Source Review permit program for the 2015 ozone standard.

The Center challenges EPA's approval of Colorado's SIP submittal on procedural and substantive grounds, but none of their arguments has merit. The Center's procedural argument fails because EPA provided notice of what it was approving and EPA was not required to reproduce the relevant text of Colorado's publicly available regulations. The Center's substantive challenges fail because EPA reasonably

concluded that Colorado's regulations meet federal regulatory requirements.

EPA recognizes that Colorado has faced challenges in meeting the 2008 and 2015 ozone standards. Numerous types of sources contribute to ozone levels. Numerous federal and State programs regulate the emissions that contribute to ozone levels. Judicial review in this case is limited to EPA's approval of the State's SIP certification that one of the State's programs for one set of sources—the State's nonattainment New Source Review permit program—fulfills the SIP requirements of EPA's regulations.

STATEMENT OF JURISDICTION

On May 13, 2022, EPA issued a final rule entitled "Air Plan Approval; Colorado; Denver Metro/North Front Range Nonattainment Area; Nonattainment NSR Permit Program Certification for the 2015 8-Hour Ozone Standard." 87 Fed. Reg. 29232 (May 13, 2022) (the "Final Rule"), Addendum ("Add.") at Admin. R., Vol. 1, AR-0004–8. EPA promulgated the Final Rule pursuant to its authority under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401–7671q.

This Court has subject matter jurisdiction over the petition for review of the Final Rule under 42 U.S.C. § 7607(b)(1) because the Final Rule applies to areas in Colorado and, therefore, this Court of Appeals is the "appropriate circuit." The Center timely filed its petition for review on July 12, 2022. *See id.* (petitions must be filed within sixty days of notice in the Federal Register).

STATEMENT OF THE ISSUES

In the Final Rule, EPA approved Colorado's SIP submission that certified that already-approved pollution control provisions fulfill nonattainment New Source Review permit program requirements under the 2015 ozone standard for the Denver Metro Area. The petition presents the following issues:

1. Whether EPA provided reasonable notice of the regulatory provisions on which Colorado based its SIP certification when both the State's SIP submission and EPA's notice of its proposed action included citations to the applicable, publicly available State provisions.
2. Whether EPA reasonably determined that the definitions in Colorado's nonattainment New Source Review permit program meet the minimum SIP requirements for the 2015 ozone standard.

ADDENDUM TO BRIEF

Applicable EPA and State of Colorado statutes, regulations, and cited portions of the Administrative Record are contained in the attached Addendum ("Add.") to this brief and, where available, are parallel cited with the page number from the Administrative Record ("Admin. R.") filed on August 22, 2022, Doc. No. 010110728241.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. The Clean Air Act and National Ambient Air Quality Standards

The Clean Air Act, 42 U.S.C. §§ 7401–7671q, establishes a comprehensive program for controlling and improving the nation's air quality through both state and federal regulation. *See U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012) (observing that the Clean Air Act uses a cooperative federalism approach to regulate air quality). Among other requirements, the Act instructs EPA to establish national ambient air quality standards ("NAAQS") for air pollutants that may endanger public health or welfare. 42 U.S.C. §§ 7408, 7409. NAAQS are maximum standards for pollutant concentrations designed to protect public health with an adequate margin of safety. 42 U.S.C.

§§ 7409, 7410. Ozone is one of the six pollutants currently subject to NAAQS. *See* 40 C.F.R. § 50.10.

Ground level ozone forms when nitrogen oxides and volatile organic compounds react in the presence of sunlight. 86 Fed. Reg. 60434, 60434–35 (Nov. 2, 2021), Admin. R., Vol. 1, AR-0001–2. These two pollutants, referred to as ozone precursors, are emitted by many types of pollution sources, including motor vehicles, power plants, and industrial facilities. *Id.* at 60435, Admin. R., Vol. 1, AR-0002. EPA published the first ozone NAAQS in 1979 and published successively more stringent ozone NAAQS in 1997, 2008, and 2015. 44 Fed. Reg. 8202 (Feb. 8, 1979); 62 Fed. Reg. 38856 (July 18, 1997); 73 Fed. Reg. 16436 (Mar. 27, 2008); 80 Fed. Reg. 65292 (Oct. 26, 2015).

1. State Implementation Plans

Under the Act, States have the primary responsibility for formulating pollution control strategies and ensuring that their ambient air meets the NAAQS for each pollutant, consistent with the Act's requirements. 42 U.S.C. § 7407(a) (each State shall "specify the manner" in which NAAQS will be achieved). Each State develops and establishes its comprehensive approach for attaining the NAAQS in a

State Implementation Plan ("SIP"). *Id.* § 7410(a). A SIP must contain, among other things, a "control strategy," which is a combination of measures designed to achieve the reduction of emissions necessary for attainment and maintenance of the NAAQS. *Id.* § 7410(a)(2); 40 C.F.R. § 51.100(n). Every SIP or SIP revision must be adopted by the State after reasonable public notice and hearing, and it must be submitted to EPA for approval. 42 U.S.C. § 7410(a)(1), (a)(2), (*l*). EPA cannot approve a revision of a plan if the revisions would interfere with any applicable requirement concerning attainment or other applicable requirement of the Act. *Id.* § 7410(*l*).

2. Nonattainment Areas

In general, geographic areas meeting a NAAQS for a particular pollutant are designated attainment, and areas not meeting the standard are designated nonattainment. *See id.* § 7407(d). EPA classifies nonattainment areas for certain pollutants at various levels (*e.g.*, marginal, moderate, serious, severe, extreme) based, in part, on the severity of the air pollution problem and the anticipated timeframe needed to achieve attainment. *See, e.g.*, *id.* §§ 7511, 7513. A SIP must

contain additional requirements for each pollutant in a designated nonattainment area within a State. *Id.* §§ 7501–15.

3. SIP Submissions that Include Certifications of Existing Programs.

When EPA designates an area as nonattainment for an ozone NAAQS, a State must submit a revised SIP that meets each nonattainment area planning requirement. 42 U.S.C. § 7502(b), (c); § 7511a. EPA has issued several revised ozone NAAQS and completed designations in accordance with those various NAAQS. Through this process, which has spanned many years, *see supra* at 7, EPA recognized that many States already have regulations in place to address certain nonattainment area planning and permitting requirements due to fulfilling SIP requirements for a nonattainment designation for a prior ozone NAAQS. 83 Fed. Reg. 62998, 63001 (Dec. 6, 2018) (final rule establishing implementation requirements for the 2015 ozone NAAQS). Where a State determines that an existing regulation is adequate to meet applicable requirements for a revised ozone NAAQS, such as for nonattainment New Source Review requirements, the State may provide a SIP submittal certifying that determination in lieu of submitting new or revised regulations. *Id.* at 63002.

A State that chooses to provide such a certification in lieu of submitting a new or revised regulation must provide the certification to EPA as a SIP revision in accordance with 42 U.S.C. § 7410, as well as specific EPA regulations. 83 Fed. Reg. at 63002. The State identifies the relevant applicable requirements and explains how each is met for the revised ozone NAAQS by the regulation previously approved for a prior ozone NAAQS. *Id.* EPA must evaluate and act on the certification SIP in accordance with applicable SIP submission requirements. *Id.*

4. New Source Review

The Act contains requirements for the preconstruction permitting of proposed new and modified stationary sources of air pollution,[1] which are referred to as "New Source Review." There are three types of New Source Review, one or more of which can apply at a given source, depending upon whether the source is major or minor, whether the proposed construction or modification causes an increase in emissions

[1] The Clean Air Act defines "stationary source" as "generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle." 42 U.S.C. § 7602(z) (Add. 003); *see* 5 Colo. Code Regs. § 1001-5:3.A.I.B.43 Admin. R., Vol. 2, AR-0994.

for a given pollutant above the significance threshold, and whether the source is located in an attainment area or a nonattainment area for the given pollutant. *See* 79 Fed. Reg. 8368, 8376 (Feb. 12, 2014).

a. New Source Review for Major Sources

The Act provides two different preconstruction permitting programs for "major" sources, and their applicability depends on whether the sources are located in an attainment or nonattainment area. For major sources in attainment areas, the Prevention of Significant Deterioration Program, 42 U.S.C. §§ 7470–7479, is intended to give "added protection to air quality in certain parts of the country notwithstanding attainment and maintenance of the NAAQS." *See Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 567–68 (2007) (describing Prevention of Significant Deterioration Program) (internal quotation marks omitted). A Prevention of Significant Deterioration Program permit must be obtained prior to construction or modification[2] of such major pollutant-emitting facilities. 42 U.S.C. § 7475(a).

[2] The Act defines "construction" to include "modification," which "means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant

Cont.

For nonattainment areas, major sources are subject to the more stringent nonattainment New Source Review program, which applies to major new or modified sources of a pollutant for which the area is designated nonattainment. 42 U.S.C. §§ 7502, 7503. For non-attainment New Source Review, a major source is generally one that emits, or has the potential to emit, 100 tons per year or more of a pollutant for which the area in which it is located is designated nonattainment. *Id.* § 7602(j); 40 C.F.R. § 51.165(a)(1)(iv).[3] A new or modified source generally must meet the lowest achievable emission rate and must obtain sufficient emission reductions from existing sources to offset its increased emissions. *Id.* §§ 7502(c)(5), 7503.

EPA promulgated regulations specifying the requirements for nonattainment New Source Review programs. *See* 40 C.F.R. § 51.165. These regulations specify the provisions that States must include in a SIP for each ozone nonattainment area. *See id.* § 51.165(a). In 2018,

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emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §§ 7411(a)(4), 7479(2)(C).

[3] Lower thresholds may apply in serious, severe, or extreme nonattainment areas for certain pollutants. *See, e.g.,* 42 U.S.C. §§ 7511a(c)–(e), 7513a(b)(3); 40 C.F.R. § 51.165(a)(1)(iv)(A).

EPA added to these nonattainment New Source Review requirements to facilitate implementation of the 2015 ozone NAAQS. *See* 40 C.F.R. § 51.1314.

b. New Source Review for Minor Sources

A State's SIP must regulate the construction and modification of any stationary source "as necessary" to achieve the NAAQS. *See* 42 U.S.C. § 7410(a)(2)(C). Pursuant to this requirement, SIPs contain minor New Source Review programs. These programs regulate proposed new sources and proposed modifications to existing sources with potential emissions increases below the thresholds that would trigger major New Source Review, if such regulation is necessary to achieve the NAAQS. *See New Jersey v. EPA*, 989 F.3d 1038, 1043 (D.C. Cir. 2021).

II. Implementation of the Nonattainment New Source Review Program for Ozone in Colorado

In 1994, EPA first approved the Colorado nonattainment New Source Review permit program as meeting the applicable ozone nonattainment area requirements established by the 1990 amendments to the Clean Air Act. 59 Fed. Reg. 42500, 42502–03 (Aug. 18, 1994). This approval addressed the Denver-Boulder area and the 1979 ozone

NAAQS, which was the ozone NAAQS applicable at that time.[4] In 2018, EPA approved Colorado's nonattainment New Source Review permit program as meeting the permit program requirements under the 2008 ozone NAAQS. 83 Fed. Reg. 31068, 31070 (July 3, 2018) (approving "NNSR" program). Two years later, Colorado provided a SIP submission to EPA certifying that its nonattainment New Source Review permit program met the permit program requirements under the 2015 ozone NAAQS.

A. The Proposed Rule

EPA proposed to approve Colorado's SIP submission that the State had fulfilled, through certification of its previously-approved SIP revisions, nonattainment New Source Review permit program requirements under the 2015 ozone NAAQS for the Denver Metro Area. 86 Fed. Reg. at 60434, Admin. R., Vol. 1, AR-0001.

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[4] EPA initially designated the Denver-Boulder area as a transitional ozone nonattainment area under 42 U.S.C. § 7511e after the enactment of the 1990 Amendments to the Clean Air Act. *See* 56 Fed. Reg. 56694, 56732 (Nov. 6, 1991). At the time Colorado submitted its SIP revision for EPA approval in this case, the Denver Metro Area included Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson counties, and portions of Larimer and Weld counties.

The proposed rule identified Code of Colorado Regulation, Regulation 3, Part D as Colorado's SIP-approved nonattainment New Source Review permit program. *Id.* at 60435, Admin. R., Vol. 1, AR-0002. The proposed rule explained the minimum SIP requirements for nonattainment New Source Review permit programs for the 2015 ozone NAAQS, which are found at 40 C.F.R. § 51.165. *Id.* The proposed rule identified eight specific nonattainment New Source Review provisions from 40 C.F.R. § 51.165 that each SIP for an ozone nonattainment area must contain. 86 Fed. Reg. at 60435, Admin. R., Vol. 1, AR-0002. The proposed found that Colorado's SIP submission certified that its existing nonattainment New Source Review permit program, covering the Denver Metro Area for the 2015 ozone NAAQS, is at least as stringent as the minimum requirements for nonattainment New Source Review permit programs established at 40 C.F.R. § 51.165. *Id.*

Based on these considerations, EPA proposed to approve the SIP submission containing the nonattainment New Source Review permit program certification provided by the State. *Id.* at 60436, Admin. R., Vol. 1, AR-0003. EPA solicited public comments on the proposed action. *Id.*

B. The Final Rule

In the Final Rule, EPA considered two sets of public comments. 87 Fed. Reg. at 29232–35, Admin. R., Vol. 1, AR-0004–7. One commenter expressed support for the proposed approval. *Id.* at 29232, Admin. R., Vol. 1, AR-0004. The Center provided the other set of comments, which raised five issues. EPA responded to each of the five issues and explained why none of the concerns raised by the Center justified disapproval of Colorado's SIP submission. *Id.* at 29232–35, Admin. R., Vol. 1, AR-0004–7. EPA concluded that the State's certified nonattainment New Source Review permit program was prepared in accordance with Clean Air Act requirements and fulfilled the specific minimum SIP requirements of 40 C.F.R. § 51.165. *Id.* at 29235, Admin. R., Vol. 1, AR-0007. EPA approved the SIP submission. *Id.*

SUMMARY OF ARGUMENT

EPA reasonably approved Colorado's SIP submission that certified that the State's nonattainment New Source Review permit program, which had previously been approved by EPA, met the federal regulatory requirements for such a program under the 2015 ozone NAAQS. The State's program contained all the necessary elements for a

nonattainment New Source Review permit program. Its regulation of emissions from stationary sources of air pollution conforms to the applicable regulatory definitions and is consistent with EPA's interpretation of those definitions.

The Center challenges EPA's approval on procedural and substantive grounds. Procedurally, EPA's docket for its proposed approval and its Federal Register notice for the proposed approval provided adequate notice to the public of the provisions of Colorado's nonattainment New Source Review permit program that the State certified and EPA approved in the Final Rule. EPA's docket at the time it published the proposed rule in the Federal Register contained the State's SIP submission. That submission identified the State regulations that Colorado certified as meeting the regulatory requirements: 5 Colo. Code Regs. Regulation 3, Part D, §§ I, II, and V. EPA's notice of the proposed rule similarly cited to Regulation 3, Part D as the basis for its approval and provided citations to specific sections when appropriate. The Center and other members of the public could easily locate the text of the current Colorado regulations being certified, including from several internet sites. To provide adequate notice and

opportunity for comment, the Administrative Procedure Act does not require that EPA publish the full text of referenced state regulations that are accessible by a variety of means, including a simple internet search.

The Center's two substantive challenges fail to show that EPA unreasonably determined that the State's nonattainment New Source Review permit program meets federal regulatory requirements. First, the Center incorrectly argues that emissions from temporary activities such as construction and exploration should be included in the calculation of the "potential to emit" of a stationary source. The "potential to emit" is used to determine if a stationary source is a major source subject to nonattainment New Source Review permit requirements. A stationary source's potential to emit pollutants is based on the stationary source's physical and operational design. For this reason, under EPA regulations, the "potential to emit" expressly excludes "secondary emissions," which are defined as emissions that result from the construction of the stationary source but not from the stationary source itself.

In the Final Rule, EPA reasonably interpreted an ambiguity in the definitions of "potential to emit" and "secondary emissions" in its nonattainment New Source review regulations as they relate to temporary emissions other than emissions from construction. EPA interpreted the potential to emit to include the continuous operating emissions from the stationary source. EPA interpreted potential to emit not to include construction and other temporary emissions. This Court should defer to EPA's interpretation to resolve this ambiguity in the regulations because it is reasonable and the character and context of EPA's interpretation entitle it to controlling weight. Colorado's nonattainment New Source Review permit program, which excludes emissions from temporary activities, meets the requirements of the federal regulatory program, as interpreted by EPA.

Second, the Center incorrectly argues that the State's definition of major stationary source and major modification is less stringent than required under the EPA's regulations. The Center highlights the difference between Colorado's use of the phrase "internal combustion engines on any vehicle" and the federal regulation's use of "nonroad engine." The difference has no material consequence. The key is the

definition of "nonroad engine." Under Colorado's definitions, a "major stationary source" is a "stationary source" and a "major modification" occurs at a "stationary source." Colorado's definition of "stationary source," like the federal definition, excludes emissions from "nonroad engines." By tracking the definitions in the federal regulations and the State program, the scope of Colorado's program meets the requirements of the federal regulatory program.

The Center's arguments do not show that EPA's approval of Colorado's SIP certification was arbitrary or capricious. The Court should deny the Center's petition for review.

STANDARD OF REVIEW

An EPA action that approves a SIP revision is reviewed under the deferential standard of review for agency actions set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *see N.M. Env't Improvement Div. v. Thomas*, 789 F.2d 825, 829 (10th Cir. 1986) (reviewing disapproval of State Implementation Plan using Administrative Procedure Act). Under this standard of review, agency action will not be set aside unless it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *U.S.*

Magnesium, LLC v. EPA, 690 F.3d 1157, 1164 (10th Cir. 2012). The arbitrary and capricious standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also U.S. Magnesium*, 690 F.3d at 1164.

An agency action is arbitrary and capricious only "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, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *U.S. Magnesium*, 690 F.3d at 1164. Under this standard, the reviewing court may not set aside agency action so long as the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *OXY USA, Inc. v. U.S. Dep't of Interior,* 32 F.4th 1032, 1044 (10th Cir. 2022).

EPA's interpretation of its own regulations is subject to deferential review. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Absent a genuine ambiguity, the plain terms of a regulation govern. *Id.* at 2415.

A court should defer to an agency's interpretation of its own regulations where (1) there is genuine ambiguity; (2) the agency's interpretation is reasonable; and (3) if the "character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416–2418; *see also Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 1006 (10th Cir. 2022).

ARGUMENT

I. EPA Provided Reasonable Notice of the Regulatory Provisions that Are the Basis for Colorado's SIP Certification.

EPA included Colorado's SIP submission in its rulemaking docket. Colorado's submission identified the parts of Colorado's regulatory program—Regulation 3, Part D—upon which Colorado based its SIP certification. Similarly, EPA's proposed rule identified Regulation 3, Part D as the part of Colorado's regulations upon which EPA based its approval. EPA's and Colorado's reference to the relevant State regulations, rather than reproducing the regulatory provisions in the Federal Register notice of the proposed approval, provided adequate notice of EPA's proposed action. A new comment period is not necessary.

Initially, the Court should keep in mind that the Final Rule does not approve any new or revised regulatory text in the Colorado nonattainment New Source Review permit program. Instead, the Final Rule approves the State's SIP certification that a previously approved regulatory program meets the requirements for the nonattainment New Source Review permit program required by the 2015 ozone NAAQS. The State requested this approval in accordance with EPA guidance that provides States with flexibility to utilize a streamlining SIP submission option. This guidance allows states with previously approved provisions in a SIP, when appropriate, to "certify" that its existing approved program meets the applicable SIP requirements for a revised ozone NAAQS, in lieu of submitting new or revised regulations. *See* 83 Fed. Reg. 62998, 63001 (Dec. 6, 2018); *see supra* at 9–10.

The Center had notice of the permit program elements that the State certified. The State's SIP submittal specifically identified the relevant state regulations. Regarding the nonattainment New Source Review permit program requirements, the State certified that it met its obligations by implementing Regulation Number 3, Part D, an EPA-approved nonattainment areas New Source Review program. Admin.

R., Vol. 1, AR-0009–10, 20. The State submission also provided a table, titled Colorado State Implementation Plan Requirements, 2015 Ozone NAAQS (the "Plan Requirements Table"), that identified 5 Colo. Code Regs. Regulation 3, Part D as meeting Nonattainment Area New Source Review permit program requirements pursuant to the Clean Air Act. Admin. R., Vol. 1, AR-0021. The Plan Requirements Table also identified Regulation 3, Part D, §§ I, II, and V as meeting the requirements of 40 C.F.R. 51.165. *Id.*[5] Finally, the Plan Requirements Table identified Regulation 3, Part D, § V.A.3 as meeting the Clean Air Act's general offset requirements for nonattainment areas. Admin. R., Vol. 1, AR-0022.

The Center could easily access the State submission at the time EPA published its proposed rule and solicited comments. On November 1, 2021, EPA made the State submission available electronically on its rulemaking website. *See* www.regulations.gov (docket EPA-R08-OAR-2020-0644, which shows the posting of the State submission on

[5] The State's Plan Requirements Table further identified the location in the Federal Register for EPA's most recently approved revisions to Part D. Admin. R., Vol. 1, AR-0021 (identifying 84 Fed. Reg. 18991 (May 3, 2019)); Admin. R., Vol. 1, AR-0022 (identifying 81 Fed. Reg. 3963 (Jan. 25, 2016)).

November 1, 2021). The same day, in EPA's proposed rule, EPA provided notice to the public that all documents in the docket are listed in www.regulations.gov and provided the docket number for easy access. 86 Fed. Reg. at 60434, Admin. R., Vol. 1, AR-0001. As discussed above, the State submission identified 5 Colo. Code Regs. Regulation 3, Part D, including sections §§ I, II, and V, as meeting nonattainment area New Source Review permit program requirements.

The State's Regulation 3, Part D can be readily accessed from a variety of sources where state regulations can be found, including on the State's website, EPA's website, public libraries, and other resources that compile state regulations (such as Westlaw and Lexis). The Center claims locating these resources is "complicated and time-consuming." Petitioner's Brief ("Pet. Br.") at 23. However, these resources can be accessed by a relatively straightforward two-step process: (1) reviewing the State's submission on EPA's docket to identify the regulations cited in the State's certification and Plan Requirements Table, *i.e.*, Regulation 3, Part D §§ I, II, and V; and (2) locating those State regulations using one of various publicly available resources. Consequently, the Center had the ability prior to submitting its

comments to review the State's submission to determine which regulations the State certified to meet nonattainment New Source Review permit requirements. In fact, the Center did so; both their comments on the proposed approval and their arguments in this case demonstrate they had access to the State's submission and the relevant State regulatory text. *See* Admin. R., Vol. 2, AR-1561 (Center's comments reference the State's submission and the Plan Requirements Table that identify Regulation 3, Part D).

In addition, EPA's Federal Register notice for the proposed rule provided adequate additional notice of the regulatory provisions that Colorado certified and EPA approved as meeting minimum requirements for nonattainment New Source Review permit program. The proposed rule published in the Federal Register identified Code of Colorado Regulations at Regulation 3, Part D as the Colorado SIP-approved nonattainment New Source Review program the State certified. 86 Fed. Reg. at 60435, Admin. R., Vol. 1, AR-0002. The proposed rule described several specific provisions of Regulation 3, Part D relevant to the determination of compliance with 40 C.F.R. § 51.165. *Id.* It cited to specific subsections of Part D in footnotes to the proposed

rule. *Id.* at 60435 nn. 16, 17, and 18, Admin. R., Vol. 1, AR-0002.[6] EPA concluded by "proposing to approve Colorado's certification that the SIP-approved new source review permitting requirements *in Regulation 3, Part D of the CCR* meet the requirements located in 40 C.F.R. § 51.1314 and 40 C.F.R. § 51.165." *Id.* at 60436, Admin. R., Vol. 1, AR-0003(emphasis added). In sum, the State's submission with the Plan Requirements Table and EPA's Federal Register notice of the proposed rule repeatedly referenced Regulation 3, Part D of the Code of Colorado Regulations, thereby providing sufficient notice to the public of the rules EPA approved as meeting nonattainment New Source Review requirements.

The notice EPA provided in the Federal Register is sufficient in this situation where EPA was not proposing to approve any revisions to the text of the State's SIP. Instead, EPA proposed to approve the State's certification that is based on already-approved regulatory text. The already-approved regulatory text is found in Colorado's active

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[6] The proposed rule cited to 5 Colo. Code Regs. § 1001-5:3.D.II.A.25.b, 5 Colo. Code Regs. § 1001-5:3.D.II.A.25.d, and 5 Colo. Code Regs. § 1001-5:3.D.V.A.3.a(i)(a). 86 Fed. Reg. at 60435 n. 16, n.17, n.18, Admin. R., Vol. 1, AR-0002.

regulations that were publicly available in several places at the time of EPA's proposed approval, including EPA's website showing the text of the regulatory elements in Colorado's SIP.

Even assuming that EPA had approved the text of new or revised SIP provisions in this action (which it did not), the Center's demand that EPA publish the entire text of State SIP provisions that EPA proposes to approve challenges well-established federal agency practice of using incorporation by reference of State SIP provisions in rulemakings. *See* Pet. Br. at 23–24. Federal regulations expressly authorize agency's use of incorporation by reference. *See* 1 C.F.R. § 51.5. EPA has repeatedly used incorporation by reference when approving the text of Colorado's SIP provisions. *See e.g.*, 84 Fed. Reg. at 18992–93; 83 Fed. Reg. at 31069–70.[7] The practice is reasonable because SIP provisions are lengthy and readily available to the public. Here, Regulation 3, Part D is 75 pages in the administrative record. AR

[7] EPA did not use incorporation by reference in the Final Rule because it was not approving the text of any SIP revisions, but instead was approving a SIP submittal containing a certification. EPA's approach here is consistent with EPA's approval of other State certifications. *See e.g.,* 86 Fed. Reg. 50456 (Sept. 9, 2021) (Texas); 84 Fed. Reg. 5598 (Feb. 22, 2019) (Pennsylvania).

1050-1124. Publishing full regulatory text for each submission to EPA of a SIP revision by each of the 50 States is an unnecessary burden on EPA and the Federal Register when the text being approved is reflected in active state codes that are easily available from various public sources.

The Center highlights that EPA referred to its website for a copy of the relevant portions of Colorado's SIP provisions when the website's contents did not include the most recent SIP approval. Pet. Br. at 21. This omission from the website was of no consequence. At the time of the proposed rule, the copy of Colorado's SIP on EPA's website had not been updated to include EPA's approval action on May 3, 2019. *See* 87 Fed. Reg. at 29233 n.2, Admin. R., Vol. 1, AR-0005. However, the only approval action in the May 3, 2019, rulemaking relating to Colorado's nonattainment New Source Review permit program addressed an amendment to include the lower thresholds for application of nonattainment New Source Review for areas reclassified to serious, severe, or extreme nonattainment. *See* 84 Fed. Reg. at 18991. Later in 2019, EPA's re-designation of the Denver Metro Area from a moderate to serious nonattainment area under the 2008 ozone NAAQS would

require application of the lower thresholds. This change has no current relevance to the certification of the State's nonattainment New Source Review permit program for the 2015 ozone NAAQS, for which the Denver Metro Area was designated as marginal nonattainment.[8] This omission from EPA's website did not prevent the Center from reviewing the active text of Regulation 3, Part D and identifying the permit program the State identified in its submittal that EPA approved for the 2015 Ozone NAAQS.

The Center appears confused regarding the version of the SIP that Colorado relied upon in its submittal, Pet. Br. at 22–23, but this may reflect the Center's misunderstanding of the SIP procedure where a SIP submittal includes certification of previously approved regulations. *See* Pet. Br. at 24–25. Colorado submitted and EPA approved a certification that the State's *current* version of the SIP, which EPA previously approved, meets nonattainment New Source Review permit program requirements for the 2015 ozone NAAQS. The Center mentions that the Plan Requirements Table states that the "last approval" of Section

[8] EPA subsequently redesignated the Denver Metro Area as a moderate nonattainment area. 87 Fed. Reg. 60897, 60916 (Oct. 7, 2022).

V.A.3 of Part D occurred on January 25, 2016. Pet. Br. at 22–23; Admin. R., Vol. 1, AR-0022. This mention of the "last approval" demonstrates that the SIP certification submitted in 2020 incorporates previously approved provisions and that the current version of the State's nonattainment New Source Review permit program will include the most recent update, which for Section V.A.3 occurred in 2016.[9]

The Center erroneously argues that EPA's decision not to provide the full text of the State's regulations has consequences beyond this rulemaking. Pet. Br. at 17, 25–26. The alleged consequences identified by the Center relate to permitting and enforcement actions, but these actions are not affected by EPA's approval of the SIP certification in the Final Rule. The date EPA approves a State's SIP certification based on previously approved SIP provisions is not the same as the effective date of the approved SIP provisions for Clean Air Act permitting and enforcement purposes. The Center correctly notes that the SIP requirements in place at the time a source's permit was issued or a violation occurs establish the relevant Clean Air Act requirements. Pet.

[9] The State provided the dates of the most recent approval of the other sections it was certifying. Admin. R., Vol. 1, AR-0021–22.

Br. at 25. However, the date of the Final Rule in which EPA approved Colorado's SIP certification, May 13, 2022, does not establish the effective date of the various provisions of Colorado's nonattainment New Source Review permit program, under the federally enforceable SIP. EPA approved those provisions as meeting federal requirements and they became an effective part of the SIP years before, when EPA previously-approved them as part of the SIP. *See e.g.*, 59 Fed. Reg. 42500 (Aug. 18, 1994). These provisions became enforceable requirements of the SIP under the Clean Air Act by EPA or citizens on that earlier date.

For example, if the alleged violation or permit condition is based on a SIP provision approved by EPA's action on August 18, 1994, then August 18, 1994 is the relevant date that these requirements became enforceable through the SIP, not EPA's approval of the State's certification in May 2022. If an alleged major modification of a source occurred in 2019 without complying with the nonattainment New Source Review permit requirements in the SIP, the citizen suit plaintiff would rely on the State's SIP provision in place in 2019. In this situation, EPA's approval of the State's SIP certification in 2022 that

the relevant requirements were met by SIP provisions EPA previously approved did not alter the federally enforceable permitting requirements that have been in effect since 1994.[10]

II. EPA's Approval of the SIP Certification was neither Arbitrary nor Capricious Because the Provisions of Colorado's Nonattainment New Source Review Permit Program Meet Clean Air Act Regulatory Requirements.

EPA reasonably determined that Colorado's nonattainment New Source Review program meets the regulatory requirements of the Clean Air Act and EPA's implementing regulation. The applicable EPA regulation—40 C.F.R. § 51.165—requires that a SIP for an ozone nonattainment area contain eight primary provisions. 40 C.F.R. § 51.165(a)(1), (3), (8), and (9); *see* 86 Fed. Reg. at 60435. Colorado certified that its nonattainment New Source Review program meets the requirements for the nonattainment New Source Review permit programs at 40 C.F.R. § 51.165. Admin. R., Vol. 1, AR-0009–10.

[10] EPA acknowledges that determining SIP provisions that were applicable years or decades earlier can be difficult. *See* Pet. Br. at 26. However, including the current, and readily accessible, regulatory text in an action certifying a previously-approved provision will not "ameliorate" that difficulty. *See* Pet. Br. at 17.

The Center challenges EPA's approval based on emissions from certain activities and equipment that Colorado's nonattainment New Source Review permit program excludes from consideration when determining whether a source is a major source. However, EPA in the Final Rule reasonably interpreted its regulations to exclude from the potential-to-emit calculation those emissions associated with construction and other temporary activities. Similarly, internal combustion engines on vehicles, such as equipment on flat-bed trucks, are permissibly excluded from the definition of stationary sources for purposes of determining whether a source is a major source.

The Center's arguments fail to establish a basis to set aside EPA's approval of Colorado's SIP certification.

A. EPA Reasonably Approved Colorado's Nonattainment New Source Review Program that Excludes Emissions from Temporary Activities, Such as Construction, from the Determination of a Major Stationary Source.

Whether a source is a major source subject to nonattainment New Source Review in the Denver Metro Area ozone nonattainment area is based on its "potential to emit" ozone precursors above regulatory thresholds. The calculation of potential to emit, in turn, depends on the emissions from the physical and operational design of the stationary

source, as it is defined in federal regulations. Under EPA's regulations, certain "secondary emissions" are not considered when calculating the potential to emit. Emissions associated with construction are among secondary emissions. Colorado's regulations similarly do not include "temporary construction or exploration activities" in potential-to-emit calculations. The Center's challenge to EPA's approval based on minor differences in wording in Colorado's definitions of excluded emissions does not result in a permit program that fails to meet federal regulatory standards.

1. The Court Should Defer to EPA's Reasonable Interpretation of Its Regulatory Definitions to Exclude Emissions from Construction and other Temporary Activities from the Determination of Whether a Stationary Source is a Major Source.

The touchstone of potential to emit is the design of the stationary source, rather than construction or other activities not occurring as part of the source's designed operations. Potential to emit means the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. § 51.165(a)(1)(iii). The definition of "potential to emit" further excludes "secondary emissions" in determining the potential to emit of a stationary source. 40 C.F.R.

§ 51.165(a)(1)(iii). Secondary emissions are defined as "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 modification itself." 40 C.F.R. § 51.165(a)(1)(viii).

Thus, the definitions of potential to emit and secondary emissions when read together include in the potential-to-emit calculation the emissions from the stationary source's physical and operational design but exclude emissions from construction activities that do not come from the major source itself. However, the regulations do not explicitly address how other temporary emissions that are not associated with the physical and operational design of the stationary source should be evaluated for the potential-to emit calculation. In the Final Rule, EPA interpreted the definitions to include in the potential-to-emit calculation "continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction." 87 Fed. Reg. at 29234, Admin. R., Vol. 1, AR-0006.

The Court should defer to EPA's reasonable interpretation of the definitions, which meet the three factors of the test set out in *Kisor*, 139 S. Ct. at 2416–18. First, the Court must determine that the text of the

definitions of potential to emit and secondary emissions are genuinely ambiguous in the context of temporary emissions other than construction activities. A court makes this determination only after exhausting "all the 'traditional tools' of construction," including the "'text, structure, history, and purpose of a regulation.'" *Walker*, 30 F. 4th at 1006 (quoting *Kisor*, 139 S. Ct. at 2412, 2415). Although the text of the definition of secondary emissions addresses construction of a major stationary source, the definitions of secondary emissions and potential to emit do not expressly address whether other temporary emissions that are not from the physical and operational design of the stationary source are excluded from the potential-to emit calculation. The structure and history associated with promulgation of the definition also do not expressly address temporary activities other than construction. *See* 51 Fed. Reg. 40656 (Nov. 7, 1986) (final rule); 48 Fed. Reg. 46152 (Oct. 11, 1983) (proposed rule). The purpose of the definitions is to include the emissions from the stationary source's physical and operational design when calculating the potential to emit, but the definitions do not unambiguously make distinctions specific to temporary emissions other than construction.

Second, EPA's interpretation is reasonable and comes within the "zone of ambiguity" identified after employing all interpretive tools. *Walker*, 30 F.4th at 1010 (citing *Kisor*, 139 S. Ct. at 2415–16). As explained above and by EPA in the Final Rule, the focus of nonattainment New Source Review is the potential to emit pollutants from a stationary source's physical and operational design. 87 Fed. Reg. at 29234, Admin. R., Vol. 1, AR-0006; *see supra* at 35–36. EPA considered that the definition of potential to emit excludes secondary emissions, such as emissions from construction. 87 Fed. Reg. at 29234, Admin. R., Vol. 1, AR-0006. EPA interpreted these definitions of the nonattainment New Source Review permit programs as concerned with "continuous operating emissions of a stationary source and not temporary emissions or emissions associated with construction." *Id.* The definitions of potential to emit and secondary emissions support EPA's reasonable interpretation. *Id.*

Third, "the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2415–16. The Supreme Court laid out three "especially important markers" for determining if an agency's regulatory interpretation

commands deference: (a) whether the agency's interpretation reflects the agency's "authoritative" or "official position"; (b) whether "the agency's interpretation implicates its substantive expertise"; and (c) whether the agency's construction is rooted in its "fair and considered judgment." *Kisor*, 139 S. Ct. at 2416–17. EPA's interpretation is authoritative and official. It was offered in the Final Rule and published in the Federal Register, a vehicle used to convey authoritative policy. It implicates EPA's substantive expertise in its role as the agency charged with administering the Clean Air Act. Finally, the interpretation is EPA's considered judgment; it is not a "*post hoc* rationalizatio[n] advanced to defend past agency action" and it does not create "unfair surprise," such as when the interpretation conflicts with the agency's prior interpretation or imposes retroactive liability for long-standing conduct that the agency had not previously addressed. *Kisor*, 139 S. Ct. at 2417–18.

Nonattainment New Source Review concerns the continuous operating emissions of a stationary source and not the emissions associated with temporary activities, such as construction, that do not arise from the operations of the stationary source. *See* 87 Fed. Reg. at

29234, Admin. R., Vol. 1, AR-0006. The Court should defer to EPA's interpretation of potential to emit and secondary emissions when evaluating whether the exclusion of emissions from temporary activities contained in the definitions in the Colorado's regulatory program meets EPA regulatory requirements for a nonattainment New Source Review permit program.

2. Colorado's Nonattainment New Source Review Permit Program Meets Federal Regulatory Requirements, as Interpreted by EPA.

The Colorado nonattainment New Source Review permit program is comparable to and no less stringent than federal requirements. The State program, as required by federal regulations, determines whether a source in a nonattainment area is subject to nonattainment New Source Review permitting requirements based on the source's potential to emit, which is specified in tons per year of regulated New Source Review pollutants. 5 Colo. Code Regs. § 1001-5:3.D.II.A.25.b; Admin. R., Vol. 2, AR-1064.

Colorado's nonattainment New Source Review permit regulations also have provisions analogous to EPA's definition of secondary emissions. Its definition of major stationary source provides that:

> Emissions caused by indirect air pollution sources (as defined in Section I.B.24 or 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.

5 Colo. Code Regs. § 1001-5, Part D, II.A.25.f; Admin. R., Vol. 2, AR-1066 (emphasis added). Its definition of major modification similarly provides that:

> 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.

Id. at Part D, § II.A.23f, Admin. R., Vol. 2, AR-1062 (emphasis added).

The Center focuses on the word "temporary" in the Colorado definition of major stationary source, Pet. Br. at 31–32, but this focus ignores the context provided by the State's regulation. Both definitions provide examples of what the State considers "temporary." The examples deal with activities that are not part of the operation of the stationary source. The first excludes from potential-to-emit calculations those emissions associated with construction activities, which the federal regulations similarly exclude. The second excludes from

potential-to-emit calculations those emissions associated with exploration activities. Although the federal definitions of potential to emit and secondary emissions do not expressly address exploration activities, EPA has reasonably interpreted those definitions to exclude temporary activities as not occurring as part of the physical and operation design of a stationary source.

The specific example the Center offers, Pet. Br. at 33, highlights the problem with the Center's interpretation that temporary emissions should not be excluded from potential to emit. The Center suggests the building of a factory and contrasts that with the emissions from an offsite cement processing plant used to supply cement to construct the factory. Pet. Br. at 33. A more relevant example would be building a factory, such as a paper mill, and asking whether the on-site emissions associated with construction of the paper mill from an *on-site* cement processing plant are included in the potential to emit to determine if the paper mill is a major source. The definition of secondary emissions says such construction emissions are not included in potential-to-emit calculations because they do not come from the stationary source—the physical and operational design of the paper mill. *See* 40 C.F.R.

§ 51.165(a)(1)(viii). Even though an on-site cement processing plant may be located on the same piece of land, and the construction is necessary for the paper mill to operate, the temporary emissions from the cement processing plant are not included in potential to emit calculations.

The Center misplaces reliance on the permit for the South Fork offshore wind energy generating plant because the applicable regulations for off-shore and on-shore facilities are materially different in this context. *See* Pet. Br. at 36. As explained above, *supra* at 35-36, potential to emit for nonattainment New Source Review excludes emissions from construction activities. In contrast, the statutory definition of Outer Continental Source expressly *includes* "construction" as an activity that qualifies as an Outer Continental Source. 42 U.S.C. § 7627(a)(4)(C) ("such activities include, but are not limited to, platform and drill ship exploration, *construction*, development, production, processing, and transportation") (emphasis added). Thus, emissions from construction are included in the potential emissions of Outer Continental Sources, and permits for wind farms such as South Fork

may have emission limits on the construction phase of these projects.[11] *See* Admin. R., Vol. 1, AR-0777 ("the final permit will protect air quality in the affected area by maintaining emission control requirements for construction activities that are regulated as [Outer Continental] sources"); Admin. R., Vol. 2, AR-0777 ("the final permit contains emissions limitations and conditions for construction activities that protect air quality in the affected area").

In sum, Colorado's nonattainment New Source Review permit program meets the requirements of EPA's reasonable interpretation of the definitions of potential to emit and secondary emissions in 40 C.F.R. § 51.165.

B. EPA Reasonably Approved Colorado's Nonattainment New Source Review Program that Excludes Emissions from Internal Combustion Engines on Any Vehicle from the Determination of Major Stationary Source.

The Center incorrectly argues that Colorado's nonattainment New Source Review program violates the Clean Air Act and 40 C.F.R.

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[11] The Center mistakenly comments that "obvious[ly]" a wind generating plant is not a source of emissions. Pet. Br. at 36. In fact, the permit for the South Fork wind energy project regulates emissions from engines on the wind turbine generators and the offshore substation. Admin. R., Vol. 1, AR-0767, 769, 770.

§ 51.165 because it excludes emissions from internal combustion engines *on* any vehicle when determining whether a source is a major source for permitting purposes. Pet. Br. at 38–40. The Center's argument fails because Colorado's regulations are consistent with federal regulatory requirements. The key to this argument is the definition of "nonroad engine."

Under the Clean Air Act, a stationary source does not include emissions from a "nonroad engine." 42 U.S.C. § 7602(z). A nonroad engine is an internal combustion engine that is not used in a motor vehicle or that is not subject to regulation under two Clean Air Act regulatory programs separate from New Source Review. 42 U.S.C. § 7550(10). Federal regulations further define "nonroad engine" to include "an internal combustion engine" that "[b]y itself or in *or on* a piece of equipment . . . is portable or transportable." 40 C.F.R. § 1068.30 (definition of nonroad engine at (1)(iii)) (emphasis added); *see* 68 Fed. Reg. 17741, 17742 (Apr. 11, 2003) (explaining the need to clarify the nonroad engine definition). Because nonroad engines are *not* considered stationary sources, they are not subject to New Source Review requirements unless certain exceptions apply. *See* 42 U.S.C.

§ 7602(z). The Center's example of an engine sitting on a vehicle such as a flat-bed truck is an engine on a piece of equipment that is transportable and, thus, a nonroad engine that is excluded from stationary sources.

A nonroad engine can be a stationary source in two circumstances. First, a nonroad engine can be a stationary source if the engine is regulated under 40 C.F.R. Part 60 or is otherwise regulated by a federal New Source Performance Standard. 40 C.F.R. § 1068.30 (definition of nonroad engine at (2)(ii)). Second, a nonroad engine can be a stationary source if "the engine . . . remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source." *Id.* at (2)(iii).[12]

Colorado's regulations incorporate essentially the same definition of nonroad engines. *See* 5 Colo. Code Regs. § 1001-5:3.A.I.B.31, Admin.

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[12] This second circumstance also encompasses two additional situations: (i) one or more engines that are used to replace another to perform the same or a similar function and which in combination will remain at the same location for 12 or more months including time between replacement; or (ii) one or more replacement engines that are used in the same location for three or more months during the full annual operating period of a source (i.e., if the source only operates for certain months of the year) for two or more years. *Id.* at (2)(iii).

R., Vol. 2, AR-0990.[13] Colorado's definition of a "non-road engine" includes the same category of internal combustion engines that by itself or in *or on* a piece of equipment is portable or transportable. 5 Colo. Code Regs. § 1001-5:3A.I.B.31(a)(iii), Admin. R., Vol. 2, AR-0990. Colorado has the same exceptions for engines regulated under New Source Performance Standards and when used at the same location for more than 12 months. 5 Colo. Code Regs. § 1001-5:3.A.I.B.31(b)(ii), (iii), Admin. R., Vol. 2, AR-0990–91. Thus, Colorado properly certified that its regulations meet the requirements of the Clean Air Act and 40 C.F.R § 51.165. EPA's approval of the certification SIP submittal was not arbitrary or capricious.

The Center's argument focuses on definitions of major stationary source and major modification, which exclude emissions from "internal combustion engines on any vehicle," rather than emissions from a "nonroad engine." Pet. Br. at 38–39. However, the Center's focus overlooks the fact that both of these definitions are based on Colorado's

[13] The only notable difference between the federal regulation and the Colorado regulation is that the Colorado regulation does not specify that the replacement engine provision includes time between replacements. *See* 5 Colo. Code Regs. § 1001-5:3.A.I.B.31.b(iii), Admin. R., Vol. 2, AR-0991.

definition of "stationary source." *See* 5 Colo. Code Regs. § 1001-5:3.D.II.A.23.f, Admin. R., Vol. 2, AR-1062 (defining Major Modification); 5 Colo. Code Regs. § 1001-5:3.D.II.A.25.f, Admin. R., Vol. 2, AR-1066 (defining Major Stationary Source). Colorado defines a "major stationary source" in a nonattainment area as any "stationary source" of air pollutants that emits a certain quantity of air pollutants. 5 Colo. Code Regs. § 1001-5:3.D.II.A.25.b, Admin. R., Vol. 2, AR-1064. Colorado's definition of "stationary source," in turn, excludes those "emissions resulting directly from an internal combustion engine for transportation purposes or from a *non-road engine*." 5 Colo. Code Regs. § 1001-5:3.A.I.B.43, Admin. R., Vol. 2, AR-0994 (emphasis added).

Similarly, a "Major Modification" is a "physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase." 5 Colo. Code Regs. § 1001-5:3.D.II.A.23, Admin. R., Vol. 2, AR-1061. Because a major modification is a change to a major stationary source, which is based on the definition of stationary source, potential emissions from nonroad engines are also excluded from major modifications. Thus, Colorado's

permit program is consistent with federal regulations by excluding emissions from nonroad engines.

EPA reasonably determined that Colorado's use of the term "internal combustion engines on any vehicle" does not exclude more categories of emissions than those excluded by "nonroad engines." Colorado's regulations do not define the term "internal combustion engines on any vehicle" that appears in the definitions of Major Stationary Source and Major Modification. Because Major Stationary Source incorporates the term stationary source, and Major Modification incorporates the term Major Stationary Source in the Colorado regulations, the phrase "internal combustion engines on any vehicle" in the Colorado regulation tracks the phrase "an internal combustion engine . . . . on a piece of equipment" in the EPA definition of "nonroad engine." *See* 40 C.F.R. § 1068.30. EPA's use of the phrase "on a piece of equipment" is, if anything, broader than Colorado's phrase "on any vehicle." Colorado's regulations meet the federal requirements. Both would exclude emissions from an engine that sits on a flat-bed truck.

CONCLUSION

The Center expressed concerns regarding Colorado's implementation of its nonattainment New Source Review program in the context of drilling and fracking of oil and gas wells. *See e.g.,* Pet. Br. at 5, 19. However, the appropriate permitting approach for activities at a specific oil and gas facility requires a case-by-case evaluation of the equipment and emissions involved. Concerns with a State's implementation of its SIP requirements are generally not relevant to a challenge to an EPA approval of a State SIP submission. *See Mont. Env't Info. Ctr. v. Thomas*, 902 F.3d 971, 978–79 (9th Cir. 2018) (finding that concerns regarding a State's implementation of a SIP's language are not an appropriate challenge to EPA's approval of the SIP). Such concerns are not relevant to EPA's approval of the State's SIP certification in the Final Rule.

For the reasons discussed above, the Court should deny the petition for review.

ORAL ARGUMENT STATEMENT

EPA requests oral argument to assist the Court in understanding the relevant statutory and regulatory provisions under the Clean Air Act's nonattainment New Source Review program and the basis for the EPA's decision in the Final Rule.

Respectfully submitted,

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JANUARY 30, 2023

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,324 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Microsoft Word computed the word count.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.

s/ Alan D. Greenberg
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Dated: January 30, 2023

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing RESPONDENTS' BRIEF:

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s/ Alan D. Greenberg
Alan D. Greenberg

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

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