

No. 23-9565

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

and

STATE OF COLORADO,
Intervenor.

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

BRIEF FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

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Oral argument is requested.

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PRIOR OR RELATED APPEALS

In a related appeal, the State of Colorado challenged the same final rule at issue here. *State of Colorado v. EPA et al.*, Case No. 23-9566 (10th Cir.). The cases were previously coordinated but later severed. ECF No. 010110938322. That case is currently held in abeyance. *Id.*

GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NO _x	Nitrogen Oxides
RFP	Reasonable Further Progress
VOC	Volatile Organic Compounds

INTRODUCTION

This case concerns the State of Colorado’s plan to reduce ozone pollution in Denver. Under the Clean Air Act (“CAA” or “Act”), Colorado was required to develop a State Implementation Plan (“Plan”) to improve air quality in Denver, with the goal of attaining the national ambient air quality standards (“NAAQS”) for ozone. Plans contain multiple severable elements that fit together to implement, maintain, and enforce the NAAQS. The U.S. Environmental Protection Agency (“EPA”) reviews Plans for compliance with the Act, and EPA-approved elements become federally enforceable.

In this action, Petitioners challenge EPA’s final action approving discrete elements of Colorado’s Plan for Denver. Consistent with the text of the Act and EPA’s longstanding implementing regulations, EPA properly approved elements of the Plan that met applicable requirements. EPA reasonably determined, among other things, that the Plan documented sufficient creditable reductions to demonstrate satisfaction of “reasonable further progress” requirements and that the Plan would improve air quality and therefore not interfere with attainment requirements.

Before EPA took final action on the Plan, it determined that Denver did not attain the NAAQS by the applicable date, thereby reclassifying Denver to a more stringent air quality designation (from “Serious” to “Severe”). But this

reclassification did not relieve EPA of its duty to approve the parts of the existing Plan that satisfied the requirements of the Act. Contrary to Petitioners' arguments, achieving attainment is not the standard by which the disputed elements are measured under EPA's longstanding regulations. Indeed, there are other mechanisms under the Act not at issue in this final action (like the attainment demonstration) which work to ensure Denver's continued progress towards addressing nonattainment on the ground.

Because EPA's approval is consistent with the Act and the implementing regulations, and well-supported by the record before EPA, this Court should uphold the approval and dismiss the petition.

STATEMENT OF JURISDICTION

To the extent that Petitioners are challenging EPA's existing regulations as inconsistent with the CAA, this Court lacks jurisdiction over those claims because they are time-barred. *Utah v. EPA*, 765 F.3d 1257, 1258 (10th Cir. 2014). This Court otherwise has jurisdiction under 42 U.S.C. § 7607(b)(1). The petition for review was timely filed because the final action was published on May 9, 2023, 88 Fed. Reg. 29827 ("Final Rule"), and the petition for review was filed on July 10, 2023, ECF No. 010110884679.

STATEMENT OF THE ISSUES

1. Whether EPA reasonably approved Colorado's reasonable further progress demonstration when it satisfied the applicable specified emissions reduction requirements set forth in the Act.
2. Whether EPA reasonably approved Colorado's related motor vehicle emissions budgets because they are consistent with meeting the applicable reasonable further progress requirements.
3. Whether EPA reasonably approved Colorado's reasonable further progress demonstration based on an adequate showing of creditable reductions.
4. Whether EPA reasonably determined that Colorado's Plan would not increase emissions and interfere with the attainment of the NAAQS.
5. Whether vacatur is an appropriate remedy for any error given the air quality benefits of the measures EPA approved.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Clean Air Act, National Ambient Air Quality Standards, and Ozone

The CAA, 42 U.S.C. §§ 7401–7671q, establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulations. Under Title I of the Act, EPA is charged with identifying air pollutants that endanger the public health and welfare and meet certain other

criteria, and with formulating the NAAQS that specify the maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408, 7409. After setting a new or revised NAAQS, EPA must designate geographic areas as being in “attainment,” “nonattainment,” or “unclassifiable” for the new or revised standard. *Id.* § 7407(d). If air quality in an area meets the NAAQS, it receives an attainment designation; if an area exceeds the NAAQS, it receives a nonattainment designation. *Catawba Cnty. v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009).

Once EPA promulgates a new or revised NAAQS, states have the primary responsibility for formulating pollution control strategies and ensuring that their ambient air quality meets the NAAQS. 42 U.S.C. § 7407(a). All states must prepare a Plan for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region within the state.¹ *Id.* § 7410(a)(1), (a)(2). A Plan must include, among other provisions, enforceable emissions limitations, and other measures to help attain and maintain the NAAQS. *Id.* § 7410(a)(1)–(a)(2).

States with areas designated nonattainment for new or revised NAAQS must submit a Plan to EPA that meets applicable requirements and provides for attainment of the standard. *Id.* § 7502(b)–(c). If the Plan meets all the CAA’s

¹ The Denver Metro/North Front Range area (“Denver Area”) is an air quality control region. 40 C.F.R. § 81.306.

applicable requirements, EPA “shall” approve it. *Id.* § 7410(k)(3); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). This process is not a static one, however. States routinely submit Plan revisions to EPA for approval consistent with the requirements of the Act. States also make submissions when changes to federal or state law occur, and the state seeks to incorporate those changes into the Plan.

In determining whether to approve a Plan, EPA must consider whether the submission would “interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement” of the Act. 42 U.S.C. § 7410(l). The level of rigor needed for this analysis varies depending on the nature and circumstances of the submission. *See Ctr. for Biological Diversity v. EPA*, 75 F.4th 174, 181 n.4 (3rd Cir. 2023).

EPA has regulated ozone under the NAAQS program since the 1970s. *See* 73 Fed. Reg. 16436, 16438 (Mar. 27, 2008). Ozone is not emitted directly from sources. It is formed in the atmosphere through chemical reactions between precursor pollutants—namely, nitrogen oxides (“NO_x”) and volatile organic compounds (“VOC”)—that are directly emitted in the presence of sunlight and under certain meteorological conditions. *See* 80 Fed. Reg. 65292, 65299–300

(Oct. 26, 2015). This case concerns EPA’s 2008 ozone NAAQS.² *See* 40 C.F.R. § 50.15; *see generally* 73 Fed. Reg. at 16436.

In the 1990 CAA amendments, Congress established additional provisions specific to ozone nonattainment areas. 42 U.S.C. §§ 7511–7511f. Among these provisions is a classification system for ozone nonattainment areas based on the magnitude by which they exceed the standard. Upon designation, EPA classifies each ozone nonattainment area as Marginal, Moderate, Serious, Severe, or Extreme based on the degree to which the ozone level exceeds the standard. *See* 42 U.S.C. § 7511(a)(1); 40 C.F.R. § 51.1103. An area’s classification determines the date by which it must attain the relevant ozone NAAQS, known as the “attainment date.” *See* 40 C.F.R. § 51.1103(a). States also must include increasingly stringent requirements in their nonattainment plans depending on these classifications. *See* 42 U.S.C. § 7511a. Thus, the redesignation process reflects a deliberate balance adopted by Congress—states have more time to come into attainment, but in exchange, they must meet more stringent requirements moving forward.

Within six months after the applicable attainment date, EPA must determine whether the area attained the NAAQS by that date. *Id.* § 7511(b)(2)(A). If EPA

² In 2015, EPA promulgated revisions to the NAAQS that set more stringent standards for ozone, 80 Fed. Reg. at 65292, but existing Plan requirements for the 2008 ozone NAAQS remained in place, 83 Fed. Reg. 62998, 63000 (Dec. 6, 2018).

determines that the area did not timely attain the NAAQS, the area is reclassified to the next higher classification (*e.g.*, from Moderate to Serious). *Id.* This reclassification results in a later attainment date accompanied by requirements for a new Plan submission with more stringent controls. *Id.* §§ 7511(a), 7511a. However, the state must still fulfill its obligation with respect to each required element under Section 7511a(c) of the Plan for the lower classification—the submitted Plan to meet those lower classification elements does not become moot.

2. Components of State Implementation Plans for Ozone Nonattainment Areas

Ozone nonattainment area Plans must meet specific requirements, which differ depending on the area’s classification. The relevant requirements are outlined below.³

a. Attainment Demonstration

For Serious ozone nonattainment areas, the state must submit an “attainment demonstration.” 42 U.S.C. § 7511a(c)(2)(A). The attainment demonstration is an analysis of specific annual emissions reductions, including mathematical modeling and supporting information, showing that an area will attain the NAAQS by the applicable attainment date. *Id.* Thus, the attainment demonstration is a planning

³ All Plans, including those for nonattainment areas, are also subject to general requirements set forth in 42 U.S.C. § 7410(a)(2).

exercise whereby air quality modeling demonstrates whether proposed control measures will ensure timely attainment. *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1066 (9th Cir. 2008).

b. Reasonable Further Progress Demonstration

For Serious ozone nonattainment areas, the state must submit a “reasonable further progress” (“RFP”) demonstration that meets certain criteria. 42 U.S.C. § 7511a(c)(2)(B). The Act generally defines RFP as “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment . . . by the applicable date.” *Id.* § 7501(1). The specific annual emissions reductions required to demonstrate RFP for ozone nonattainment areas are set forth in Section 7511a of the Act. *See id.* § 7511a(b)(1)(A), (c)(2)(B).

Moderate ozone nonattainment area plans must provide for a 15% reduction in emissions over six years after the baseline year. *Id.* § 7511a(b)(1)(A). Serious ozone nonattainment areas must additionally provide for a 3% annual emissions reduction calculated from a baseline year and averaged over the next three-year period (i.e., 9% over three years). *Id.* § 7511a(c)(2)(B)(i). Alternatively, EPA can approve an RFP demonstration that will achieve *less* than the annual 3% reduction if a state meets certain conditions. *Id.* § 7511a(c)(2)(B)(ii). The years upon which these RFP target reductions fall are called “milestones” and states must separately

submit proof of compliance. *Id.* § 7511a(g)(1)–(2). The purpose of the RFP target reductions is to smooth out progress by ensuring that states do not design all control strategies to take effect as late as possible; progress is demonstrated incrementally over time.

i. Credibility of Reductions for RFP

Because demonstrating that a Plan provides for RFP necessarily entails predictions about the future, states often develop projected emissions inventories. These inventories demonstrate how the controls in a Plan are expected to result in future emissions reductions.

The CAA does not include specific requirements for projected inventories. But the RFP requirement for Serious ozone nonattainment areas requires that emissions reductions “be calculated in accordance with subsection (b)(1)(C) and (D) of this section (concerning creditability of reductions).” 42 U.S.C.

§ 7511a(c)(2)(B). Under Section 7511a(b)(1)(C), emission reductions are creditable for RFP “from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under subchapter V of this chapter.” The controlling regulations also mirror this language and add that creditable RFP reductions “need to be enforceable, permanent, quantifiable, and surplus.” 40 C.F.R. § 51.1110(a)(5). Section 7511a(b)(1)(D) includes limits on credibility of reductions that are not relevant

here. These credibility requirements apply to the RFP reductions but do not independently apply to projected inventories.

c. Motor Vehicle Emissions Budgets

RFP and attainment demonstrations in ozone nonattainment Plans also each include “motor vehicle emissions budgets.” These budgets are used in implementing the Act’s transportation conformity provisions, which require that planned transportation activities conform to the Plan before they can be funded or approved. *See infra* pp. 12–15; 42 U.S.C. § 7506(c)(1). Motor vehicle emissions budgets are defined by EPA’s transportation conformity regulations as the:

portion of the total allowable emissions defined in the submitted or approved [Plan] revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

40 C.F.R. § 93.101. As discussed in more detail below, these budgets are a tool used by federal and local transportation planning agencies to determine whether certain actions will conform to the Plan. 42 U.S.C. § 7506(c)(1)–(2)(A). Agencies compare estimated emissions from planned transportation activities with the budgets as part of determining whether the planned activities will “conform” to the Plan, consistent with the CAA’s transportation conformity requirements.

3. EPA's Oversight Role

Once a state submits a Plan or Plan revision, EPA conducts a completeness review, or the submission is deemed complete by operation of law. 42 U.S.C. § 7410(k)(1)(B). Within twelve months thereafter, EPA “shall approve,” in whole or in part, the portions of the Plan that meet “all of the applicable requirements of [the Act].” *Id.* § 7410(k)(1)–(3). EPA-approved Plans are federally enforceable. *See* 42 U.S.C. §§ 7604, 7413.

EPA has several options if it determines that a Plan submission does not meet the applicable requirements of the statute. It can issue a conditional approval, a partial disapproval, or a full disapproval. *Id.* § 7410(k)(3)–(4). If EPA disapproves a submission in whole or in part, it must promulgate a federal implementation plan within two years of such disapproval, unless the state corrects the deficiency and EPA approves the Plan submission before the agency promulgates the federal plan. *Id.* § 7410(c).

4. Transportation Conformity

As explained above, motor vehicle emissions budgets are used for transportation conformity purposes to determine whether a federal action will conform to the Plan. Section 7506(c)(1) of the Act prohibits federal agencies from engaging in, supporting, providing financial assistance for, licensing or permitting, or approving “any activity which does not conform” to a Plan that has been

approved by EPA under Section 7410. 42 U.S.C. § 7506(c)(1). It also provides that no metropolitan planning organization “shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under” Section 7410. 42 U.S.C. § 7506(c)(1). Activities conform to the Plan if: (1) they conform to its purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the NAAQS; and (2) they will not cause or contribute to a new violation of the NAAQS, increase the frequency or severity of any existing NAAQS violation, or delay timely attainment of the NAAQS or any required interim emission reductions or other milestones. *See id.* § 7506(c)(1)(A)–(B); 40 C.F.R. § 93.118.

Section 7506(c)(2) adds more specificity for transportation planning and decisions under the Federal-Aid Highway Act, 23 U.S.C. § 134, and Federal Transit Act, 49 U.S.C. §§ 5301–40. 42 U.S.C. § 7506(c)(2). Among other things, it prohibits the United States Department of Transportation (with limited exceptions) from approving or providing federal funds to any transportation plan, program, or project in a nonattainment area unless it conforms to the applicable Plan. 42 U.S.C. § 7506(c)(1)–(2). Section 7506(c)(2) further provides that, for a transportation plan or transportation improvement program to be found to conform to a Plan, a determination must be made that the estimated emissions from implementation of such transportation plans or programs “are consistent with

estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan.” *Id.* § 7506(c)(2)(A). The Act, in turn, defines “applicable implementation plan” to include Plans approved by EPA under Section 7410 of the Act. *Id.* § 7602(q). EPA has established regulations to implement the transportation conformity provisions of the Act at 40 C.F.R. part 93, subpart A. *See* 40 C.F.R. § 93.100.

Under Section 7506(c) and EPA’s implementing regulations, one important component⁴ of making conformity determinations for transportation plans⁵ and improvement programs⁶ is comparing the estimated emissions of the proposed plan or program with the motor vehicle emissions budgets contained in an applicable

⁴ The requirements to make conformity determinations differ for transportation plans, programs, and projects. An overview of the criteria and procedures for making conformity determinations for each type of activity can be found in EPA’s transportation conformity regulations at 40 C.F.R. § 93.109.

⁵ “Transportation plan” is defined in the transportation conformity regulations to mean “the official intermodal metropolitan transportation plan that is developed through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR part 450.” 40 C.F.R. § 93.101. These are long-term, 20-year regional transportation plans. *See 1000 Friends of Md. v. Browner*, 265 F.3d 216, 222 n.5 (4th Cir. 2001).

⁶ “Transportation improvement program” is defined in the transportation conformity regulations to mean “a transportation improvement program developed by a metropolitan planning organization under 23 U.S.C. 134(j).” 40 C.F.R. § 93.101. These are shorter, four-year plans, which list the specific projects to be carried out over the four-year period. 42 U.S.C. § 7506(c)(4)(D)(ii); 40 C.F.R. § 93.104(c)(3).

Plan. *See* 42 U.S.C. § 7506(c)(1)–(2)(A); 40 C.F.R. § 93.109. If the emissions of the proposed plans and programs exceed the budgets, the activities do not “conform” to the Plan. *See* 42 U.S.C. § 7506(c)(2)(A); *see also* 40 C.F.R. §§ 93.101 (defining applicable implementation plan to mean approved implementation plan), 93.109(c) (describing the application of “the budget test” in making conformity determinations), and 93.118(a) (one criteria for making a conformity determination for a transportation plan and a transportation improvement program is that it must be consistent with the budgets in the applicable implementation plan). The transportation conformity regulations also require the transportation plan, program, and projects to be consistent with budgets “for each year for which the applicable (and/or submitted) implementation plan specifically establishes a motor vehicle emissions budget(s),” and treat budgets from RFP demonstrations and attainment demonstrations as separate requirements. 40 C.F.R. § 93.118(b).

Because the process of reviewing and acting on a Plan pursuant to CAA Section 7410 can be a lengthy one, EPA’s regulations provide that, if certain criteria are met, EPA can find the budgets “adequate” for transportation conformity purposes before EPA takes final action on the Plan. *See* 40 C.F.R. §§ 93.109(c), 93.118(e)–(f); *see also* *1000 Friends of Md.*, 265 F.3d at 222, 237. This adequacy determination enables the relevant transportation agencies to make conformity

determinations based on the budgets in the submitted Plan that have been found to be adequate before EPA has determined whether the Plan submission is approvable. EPA's transportation conformity regulations list six criteria that must be satisfied for EPA to find budgets in a submitted Plan adequate for transportation conformity purposes. 40 C.F.R. § 93.118(e)(4).

B. Factual background

1. Colorado's Submissions, Reclassification, and the Proposed Rule

Between 2018 and 2022, Colorado made several Plan submissions related to the attainment of the 2008 ozone NAAQS for the Denver Area. AR0000003. The submissions included an attainment demonstration, emissions inventories, an RFP demonstration, and motor vehicle emissions budgets for 2020 (which was an RFP milestone year). *See id.* Colorado also submitted revisions to State Regulations 7 and 21 concerning the control of ozone precursor pollutants from operations such as oil and, gas, consumer products, and architectural and industrial maintenance coatings, and other operations. *Id.* at AR0000012–16.

Separately, Colorado submitted a 2020 RFP milestone compliance demonstration pursuant to Section 7511a(g)(2). AR0000274–85. Because it showed that the Denver Area achieved the applicable and statutorily required emissions reductions between 2018 and 2020, EPA approved the compliance demonstration in a separate action. AR0000135–39.

On October 7, 2022, EPA reclassified the Denver Area from Serious to Severe for the 2008 ozone NAAQS because it had failed to attain by the deadline of July 20, 2021. 87 Fed. Reg. 60926 (Oct. 7, 2022). Accordingly, EPA determined that the Denver Area had to attain the standard as expeditiously as practicable but no later than the Severe area attainment date of July 20, 2027. *Id.* at 60929.

Notwithstanding the reclassification,⁷ EPA proposed to approve certain aspects of Colorado's Plan submissions that satisfied the requirements of the Act. AR0000002. Among other things, EPA proposed to approve the Serious area RFP demonstration (including the 2020 RFP budgets), as well as revisions to Regulations 7 and 21. *Id.* EPA did not propose action on the submitted attainment demonstration. *Id.*

2. The Final Rule

In the final action, EPA approved, conditionally approved, and disapproved elements of Colorado's Plan. *See generally* 88 Fed. Reg. 29827. EPA's approvals that are the subject of this petition are as follows. First, EPA approved the Serious area RFP demonstration. *Id.* at 29828. The demonstration showed that emissions would fall by at least the required 9% of the baseline between 2018 and 2020 due

⁷ This reclassification did not moot Colorado's Plan submission to meet applicable Serious area requirements.

to creditable reductions, satisfying the Act’s requirements for a Serious nonattainment area. *See* AR0021570.

Second, EPA approved the budgets for the 2020 RFP milestone year. 88 Fed. Reg. at 29828. EPA specified that the budgets “are consistent with the reasonable further progress demonstration for the 2008 ozone NAAQS . . . and the other criteria in 40 CFR 93.118(e).” *Id.* EPA also found the RFP budgets to be adequate for transportation conformity purposes and available for use for future transportation conformity determinations. *Id.* (citing 40 C.F.R. § 93.118(e)(4)).

Third, EPA determined that the Final Rule complied with Section 7410(l). 88 Fed. Reg. at 29831. EPA noted that the revisions to Regulations 7 and 21 would strengthen the Plan. *Id.* at 29831. Because EPA approved control measures that would likely decrease emissions, EPA found that approved parts of the Plan would not interfere with any applicable requirements of the Act, including attainment of the NAAQS. *Id.*; *see also* AR0021592 (“Emissions are not expected to increase, and will likely decrease, as a result of EPA’s limited approval . . .”).

SUMMARY OF ARGUMENT

The Court should deny the petition because EPA’s approval of discrete elements of the Plan is consistent with the Act and the implementing regulations.

1. EPA properly approved Colorado’s RFP demonstration and motor vehicle emissions budgets even though the Denver Area failed to attain the

NAAQS by the applicable date. RFP is a tool used to help ozone nonattainment areas achieve attainment, but it is defined by statute and regulation in terms of specific required emissions reduction percentages. RFP reductions are approvable independently of the attainment demonstration, for which the CAA and EPA's implementing regulations provide separate requirements. *See* 42 U.S.C. § 7511a(b)(1)(A), (c)(2)(A)–(B); 40 C.F.R. § 51.1100(t). RFP for ozone is not meant to act as a redundant attainment demonstration. Because the Denver Area Plan satisfied specified emissions reduction requirements, EPA reasonably approved the RFP demonstration. To the extent that Petitioners challenge the meaning of RFP under EPA's longstanding regulations, this Court lacks jurisdiction to hear those claims because they are time barred.

EPA assessed the budgets for their consistency with the RFP requirements, as provided under the transportation conformity regulations. *See* 40 C.F.R. § 93.118(e)(4)(iv). Because the budgets are consistent with the applicable RFP milestone year requirements, EPA reasonably and lawfully found them adequate and approved them. To the extent that Petitioners challenge existing provisions in EPA's regulations for approving budgets and making adequacy determinations, this Court lacks jurisdiction to hear those claims because they are time barred.

2. EPA properly concluded that Colorado's Plan documented sufficient creditable reductions to demonstrate RFP. States can "take credit" in the context

of nonattainment planning only for emissions reductions resulting from control measures that are subject to federal or citizen enforcement. Here, EPA reviewed Colorado's Plan and supporting documentation and reasonably concluded that Colorado did not meaningfully rely on state-only measures in its emissions inventories to demonstrate RFP. Petitioners' broad and unsupported assumptions about the nature of the data relied upon to form the inventories and the potential effect on the RFP demonstration and budgets fail to undermine the reasonableness of EPA's conclusions on the record before it.

3. EPA's approval was consistent with the requirement that EPA "shall not" approve a Plan revision if it "would interfere with any applicable requirement concerning attainment" 42 U.S.C. § 7410(*I*). EPA reasonably determined that the revisions to the Plan either retained an existing standard, or established a more stringent one. Because the Plan revisions either improved air quality or maintained the status quo, EPA determined that the revisions would not interfere with attainment requirements and therefore satisfied Section 7410(*I*).

4. If the Court were to find any error, this Court should not vacate EPA's approvals in the Final Rule. Doing so would pose significant disruptive consequences and frustrate the objectives of the Act by removing federally enforceable control measures that are in place to help the Denver Area reduce

harmful emissions and attain the NAAQS by the new Severe area attainment deadline.

STANDARD OF REVIEW

An EPA action approving a Plan submission 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). 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. 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). “When an agency acts under an unwieldy and science-driven statutory scheme[] like the Clean Air Act, [the Court] affords the agency particular deference.” *WildEarth Guardians v. EPA*, 770 F.3d 919, 927 (10th Cir. 2014) (internal quotations omitted). *See also Oklahoma v. EPA*, 723 F.3d 1201, 1216–17 (10th Cir. 2013) (where the action at issue involves

“technical or scientific matters within the agency’s area of expertise,” deference to the agency is “especially strong”).

The Court reviews an agency’s interpretations of a statute it administers under the analytical framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).⁸ If “Congress has directly spoken to the precise question at issue,” the Court should apply the plain terms of the statute. *Id.* at 842. If, however, the statute is silent or ambiguous on the specific issue, the Court considers whether the agency’s interpretation of the statute is permissible. *Id.* at 843; *see also Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1161–62, 1164 (10th Cir. 2021). When *Chevron* does not apply, the Court affords the agency’s interpretation a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see generally, e.g., Sinclair Wyo. Refin. Co. v. EPA*, 887 F.3d 986, 991–92 (10th Cir. 2017).

EPA’s interpretation of its own regulations is also subject to deferential review. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Absent a genuine ambiguity, the

⁸ On May 1, 2023, the Supreme Court granted certiorari in *Loper Bright Enters., et al. v. Raimondo*, No. 22-451, to address the scope of agency deference under *Chevron*.

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 2416–18; *see also Walker v. BOKF, Nat’l Ass’n*, 30 F.4th 994, 1006 (10th Cir. 2022).

ARGUMENT

I. EPA Properly Approved the RFP Demonstration and Motor Vehicle Emissions Budgets, Which Are Tools Designed to Help an Area Attain the NAAQS.

EPA reasonably approved Colorado’s RFP demonstration and 2020 motor vehicle emissions budgets because they each satisfied the applicable requirements of the Act, even if standing alone they did not guarantee attainment. *See* 42 U.S.C. § 7410(k)(3). As discussed above, a nonattainment area Plan contains many elements. Although each element is intended to help an area achieve attainment, each element need not necessarily achieve that goal by itself.

Petitioners argue that the RFP and budgets components of a Plan are inseparable from a demonstration of actual attainment. *Br.* at 28–38. In their view, EPA was required to disapprove the RFP demonstration and the budgets solely because the area failed to attain—even though the Plan showed the Denver Area would meet the percentage-reduction RFP emission requirements specified in

the Act and the budgets were consistent with meeting the RFP requirements. *See* 42 U.S.C. § 7511a(b)(1)(A), (c)(2)(B).

Petitioners are wrong. The statute and EPA's implementing regulations define RFP for ozone nonattainment areas in terms of required percentage reductions in emissions, not in terms of an attainment demonstration (such a demonstration is a *separate* required element of a Plan, which is independently reviewed by EPA and not at issue here). 42 U.S.C. § 7511a(c)(2)(A)–(B); *see also* 40 C.F.R. §§ 51.1110 (RFP requirements), and 51.1108 (attainment demonstration criteria). EPA's longstanding interpretation of the statute in this respect is solidified in its controlling implementing regulations. Those regulations, which are beyond this Court's jurisdiction to review, are unambiguous. Regardless, EPA's interpretation reflected in those regulations is not only reasonable, but is the best reading of the statute, considering the structure of the Act and the distinction between RFP and the attainment demonstration.

Likewise, EPA's approval of the budgets is reasonable and consistent with the Act and EPA's longstanding implementing regulations, which are likewise beyond the Court's jurisdiction to review. EPA correctly approved the budgets because they are consistent with the applicable RFP milestone year requirements.

A. The text and structure of the Act support EPA’s interpretation that the RFP demonstration is severable from the attainment demonstration.

EPA correctly applied the statutory definition of RFP to determine that Colorado’s demonstration satisfied the Act’s requirements. Under the Act, an ozone RFP demonstration must show that the Plan will result in a specific percentage of emissions reductions by certain times calculated from a defined baseline. 42 U.S.C. § 7511a(c)(2)(B); *see also Nat. Res. Def. Council v. EPA*, 571 F.3d 1245, 1258 (D.C. Cir. 2009) (characterizing RFP provisions as “fixed percentage reductions” of emissions “on a specified schedule”). For a Serious ozone nonattainment area, States must achieve 3% annual emissions reductions from the area’s baseline emissions averaged over a three-year period, or less if the state demonstrates certain requirements, among them that its Plan includes all feasible measures considering what is technologically achievable. 42 U.S.C. § 7511a(c)(2)(B)(i)–(ii); *see also id.* § 7511a(b)(1)(A)(ii) (providing that Moderate ozone nonattainment areas can likewise justify less than the specified amount of reductions).

The demonstrations for RFP and ozone attainment are distinct requirements under the Act. 42 U.S.C. § 7511a(c)(2)(A)–(B). The RFP demonstration, as discussed above, provides that the Plan will achieve a specified percent of emissions reductions by certain dates. 42 U.S.C. § 7511a(c)(2)(B). The attainment

demonstration, on the other hand, demonstrates that the revised Plan “will provide for attainment of the ozone [NAAQS] by the applicable attainment date.” 42 U.S.C. § 7511a(c)(2)(A). This element of the Plan is an analysis based on mathematical modeling and supporting information, showing that an area will timely attain the NAAQS. *See id.*; *see supra* pp. 7–8. Petitioners’ reading of the Act conflates the RFP demonstration with the attainment demonstration. In the context of RFP for ozone, Congress identified separate, discrete progress goals that would contribute to attainment, without requiring that those goals alone ensure attainment. 42 U.S.C. § 7511a(c)(2)(B). Underscoring that RFP goals were not intended to alone ensure attainment, Congress provided states the option to propose *smaller* RFP emission reductions based on what “can feasibly be implemented in the area, in light of technological achievability”—and regardless of the consequences for attainment. *See id.* § 7511a(c)(2)(B)(ii).

Petitioners rely on two Section 7511a subsections—42 U.S.C. § 7511a(b)(1)(A)(i) and 42 U.S.C. § 7511a(c)(2)(B)—to support their flawed argument that Section 7511a “requires that RFP provisions achieve attainment by the relevant date.” Br. at 29; *see also id.* at 31. As discussed above, Section 7511a(c)(2)(B) identifies annual emissions reductions for Serious areas that are designed to contribute to the goal of attainment but may not achieve attainment on

their own. Section 7511a(b)(1)(A)(i)⁹ states that the RFP demonstration for Moderate areas shall provide annual emissions reductions “as necessary” to attain the NAAQS. 42 U.S.C. § 7511a(b)(1)(A)(i). However, this language does not tie ozone RFP to an attainment demonstration in the way Petitioners contend. The Act more specifically identifies what is “necessary” as a specified required percent reduction of baseline emissions for defined intervals of time, *id.* § 7511a(b)(1)(A), (c)(2)(B)(i), or possibly a smaller percentage reduction if meeting the default specified percent reduction is not achievable, *id.* § 7511a(c)(2)(B)(ii). To be sure, under this framework it is possible that a state would need to do more than meet RFP goals to ultimately reach attainment, but any such disparity is addressed by the additional required components of a Plan, including the separate attainment demonstration requirement.¹⁰

Petitioners also point to the Act’s general definition of RFP as evidence that “RFP provisions must reach attainment.” Br. at 29. But Petitioners cherry-pick parts of the general Section 7501 definition while ignoring its context and the ozone-specific overlay in Section 7511a. The Act defines RFP as “such annual

⁹ Although Section 7511a(b) applies to Moderate nonattainment areas, Moderate area requirements also apply to Serious areas. 42 U.S.C. § 7511a(c).

¹⁰ When an area is reclassified to Severe nonattainment for ozone, other measures are required (in addition to the existing RFP requirements) to move the area toward attainment. *See* 42 U.S.C. § 7511a(d).

incremental reductions in emissions of the relevant air pollutant *as are required by this part* or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.” 42 U.S.C. § 7501(1) (emphasis added). The words “this part” refers to part D of title I of the Act, which contains Section 7511a. Thus, what is “required” by the relevant part of the Act for Serious ozone nonattainment areas is an RFP demonstration that meets the specified annual reductions. *Id.* § 7511a(b)(1)(A), (c)(2)(B).

Petitioners’ reading of the general definition also ignores important context and history. The clause following the “or” defines RFP with respect to what is needed to attain, but this is only part of the definition. If Congress intended for RFP to *always* ensure attainment, as Petitioners claim, then this definition would have clearly expressed that intent by leaving out the first portion (“as are required by this part”). In fact, Congress did at one time define RFP to always ensure attainment. Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685, 746 (1977) (defining RFP as “annual incremental reductions in emissions of the applicable air pollutant . . . which are sufficient . . . to provide for attainment of the applicable [NAAQS]” by the applicable date). When Congress amended the CAA in 1990, however, it not only included the ozone-specific NAAQS provisions in Section 7511a, but it also amended the general definition of RFP in Section 7501 to incorporate the specific percent reductions that Congress established in Section

7511a. The CAA now provides that RFP means reductions required by Part D “or” reductions to ensure attainment if the Administrator so requires. 42 U.S.C. § 7501(1).

EPA does not dispute that RFP provisions are a tool used to *help* an area attain. But again, they are not the only elements responsible for achieving attainment. A Plan that meets RFP requirements thus does not become automatically subject to disapproval because of shortfalls in other areas that may result in a failure to reach attainment by the attainment date.¹¹

B. EPA’s action comports with long-standing regulations for ozone RFP.

The plain text of the relevant regulations, which Petitioners do not cite or quote, is also instructive. The regulations that define RFP unequivocally express EPA’s interpretation as requiring only the specified percentage reduction requirements provided in the Act:

Reasonable further progress (RFP) means both the emissions reductions required under CAA section 172(c)(2) *which EPA interprets to be* an average 3 percent per year emission reductions of either VOC or NO_x and CAA sections 182(c)(2)(B) and (c)(2)(C) and the 15 percent reductions over the first six years of the plan and the following three percent per year average under § 51.1110.

¹¹ Notably, the Denver Area did achieve the planned RFP reductions. *See* AR0000135–39 (EPA’s determination that the 2020 milestone compliance demonstration is adequate to show that the Denver Area met the RFP milestone requirements); AR0000274–85 (Colorado’s milestone compliance demonstration).

40 C.F.R. § 51.1100(t) (emphasis added). Section 51.1110(a),¹² which sets forth the RFP requirements for areas classified Moderate or higher, also describes RFP in terms of specific percentage emissions reductions.¹³ Thus, the regulations by their plain terms do not require that the RFP demonstration alone guarantee attainment, but just require that an area make incremental *reasonable* progress toward attainment via achieving specified percentages of emissions reductions. EPA correctly evaluated Colorado’s RFP demonstration by applying the controlling regulations.

Petitioners incorrectly argue that EPA is “selectively citing” its own regulations and taking the regulatory definition of RFP out of context. Br. at 31–33. Though unclear, Petitioners appear to be asserting that EPA erred when it relied on its own duly promulgated regulations to support its reasoning. But the regulations are not ambiguous, and EPA has applied the same regulatory interpretation of RFP in response to similar objections in other Plan approval actions for the ozone NAAQS. *See, e.g.*, 88 Fed. Reg. 24693, 24694–95 (April 24, 2023). Nor is EPA “selectively citing” to its regulations as there is nothing else to

¹² Section 51.1110(a) provides the RFP requirements for various implementation scenarios and consistently frames those requirements in terms of fixed percentages. Specific percentages are used thirteen times in this regulatory provision.

¹³ These regulations were promulgated in 2015, 80 Fed. Reg. 12264 (Mar. 6, 2015), as part of a rulemaking implementing requirements for the 2008 ozone NAAQS (the “2008 Ozone Rule”).

cite that suggests anything other than what is clearly stated in Sections 51.1100(t) and 51.1110(a). Petitioners point to no alternative provisions within the 2008 Ozone Rule that could be read to support their position.

Even if Petitioners could identify any ambiguity within Sections 51.1100(t) and 51.1110(a), and they cannot, the structure and purpose of the regulations, coupled with the history of the 2008 Ozone Rule, confirm EPA's construction of the regulations' plain text. *Kisor*, 139 S. Ct. at 2423.

First, the different elements of the Plan are reflected in the structure of the regulations, which set forth separate requirements for the control strategy for the area, and for attainment and RFP demonstrations. *Compare* 40 C.F.R. § 51.112 (as part of control strategy, Plan must show that it contains measures adequate to ensure attainment) *and* 40 C.F.R. § 51.1108 (attainment demonstration requirements), *with* 40 C.F.R. § 51.1110 (RFP requirements).

Second, the history of the 2008 Ozone Rule supports EPA's interpretation. The 2008 Ozone Rule was preceded by a preamble in 1992 setting forth EPA's interpretation of Title I of the Act. *See generally* 57 Fed. Reg. 13498 (Apr. 16, 1992). As documented in the 1992 Preamble and 2008 Ozone Rule, EPA has long viewed the RFP demonstration and attainment demonstration as independent requirements serving distinct purposes. *See* 1992 Preamble, 57 Fed. Reg. at 13515–16 (describing the requirements of the attainment demonstration); *id.* at

13516–18 (defining the RFP demonstration and how to quantify the baseline emissions upon which the percent reductions are calculated); 2008 Ozone Rule, 80 Fed. Reg. at 12265 (characterizing the attainment demonstration and RFP as distinct Plan requirements for the 2008 ozone NAAQS). The 2008 Ozone Rule states that the purpose of the percent reduction requirements is “to foster the achievement of reasonable further progress toward attainment.” 80 Fed. Reg. at 12276. It acknowledges that RFP provisions are a tool used to move an area “toward attainment” by reducing precursor pollutants by a fixed amount each year. *Id.* at 12271–72.

Thus, the plain text, structure, history, and purpose of the regulations support EPA’s interpretation. “Reasonable further progress” means just that—incremental progress toward achievement of the goal of attainment. EPA appropriately applied that interpretation to the action here because Colorado’s Plan met the specific percent reduction requirements set forth in the Act and the regulations.

C. Petitioners are jurisdictionally barred from directly challenging the validity of the regulations.

Without identifying any ambiguity in EPA’s implementing regulations, Petitioners imply that the regulations can be set aside or ignored because they “cannot be reconciled with the statutory text.” Br. at 32 (citing *Sierra Club v. EPA*, 551 F.3d 1019, 1021, 1027–28 (D.C. Cir. 2008)). But to the extent Petitioners are arguing that the Act should be interpreted to require that RFP

demonstrations must guarantee attainment, and that EPA’s regulations should have been so written consistent with their preferred statutory interpretation, that is a regulatory challenge that could have been raised only in the D.C. Circuit within 60 days of the 2008 Ozone Rule’s promulgation in 2015. 42 U.S.C. § 7607(b)(1).¹⁴

A challenge to the regulations filed outside this 60-day window is jurisdictionally barred unless it is based on grounds arising after the initial window for judicial review. *Utah v. EPA*, 765 F.3d 1257, 1258–62 (10th Cir. 2014).

Petitioners do not purport to directly challenge the rule on after-arising grounds, and any such challenge could be brought only in the D.C. Circuit. Petitioners’ challenge is based on grounds known at the time EPA promulgated the 2008 Ozone Rule because the regulatory definition of RFP clearly states that EPA is interpreting the same CAA provisions that Petitioners are now relying on.

Compare 42 U.S.C. §§ 7502(c)(2) and 7511a(c)(2)(B)–(C), with 40 C.F.R. § 51.1100(t).

The case that Petitioners cite, *Sierra Club v. EPA*, is a red herring. That case concerned whether EPA “reopened” its regulations exempting major sources of hazardous air pollutants from normal emission standards during startup, shutdown,

¹⁴ In fact, the 2008 Ozone Rule was contested, and the petitioners did not challenge the meaning of RFP as it relates to attainment. *See generally S. Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138 (D.C. Cir. 2018).

and malfunction periods. 551 F.3d at 1024–28. Under the reopener doctrine, an otherwise untimely challenge to an agency action can proceed “where an agency has—either explicitly or implicitly—undertaken to reexamine its former choice.” *Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016) (internal quotation marks omitted) (quoting *Nat’l. Mining Ass. v. Dep’t of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995)). But Petitioners do not argue that EPA reopened its regulations—likely because they have no basis to do so—and they fail to explain how this Court could otherwise set aside or ignore unambiguous controlling regulations promulgated nearly a decade ago and that this Court lacks jurisdiction to review.

D. EPA Reasonably Approved the Budgets for Transportation Conformity Purposes Based on Their Consistency with the Applicable RFP Milestone Year Requirements.

EPA’s transportation conformity regulations, which implement Section 7506(c) of the CAA, state that motor vehicle emissions budgets may be evaluated and approved or found adequate based on consistency with an RFP demonstration, or an attainment demonstration, or both, depending on what is relevant to the EPA’s action on a given Plan revision. This furthers the goal of Section 7506(c), which is to ensure that planned transportation activities conform to the applicable Plan before they can be funded or approved. 42 U.S.C. § 7506(c)(1). Here, EPA

reasonably found adequate and approved the budgets based on their consistency with the RFP demonstration, which was also approved in the Final Rule.

Petitioners contend that EPA’s decision to find adequate and approve the budgets was unlawful because the Act “ties” the budgets to attainment. Br. at 38. This argument is inconsistent with EPA’s regulations implementing the relevant statutory provisions and must be rejected. Petitioners also appear to argue that EPA erroneously determined that the budgets satisfied the fourth adequacy criterion in the transportation conformity regulations. *See* Br. at 39–41. That criterion required EPA to determine whether the budgets, “when considered together with all other emissions sources, [are] consistent with applicable requirements for reasonable further progress, attainment, *or* maintenance (*whichever is relevant to the given implementation plan submission*).” 40 C.F.R. § 93.118(e)(4)(iv) (emphasis added). The RFP requirements are the “applicable requirements” for purposes of the fourth adequacy criterion in this case, and EPA reached the reasoned conclusion that the budgets were consistent with the relevant RFP demonstration for the 2020 milestone year.

1. The budgets, when considered with all other emissions sources, are consistent with the Act’s requirements for RFP.

Petitioners argue that “EPA cannot approve [budgets] that failed to attain the NAAQS by the attainment deadline.” Br. at 38. But the Act’s attainment

requirements are not the “applicable requirements” at issue. Because EPA’s final action approved the RFP demonstration but took no action on the attainment demonstration, 88 Fed. Reg. at 29828, the Act’s RFP requirements are the relevant “applicable requirements” for purposes of the fourth adequacy criterion. *See* 40 C.F.R. § 93.118(e)(4)(iv). Contrary to Petitioners’ argument that EPA is “misreading” this regulation, Br. at 41, EPA’s interpretation that the “or” is disjunctive is consistent with the plain regulatory text.

EPA’s reading is also consistent with the plain text of the regulatory definition of “motor vehicle emissions budgets.” Budgets are defined as the on-road mobile source “portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date *for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS . . .*” 40 C.F.R. § 93.101 (emphasis added). This definition does not change when budgets for RFP and attainment are required and submitted for the same year (here, 2020).

Petitioners claim that, when budgets apply for an attainment year, they must conform to the attainment projections. Br. at 40 (citing 40 C.F.R. § 93.118(e)(4)(v)). Like Section 93.118(e)(4)(iv), Section 93.118(e)(4)(v) sets forth criterion for budgets to be found adequate for transportation conformity

purposes. It provides that budgets must be “consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan.” 40 C.F.R. § 93.118(e)(4)(v). Where, as here, EPA evaluated budgets for their consistency with RFP and did not act on an attainment demonstration, this provision does not require that the budgets also be evaluated with respect to attainment projections.

Consistent with these regulatory provisions and given the scope of EPA’s final action here, EPA reviewed the budgets alongside the RFP demonstration to determine whether they were consistent with RFP requirements. 88 Fed. Reg. at 29828 (approving the budgets “for the 2020 RFP milestone year . . . because they are consistent with the RFP demonstration”); *see also* AR0021570 (stating that EPA’s approval is based on “the State’s approved milestone compliance” and the budgets’ consistency with the RFP demonstration). This approach is consistent with EPA’s treatment of budgets for other areas when no action was taken on the attainment demonstration. *See* 88 Fed. Reg. at 24696 (deferring action on the attainment demonstration and approving the budgets for RFP purposes).

Petitioners do not challenge EPA’s conclusion that the budgets are consistent with the RFP demonstration—only that EPA should have assessed the budgets for consistency with the attainment demonstration instead. *See* Br. at 38–44. To the extent that Petitioners are arguing that EPA’s approval of the budgets

was flawed because the RFP provisions did not bring the area into attainment, Br. at 42–43, this argument fails to recognize the distinctions between RFP and attainment, and must be rejected for the reasons described in Sections I.A–B above.

Lastly, Petitioners argue that *Natural Resources Defense Council v. EPA* supports their position. Br. at 42–44. There, petitioners similarly argued that EPA’s implementing regulations “require[] that the milestone-year budgets be ‘consistent with . . . attainment.’” 638 F.3d 1183, 1192 (9th Cir. 2011). The court rejected this argument because “the rule flatly contradicts their reading.” *Id.* at 1192. “The plain-text meaning of the rule is clear: For budgets concerning milestone years, reasonable further progress requirements are relevant; for budgets concerning the attainment year, attainment requirements are relevant; and for budgets concerning maintenance years, maintenance requirements are relevant.” *Id.* at 1193. Determining that the budgets at issue concerned RFP milestone years, not the attainment year, the court upheld EPA’s adequacy determination for the budgets. *Id.*

Although the milestone year and attainment year differed in that case, the same principle applies here. EPA approved the budgets for the 2020 milestone year because they are consistent with the RFP demonstration and satisfy the criteria in 40 C.F.R. § 93.118(e) with respect to RFP. 88 Fed. Reg. at 29828. EPA

did not decide whether the budgets were consistent with attainment, and under the transportation conformity regulations, it was not required to do so, given that the relevant requirements for purposes of this final action were the RFP requirements. *See* 40 C.F.R. § 93.118(e)(4)(iv); *see also* AR0021570.

2. EPA’s interpretation of the transportation conformity regulations is entitled to deference.

As noted above, EPA’s approval of the budgets based on their consistency with the RFP demonstration accords with the plain text of the transportation conformity regulations. *See Kisor*, 139 S. Ct. at 2415. EPA’s construction of the fourth adequacy criterion to require that the budgets be consistent with the Act’s RFP requirements for this action (and thus that the budgets be reviewed considering the RFP demonstration rather than the attainment demonstration) was not plainly erroneous and is entirely consistent with the regulation’s plain language. *See* 40 C.F.R. § 93.118(e)(4)(iv).

However, even if this Court were to conclude there is genuine ambiguity in the regulations, federal agencies are entitled to deference when their regulatory interpretation is reasonable and “the character and context of the agency interpretation entitles it to controlling weight.” *Kisor*, 139 S. Ct. at 2416. Such deference is particularly warranted when, as with the application of the criteria for making adequacy findings, the action concerns “technical or scientific matters within the agency’s area of expertise.” *Oklahoma*, 723 F.3d at 1216–17.

In short, EPA articulated a reasoned basis for its determination that the budgets satisfy the fourth adequacy criterion because the budgets are consistent with the applicable requirements for RFP and because RFP requirements were the relevant requirements for purposes of this action.

Petitioners appear to imply, like their arguments regarding RFP provisions, that the transportation conformity regulations should have been written differently to require budgets to guarantee attainment. *See* Br. at 26, 38. But for the same reasons stated above, *see supra* pp. 33–35, any such argument that the regulations are defective amounts to a challenge that could have been raised only in the D.C. Circuit within 60 days of the transportation conformity rule’s promulgation. 42 U.S.C. § 7607(b)(1); *see also* 62 Fed. Reg. 43780 (Aug. 15, 1997).¹⁵

II. EPA Reasonably Evaluated the Creditability of Reductions for Colorado’s RFP Demonstration.

Petitioners argue that EPA’s approval of Colorado’s RFP demonstration was arbitrary and capricious because Colorado erroneously “took credit” for emissions reductions resulting from state law control measures that are not federally enforceable. *See* Br. at 44–48. This argument is misplaced. EPA sufficiently examined Colorado’s RFP demonstration and supporting technical documentation

¹⁵ The language in Section 93.118(e)(iv) and the definition of budgets in Section 93.101 were promulgated in a 1997 rule. While the transportation conformity regulations have been subsequently revised, this text remains the same.

and correctly concluded that Colorado did not impermissibly rely on state-only emission reductions in such a way as to invalidate its RFP demonstration. Importantly, even if Colorado's RFP demonstration did inadvertently include some state-only reductions, the RFP demonstration still documents more than enough reductions that are unquestionably creditable to satisfy the Act's RFP requirements. For example, federally enforceable measures for oil and gas condensate and storage tanks, alone, provided ample emission reductions. Because EPA examined the relevant information and articulated a rational connection between the facts and the decision, EPA's action should be upheld. *OXY USA*, 32 F.4th at 1044.

A. Colorado did not impermissibly rely on state-only measures in a meaningful way.

As background, Colorado's RFP demonstration, which was developed by the state in 2020, included a 2011 base year inventory, a 2017 RFP milestone year inventory, and a 2020 attainment year projected inventory.¹⁶ AR0014815–17; AR0014829–30. As to RFP, the 2011 inventory established the baseline from

¹⁶ The year 2020 was also an RFP milestone year, meaning that it was a year in which a target reduction in emissions was to be measured under one of the provisions of Section 7511a. *See supra* p. 9. Here, the RFP milestone years were 2017 (six years after the baseline year) and 2020 (three years later). Thus, 2020 had the distinct purposes of being both an RFP milestone year and an attainment measurement year—but the two purposes are not always linked to the same year.

which Colorado demonstrated the necessary emission reductions over time. The 2017 milestone year inventory was based on modeling as updated by actual data collected from the relevant industries. AR0014816–17. The 2020 inventory was based on modeling and projections deriving from the emissions data collected for the 2017 inventory. AR0014839. Colorado used EPA-approved emissions models and methodologies to support its calculations. AR0014816–17; AR0014839.

RFP demonstrations by their general nature include an element of prediction, in which the state explains *which* reductions they are relying on to demonstrate that they will, in the future, achieve the RFP milestones. Those predicted reductions must meet the criteria for creditability in CAA Section 7511a(b)(1)(C). *See also supra* pp. 9–10. For Serious ozone nonattainment areas, the state must show that a 3% annual emissions reduction from a baseline year will occur over a three-year period. 42 U.S.C. § 7511a(c)(2)(B)(i).

Although unclear from the brief, Petitioners appear to dispute EPA’s conclusion that the RFP demonstration showed that 3% creditable annual reductions would occur for the years 2018 through 2020.¹⁷ In fact, EPA

¹⁷ Petitioners confuse the issue of projected inventories and creditable reductions. The Act includes several inventory requirements for ozone nonattainment areas—none of which concern the inventories at issue here. *See, e.g.*, 42 U.S.C. §§ 7502(c)(3), 7511a(a)(1), 7511a(a)(3), and 7511a(b)(1)(B). The projected inventory that Petitioners challenge has regulatory significance for the

reasonably concluded, based on the record before it, that required projected reductions in that period would occur from creditable measures. And the reductions *did* occur as projected, as evidenced by Colorado’s milestone compliance demonstration. AR0000135–39.

In its submission, Colorado confirmed that “State-only and voluntary local measures do not receive emission reduction credits in the 2020 emission inventories because they are not included as enforceable measures in the [Plan].”¹⁸ AR0014883. Colorado further explained that, because state measures can be difficult to model and quantify, they were not included as enforceable measures and did not receive emission reduction credits in the inventories. *See, id.*; AR0014926; AR0014833–37.

After reviewing the rulemaking record, EPA reasonably concluded that Colorado did not impermissibly rely on state-only measures in a meaningful way. AR0021574–76. In response to comments, EPA clarified aspects of the inventory

Final Rule only in so far as it was used to demonstrate how Colorado would *achieve* RFP. *See* AR0000004 (stating EPA is “evaluating Colorado’s emission inventories for purposes of meeting RFP requirements”). Therefore, Petitioners’ argument does not concern any CAA requirement regarding emissions inventories, but rather the credibility of reductions under Section 7511a(b)(1)(C). *See supra* pp. 9–10.

¹⁸ Petitioners’ accusations regarding Colorado’s history of air quality control are baseless and irrelevant. *See* Br. at 49–51. EPA is required to review and approve Plans if they meet the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). EPA did so here when it approved elements of Colorado’s Plan.

that the commenter misunderstood. For example, EPA explained that certain data referred to by commenters was for “area sources and thus not part of the 2017 and 2020 oil and gas point source inventories,” that some revisions to Regulation 7 were intended to be state-only and were not included in the Plan submission, and that the state was not relying on parts of Regulation 7 that had not yet been approved into the Plan. AR0021575. EPA also explained that a major portion of the creditable reductions came from federally enforceable portions of Regulation 7: the “95% control efficiency of air pollution control equipment and condensate storage tanks over two tons per year of actual uncontrolled VOCs.” *Id.*¹⁹

Nevertheless, Petitioners continue to make unsupported assumptions about the nature of the inventories and incorrectly imply that significant credited emissions reductions must have resulted from state-only control measures. Br. at 46–47. Petitioners also expand the scope of the issue from the comments in an impermissible way.²⁰ Petitioners attempt to reframe this as a problem of state

¹⁹ EPA further explained creditable reductions from Regulation 7 related to external combustion boilers, internal combustion engines, and industrial processes. *See* AR0021575.

²⁰ “Generally, a party challenging an agency regulation must have initially presented its concerns to the agency during the rulemaking process in order for a reviewing court to consider those concerns.” *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141, 1151 n.11 (10th Cir. 2016). Petitioners have waived any argument based on the unspecified “various elements” that they allude to.

reporting more broadly, and one that inexplicably implicates other, unspecified “elements” of Colorado’s Plan besides RFP, which were not identified in their comments. *Compare* Petitioners’ comments on proposed rule, AR0020302, *with* Br. at 46–47. Contrary to Petitioners’ assertions, EPA correctly made a rational connection between the facts found and the decision made with respect to the creditability of the reductions in the inventories relied upon for RFP. *See OXY USA*, 32 F.4th at 1044.

B. Even if Colorado’s inventory included some state-only measures, EPA properly concluded that Colorado demonstrated RFP with creditable reductions.

In response to comments, EPA further explained that, even if Colorado credited some state-only measures, it would not impact the ultimate conclusions of the RFP demonstration. AR0021575–76. The projected reductions included in the record for the Denver Area far surpassed the reductions required to demonstrate that the area would meet the 9% progress requirement from 2018 to 2020. *See* AR0021575–76. Specifically, EPA explained that Colorado had demonstrated that the area would achieve 14 tons per day (“tpd”) of VOC emissions reductions beyond that required to demonstrate RFP under the Act. AR0021575. The demonstration included an analysis of every source category of VOC emissions.

Information in the record shows that the reductions from the rules applicable to the oil and gas condensate/oil tanks category alone are sufficient to establish the

necessary RFP. Specifically, the 2011 base year inventory, which Petitioners do not challenge, is 518.8 tpd VOC and 320.0 tpd NO_x. AR0014816. Applying the percent reductions required under the Act to show RFP over the 2018–2020 interval would result in a minimum necessary reduction of 46.7 tpd VOC, AR0014789, or 28.8 tpd NO_x, or a combination of both. The RFP demonstration shows creditable net VOC reductions of 57.5 tpd from the oil and gas condensate/oil tanks category between 2018 and 2020.²¹ *See* AR0014788 (tbl. 2). These 57.5 tpd of federally required reductions make up 11.1% of the 2011 VOC baseline of 518.8 tpd—exceeding the 9% RFP requirement.

Even if EPA were to set aside the demonstrated and federally enforceable reductions described above, Colorado’s RFP demonstration is still sufficient. Reductions from federally enforceable measures such as VOC content limits for consumer products and architectural and maintenance coatings in Regulation 21, VOC and NO_x controls for mobile sources, and NO_x controls for electric generating unit (“EGU”) point sources in Regulation 3 would result in even greater creditable emissions reductions beyond those needed for RFP.

²¹ The calculations in section II.B of this brief are generally reached by subtracting 2020 from 2017 emissions for the relevant category and pollutant. For example, for oil and gas condensate/oil tanks, 107.7 tpd VOC (2017) – 50.2 tpd VOC (2020) = 57.5 tpd VOC reductions. *See* AR0014788 (tbl. 2).

The RFP demonstration shows net VOC reductions of 16.6 tpd resulting from federal permanent and enforceable control programs for on-road mobile-sources and area sources in Regulation 21 from 2018 to 2020.²² *See* AR0014788 (tbl. 2). In addition to VOC reductions, Colorado could have counted NO_x reductions for the federal permanent and enforceable control programs for on-road and non-road mobile sources and for EGU point sources.²³ The federal permanent and enforceable control programs for mobile sources include Tier 2 and Tier 3 standards for light-duty and some medium-duty vehicles (40 C.F.R. Parts 85, 86), heavy-duty engine and vehicle standards (40 C.F.R. Part 86), the vehicle inspection and maintenance program (Regulation 11 of the Plan), and gasoline Reid vapor pressure standards (40 C.F.R. § 1090.215(a)(2)). AR0014823–25 (on-road sources); AR0014830 (federal enforceable measures, tbl. 23); AR0014831 (inspection and maintenance program); AR0014847–48 (on-road sources). The NO_x reductions resulting from these clearly creditable control measures total 22 tpd from 2018 to 2020. *See* AR0014788 (tbl. 2). Thus, had Colorado included

²² This calculation does not include reductions from “other” in the area source category because this sub-category is not part of Regulation 21.

²³ As EPA noted in response to comments, Colorado was eligible to use a combination of VOC and NO_x reductions to demonstrate RFP. Colorado did not do so because it was able to comfortably demonstrate RFP with just VOC reductions. AR0021575

NO_x reductions, it would have demonstrated even greater emissions reductions during this period. AR0021575–76.

As demonstrated by the calculations above based on evidence in the record, the RFP demonstration was not compromised by possible inclusion of state-only reductions. Petitioners incorrectly assert that EPA “cannot” reach that conclusion without a specific quantification of all such reductions. Br. at 49. But as noted in the response to comments, and as shown above, it is possible to examine specific measures in the record that are indisputably federally enforceable to determine that the measures were sufficient to ensure RFP. Regardless of Petitioners’ assertions concerning the effect of the 2017 inventory, the quantifiable and creditable (federally enforceable) reductions that Colorado submitted are more than sufficient to satisfy the CAA requirements at issue. *See* 5 U.S.C. § 706 (in reviewing agency action, the “court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error”).

Petitioners’ vague claims regarding potential state-only reductions are insufficient to overcome EPA’s reasoned conclusion that the state’s RFP demonstration was sufficient. Even if Petitioners had identified specific reductions from state-law control measures that Colorado supposedly relied on—and they

have not—the information in the record establishes that Colorado provided for more than enough reductions to show RFP.²⁴

III. EPA Reasonably Determined that the Approved Elements of the Plan Comply with Section 7410(l) Because They Do Not “Interfere” With Attainment of the NAAQS.

In the Final Rule, EPA approved control measures that it concluded would not increase emissions and, in fact, would “likely decrease” them. AR0021592. EPA’s judgment that those Plan revisions that would not increase emissions do not “interfere” with attainment of the NAAQS is consistent with the plain and ordinary meaning of the statute, its structure, and EPA’s past practice in conducting analyses under Section 7410(l).

Petitioners’ argument to the contrary disregards the meaning of “interfere” and misconstrues the action EPA took. As a result, their interpretation of Section 7410(l)—that only Plan revisions that will provide for attainment or advancement of the NAAQS comply with the provision—finds no support in dictionary definitions or case law.

²⁴ Because the reductions are creditable for RFP purposes and the RFP demonstration served as the basis for EPA’s approval of the budgets, the reductions are likewise creditable for the budgets. *See* 40 C.F.R. § 93.118(e)(4)(iv).

A. The plain text of Section 7410(l) and the structure of the Act support EPA’s interpretation.

Section 7410(l) of the Act provides that EPA “shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment” For over fifteen years, EPA has interpreted Section 7410(l) as permitting approval of a Plan revision as long as “emissions in the air are not increased,” thereby preserving “status quo air quality.” *Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006); *see also Indiana v. EPA*, 796 F.3d 803, 806 (7th Cir. 2015) (same); *Ala. Env’t Council v. EPA*, 711 F.3d 1277, 1292-93 (11th Cir. 2013) (same); *Galveston-Houston Ass’n for Smog Prevention v. EPA*, 289 F. App’x 745, 754 (5th Cir. 2008) (hereinafter “GHASP”) (same). This understanding turns on the word “interfere,” which EPA interprets to mean “to hinder or make worse.” *Ky. Res. Council*, 467 F.3d at 995. Because the Act does not define “interfere,” it must be construed with the “ordinary meaning” of the word. *F.T.C. v. Kukendall*, 466 F.3d 1149, 1154 (10th Cir. 2006). This Court has used dictionary definitions to determine the ordinary meaning of a word. *See, e.g., id.*; *United States v. Torres-Laranega*, 476 F.3d 1148, 1158–59 (10th Cir. 2007).

The dictionary definitions uniformly support EPA’s interpretation of “interfere.” “To interfere is to hamper, frustrate, or meddle in a deleterious way.” Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 570 (3d ed. 2011); *see also Merriam-Webster’s Collegiate Dictionary* 652 (11th ed. 2005) (“to interpose in a

way that hinders or impedes”); Webster’s New World Dictionary Third College Edition 704 (1988) (defining “interfere with” as “to hinder”). Therefore, according to the plain meaning of “interfere,” a revision satisfies Section 7410(*l*) if it does not hamper, frustrate, hinder, or impede any applicable requirement concerning attainment, RFP, or any other applicable CAA requirement. *See, e.g., S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006) (“South Coast”), decision clarified on denial of reh’g on other grounds, 489 F.3d 1245 (D.C. Cir. 2007) (concluding that Section 110(*l*) precludes actions “that would hinder an area’s ability” to comply with applicable requirements). The Third Circuit has held that “[d]etermining whether such interference will occur is an inquiry centered upon the specific relationship between the instrument doing the potential interfering . . . and its effect” *Ctr. for Biological Diversity v. EPA*, 75 F.4th 174, 180 (3d Cir. 2023).

This interpretation accurately reflects Section 7410(*l*)’s role in the Act. It does not itself set requirements for emissions reductions. That is the function of Section 7410(a), which requires states to develop Plans that provide for attainment by using a package of control strategies. 42 U.S.C. § 7410(a). By contrast, Section 7410(*l*) is an “antibacksliding” provision that does not impose substantive obligations, but erects “a high threshold for removing controls from a [Plan].”

South Coast, 472 F.3d at 900; *see also Indiana*, 796 F.3d at 806 (describing Section 110(l) as an “‘antibacksliding’ provision”).

1. EPA applied the appropriate level of rigor to the Section 7410(l) analysis under the circumstances.

EPA implements this interpretation of Section 7410(l) by approving Plan revisions that either improve air quality or preserve the status quo. In doing so, “the level of rigor needed for any CAA section [7410(l)] demonstration will vary depending on the nature and circumstances of the revision.” AR0021591; *see also Ctr. for Biological Diversity*, 75 F.4th at 181 n.4. Where EPA expects that a Plan revision may increase emissions, it typically requires that a state either (1) submit an air quality analysis to demonstrate that the revision would not interfere with any applicable requirement or (2) substitute equivalent or greater emissions reductions to preserve status quo air quality. *See* AR0021591–92; *see also Ky. Res. Council*, 467 F.3d at 995 (denying petition challenging under Section 7410(l) Plan revision approval where the revision would not increase net emissions).

But where the Plan revision does not relax or remove any pollution controls—and therefore does not involve any increase in emissions—such requirements are unnecessary, because there is no reason to believe that such a Plan revision will hinder attainment by worsening air quality. *See* AR0021591–92; *Ctr. For Biological Diversity*, 75 F.4th at 181 (holding that the Section 7410(l) analysis depends on the nature of the Plan revision at issue and the “particular

interference risk it poses.”). In *WildEarth Guardians v. EPA*, 759 F.3d 1064 (9th Cir. 2014), EPA argued that Section 7410(*I*) was not implicated because the Plan revision at issue did “not relax or remove any emissions limit or control,” but in fact strengthened emission limits. Br. for EPA at 49, *See WildEarth Guardians v. EPA*, No. 12-71523, 2012 WL 5865677, at *49 (9th Cir. Nov. 9, 2012). The Ninth Circuit upheld EPA’s approval of the Plan revisions for this reason. 759 F.3d at 1074. The court noted that “even if the [Plan] merely maintained the status quo, that would not interfere with the attainment or maintenance of the NAAQS” within the meaning of Section 7410(*I*). *Id.*

EPA applied the same interpretation of Section 7410(*I*) in approving the Plan revisions at issue in this petition. EPA concluded that Colorado’s revisions were either preserving the existing standard or establishing a more stringent one, and therefore complied with Section 7410(*I*). 88 Fed. Reg. at 29831. In response to comments, EPA explained that the Plan revisions did not relax a standard or eliminate a program. AR0021592. Colorado incorporated categorical “Reasonably Available Control Technology” and other rule revisions that added emission limits into the Plan. AR0021592. And EPA determined that the proposed changes to Regulations 7 and 21 would only strengthen the Plan. *Id.*; 88 Fed. Reg. at 29831; *see also* AR0021591, AR0021602–04 (explaining revisions to the regulations). Because the Final Rule did not “weaken or remove pollution

controls,” *WildEarth Guardians*, 759 F.3d at 1074, and was likely to decrease emissions, EPA concluded that approval of the revisions would not violate Section 7410(l). 88 Fed. Reg. at 29831.

2. *WildEarth Guardians* is instructive because, as here, it involved Plan revisions that would not cause or contribute to increased emissions.

Petitioners argue that *WildEarth Guardians* is not controlling because (1) EPA did not engage in a meaningful Section 7410(l) analysis and (2) “the status quo here results in NAAQS violations.” Br. at 56. But Petitioners’ position is not supported by the Act, the case law, or the record. EPA applied the appropriate level of rigor to the Section 7410(l) analysis based on the nature of the revision that was subject to approval and the evidence before it. *See Ctr. for Biological Diversity*, 75 F.4th at 181.

Petitioners pinpoint two issues that they argue should have prompted EPA to bolster its analysis. First, they allege that the Plan revisions authorize increased emissions at Suncor Petroleum Refinery (“Refinery”). Br. at 53. They claim that the revisions are responsible for these violations because they authorize Colorado to issue an operating permit to the Refinery. *Id.* Petitioners cite their comment on the state draft operating permit, which alleges that Petitioners’ modelling shows NO_x NAAQS violations at the Refinery. AR0020323.

Petitioners fundamentally misunderstand the actions EPA took (and did not take) in the Final Rule. Gas-fueled process heaters are the equipment principally responsible for NO_x emissions at the Refinery. *See* AR0021592. Although Colorado did propose Reasonably Available Control Technology NO_x emission limits for the Refinery’s process heaters, EPA did not finalize action on this proposal in the Final Rule. 88 Fed. Reg. at 29828, 29830, 29834 (noting that EPA is not acting on NO_x emission limits for refinery gas fueled process heaters). Therefore, after considering Petitioners’ comment and their modeling, EPA did “not find any basis to conclude” that the Refinery’s operations (or anything else in the action) “could cause or contribute to any alleged violations of the NO_x NAAQS.” AR0021592.

Second, Petitioners argue that the Plan revisions necessarily interfere with attainment of the 2008 and 2015 ozone NAAQS because the area has already failed to attain those standards. Br. at 54–56. Petitioners imply that the area’s failure to attain is proof that the revisions are not preserving the status quo or decreasing emissions. *Id.* at 55–57.

Petitioners flip the analysis on its head. They appear to contend that Section 7410(*l*) precludes EPA from approving elements of a Plan for a particular criteria pollutant unless it shows that the Plan revisions will guarantee attainment of the NAAQS. Br. at 54–56. This is not the relevant inquiry under Section 7410(*l*). In

WildEarth Guardians, as here, the state was not proposing any Plan revisions that would remove pollution controls or result in increased emissions. 759 F.3d at 1074. Because the revision did not “weaken[] or remove[] pollution controls,” it did not hinder attainment. *Id.* Likewise, in *Center for Biological Diversity*, the Third Circuit upheld EPA’s determination that the Plan revisions would not increase emissions and so would not violate Section 7410(l). 75 F.4th at 180–82.²⁵

Four other circuits have considered the issue in a slightly different context but similarly upheld EPA’s interpretation. These cases concerned revisions that removed or weakened pollution controls, but any resulting emissions were offset by other substitute measures. *See, e.g., Ky. Res. Council*, 467 F.3d at 994–96; *Indiana*, 796 F.3d at 808, 812–13; *GHASP*, 289 F. App’x at 754; *Ala. Env’t Council*, 711 F.3d at 1292–93. The courts found permissible EPA’s interpretation that the relevant inquiry is whether a revision will increase net emissions—not whether it will guarantee attainment. *See, e.g., Ky. Res. Council*, 467 F.3d at 994–96 (approval of Plan revision that EPA determined would not increase net emissions was not arbitrary and capricious); *Indiana*, 796 F.3d at 812–13 (same);

²⁵ The Third Circuit noted that at times the agency should assess air quality more generally, “instead of, or in addition to, emissions” based on the nature of the proposed revisions. 75 F.4th at 181. But the court did not hold that a Plan revision must ensure attainment.

GHASP, 289 F. App'x at 754–55 (same); *Ala. Env't Council*, 711 F.3d at 1292–93 (same).

Petitioners ignore, and do not account for, the meaning of “interfere” within the statute and as interpreted by case law. *See supra* pp. 52–54. Petitioners fail to explain how the specific revisions at issue weaken or remove pollution controls or will otherwise cause an increase in emissions that would interfere with attainment of the NAAQS.

EPA reasonably concluded that its approval would not result in an interference under Section 7410(*I*) because the revisions at issue, which are intended to strengthen pollution controls to help the area attain, would not contribute to a net increase in emissions. 88 Fed. Reg. at 29831. This Court should join its sister circuits and affirm EPA’s reasoning.

IV. Relief, If Any, Should be Limited to Remand Without Vacatur

For the reasons set forth above, this Court should uphold the challenged agency action in its entirety. But should this Court identify any error, it should remand the pertinent portion of the agency action without vacatur, to avoid disruptive consequences and potential adverse environmental consequences.

To determine whether vacatur is appropriate, this Court undertakes an equitable analysis. *Dine Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1049 (10th Cir. 2023). The Court considers “(1) the seriousness of the

[agency action's] deficiencies (and thus the extent of doubt whether the agency chose correctly), and (2) the disruptive consequences of an interim change that may itself be changed.” *Id.* (internal quotation marks omitted) (quoting *Allied-Signal, Inc. v. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

Here, although it is difficult to opine in the abstract, vacatur could prevent useful and federally enforceable control measures from being incorporated into the Plan—the very measures designed to foster emissions reductions in an area that historically has struggled to attain the ozone NAAQS. It further bears noting that notwithstanding the errors alleged in this petition relating to the Denver Area’s Plan to meet requirements as a Serious nonattainment area, the Denver Area has been reclassified as a Severe nonattainment area. *See generally* 87 Fed. Reg. 60926. This means, among other things, that Colorado is already required to submit a new attainment demonstration to EPA showing that its Severe area Plan will bring the Denver Area into attainment by July 20, 2027, and to submit a new reasonable further progress demonstration showing that the Denver Area will meet the specified emissions reductions for Serious areas provided in the Act at 42 U.S.C. § 7511a(c)(2)(B). 87 Fed. Reg. at 60926; *see also* 42 U.S.C. § 7511a(d). Under the Act, EPA will review that new Plan to determine whether Colorado has shown that the area will attain by the applicable attainment date and whether the state has adopted all reasonable measures that would advance that date. 42 U.S.C.

§ 7410(k). Leaving the challenged EPA action (relating to Denver’s Serious area Plan) in place could only help the Denver Area attain by the new Severe nonattainment deadline, as the challenged Plan includes control measures that will improve air quality.

CONCLUSION

EPA’s approval of discrete elements of Colorado’s Plan is consistent with the law and supported by the record. For these reasons, and the reasons stated above, the Court should deny the petition for review.

Respectfully submitted,

s/ Lucy E. Brown

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DJ Number 90-5-2-3-22455

STATEMENT REGARDING ORAL ARGUMENT

Though deferring to the Court's judgment on the matter, the U.S. Environmental Protection Agency believes that oral argument would be useful to the Court given the complicated Clean Air Act questions at issue in this case.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 12,956 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word (Version 2311) in 14-point Times New Roman font.

s/ Lucy E. Brown
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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; and
- (3) the digital submissions have been scanned for viruses with the most re-cent version of a commercial virus scanning program, Windows Defender Antivirus Version 1.403.3605.0 (updated February 11, 2024), and according to the program are free of viruses.

s/ Lucy E. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2024, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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I will serve the foregoing filing by U.S. mail to the following counsel that cannot be served via electronic notification from the CM/ECF system:

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