

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-9565

CENTER FOR BIOLOGICAL DIVERSITY and 350 COLORADO,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents,

and

STATE OF COLORADO
Intervenor.

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

CORRECTED PETITIONERS' OPENING BRIEF

Ryan Maher
Center for Biological Diversity
411 K St. NW, Suite 1300
Washington, DC 20002
781-325-6303
rmaher@biologicaldiversity.org

Ken Fowler
Erin Kincaid
Wyatt Sassman
Asha Brundage-Moore
Environmental Law Clinic
University of Denver
Sturm College of Law
2255 E. Evans Ave.
Denver, CO 80208
303-871-6140

*Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

The Center for Biological Diversity and 350 Colorado have no parent companies, and there are no publicly traded companies that have any ownership interest in the Center for Biological Diversity or 350 Colorado.

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STATEMENT OF RELATED CASES

State of Colorado v. EPA et al., Case No. 23-9566 (10th Cir.), is a direct appeal of the same final rule but involves separate and distinct issues. This case was procedurally aligned with the present matter but has since been placed into abeyance pursuant to an October 18, 2023, Order of the Clerk of Court.

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

EPA – United States Environmental Protection Agency

MVEB – Motor Vehicle Emissions Budget

NAAQS – National Ambient Air Quality Standards

NO_x – Nitrogen Oxides

RFP – Reasonable Further Progress

SIP – State Implementation Plan

VOC – Volatile Organic Compounds

INTRODUCTION

This Clean Air Act direct appeal challenges EPA's decision to approve parts of Colorado's plan for meeting federal ozone air pollution standards even though the plan had already failed.

Ozone, often called "smog," is an air pollutant that harms human health and the environment. Colorado's Denver Metro/North Front Range area (Front Range area) has been one of the most polluted areas in the country for ozone for over fifteen years, consistently failing to meet the federal National Ambient Air Quality Standards (NAAQS) for safe levels of ozone pollution. NAAQS are limits on the maximum concentrations of pollutants like ozone allowed in the ambient air, which EPA sets at a level necessary to protect human health and welfare.

Because Colorado has unsafe levels of ozone pollution above the NAAQS, the Clean Air Act required EPA to designate the Front Range area as in "nonattainment" with the ozone NAAQS. This designation then required Colorado to submit a plan to EPA for how Colorado would reduce ozone pollution in the Front Range area to meet the NAAQS by the statutory deadline. The Act required EPA to review that state plan, and EPA can only approve the plan if it meets the requirements of the Clean Air Act.

In the decision at issue in this appeal, EPA approved parts of Colorado’s plan to reduce ozone pollution in the Front Range area after EPA determined that Colorado’s plan had failed to reduce ozone pollution below the ozone NAAQS by the date mandated under the Clean Air Act, the “attainment date.” In other words, EPA approved Colorado’s plan even though EPA knew the plan had already failed. This is a problem of EPA’s own making—EPA is supposed to act on state plans well before the attainment date, but here EPA’s long delay meant it did not approve Colorado’s plan until months after the Front Range area had failed to attain.

This action was unlawful. The Clean Air Act requires EPA to disapprove state plans that do not meet the requirements of the Act, including plans that will not reduce pollution enough to meet the NAAQS within the timelines set out in the Act. Each NAAQS is set at the level necessary to protect public health and welfare, and the Clean Air Act is structured to ensure that states achieve these standards as quickly as possible. EPA’s obligation to ensure that states’ proposed plans will actually achieve these standards is the keystone of this scheme—if EPA does not ensure that states actually meet the standards by the dates required in the Clean Air Act, then the Act’s central mechanism for protecting public health and welfare from air pollution falls apart. Here, EPA decided to approve a state plan that had already failed to reduce ozone

pollution to a level below the NAAQS by the statutory date. In doing so, EPA violated several core requirements in the Clean Air Act. EPA's decision was therefore unlawful and must be vacated.

BASIS OF JURISDICTION

This Court has jurisdiction pursuant to Section 307(b)(1) of the Clean Air Act. 42 U.S.C. § 7607(b)(1). On May 9, 2023, EPA published the final rule titled "Air Plan Approval, Conditional Approval, Limited Approval and Limited Disapproval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area." 88 Fed. Reg. 29,827 (May 9, 2023). Section 307(b)(1) of the Clean Air Act authorizes people to "petition for review of the [EPA] Administrator's action in approving or promulgating any implementation plan" in "the United States Court of Appeals for the appropriate circuit." On July 10, 2023, the Center for Biological Diversity and 350 Colorado (the Public Interest Groups), timely petitioned for review of that rule under Section 307(b)(1). This Court therefore has jurisdiction under Section 307(b)(1) of the Clean Air Act.

The approval that this action challenges is specific to Colorado. Thus, venue is appropriate in the Tenth Circuit. 42 U.S.C. § 7607(b)(1).

The Public Interest Groups have standing. To demonstrate Article III standing, the Public Interest Groups must establish that at least one of their members has standing to sue in his or her own right, that the Public Interest Groups seek to protect interests which are germane to their organizational purposes, and that the participation of individual members is not needed.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Individuals have standing if they suffer an injury-in-fact that is both fairly traceable to EPA's action and redressable by the Court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). EPA's actions injure members of the Center for Biological Diversity and 350 Colorado. Both groups' members suffer injury from the ozone pollution that will not be adequately regulated because of EPA's improper approval of Colorado's failed plan.

Scott Silber, a member of the Center for Biological Diversity, lives in Boulder, Colorado, and enjoys outdoor activities such as jogging, biking, hiking, and climbing, yet he has asthma that is aggravated by poor air quality. Silber Decl. ¶¶ 3–5 (Attach. 2). Mr. Silber often must restrict or avoid those activities altogether due to concerns about air quality. *Id.* ¶ 5. This is problematic because air quality often deteriorates during the day, and he must plan accordingly so as not to be caught biking home in unhealthy air. *Id.* ¶¶ 9, 11. In addition to the loss of recreational and exercise opportunities, Mr.

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

Heidi Leathwood, a member of 350 Colorado, lives in Denver, Colorado and enjoys outdoor activities such as walking and gardening. Leathwood Decl. ¶¶ 1, 3, 4 (Attach. 4.) Ms. Leathwood is unable to engage in these activities when there are high ozone levels because high ozone exposure causes her to cough and wheeze. *Id.* ¶ 4. Additionally, Ms. Leathwood has witnessed her husband increase medical treatment since living in Denver because the high ozone levels aggravate his asthma. *Id.* ¶ 2. Ms. Leathwood relies on public transportation, which requires her to walk or bike to a light rail or bus stop. *Id.* ¶ 3. Days with poor air quality force her to decide between risking her health to use public transportation and reduce ozone or drive a car and make the problem worse. *Id.* High ozone levels in Colorado injure Ms. Leathwood’s health and recreational opportunities.

These injuries are concrete, actual, imminent, and fairly traceable to EPA’s actions. EPA’s approval of Colorado’s failed plan results in more ozone pollution in the Front Range area than the Clean Air Act allows. A favorable

decision from this Court would redress these injuries by vacating this approval and directing EPA to disapprove the failed plan.

The Public Interest Groups also both meet the requirements for standing in this case. Protecting members from air pollution is directly germane to the Public Interest Groups' missions. Burd Decl. ¶¶ 3-7 (Attach. 3); Leathwood Decl. ¶¶ 4-6 (Attach. 4). Moreover, this case does not require the participation of any of the Public Interest Groups' members.

STATEMENT OF THE ISSUES

I. The Clean Air Act and its regulations require that state plans for achieving the NAAQS include specific pollution reduction measures and emissions budgets designed to ensure the state brings its nonattainment areas into attainment by the statutory deadline. Here, EPA found that Colorado's plan failed to bring the Front Range area into attainment with the NAAQS by the statutory date but nevertheless approved the pollution reduction measures and emissions budgets proposed in Colorado's failed plan. Can EPA lawfully approve a state's proposed pollution reduction measures and emissions budgets when those measures and budgets have already failed to achieve attainment of the NAAQS by the statutory deadline?

II. Under the Clean Air Act and its regulations, states cannot take credit for emissions reductions from measures that are not enforceable as a matter of federal law. These are called “state-only” reductions because they are only enforceable as a matter of state law. Here, Colorado’s plan improperly included emissions reductions from oil and gas sources resulting from state regulations that are not enforceable as a matter of federal law. Was EPA’s decision to approve Colorado’s plan, even though it takes credit for state-only reductions, unlawful?

III. The Clean Air Act mandates that EPA cannot approve state plans to attain one NAAQS if that plan would interfere with the state’s ability to attain another NAAQS. There is evidence in the record that EPA’s decision to approve elements of Colorado’s plan would interfere with Colorado’s ability to attain other NAAQS for ozone and nitrogen oxides, but EPA failed to analyze this issue. Was it unlawful for EPA to approve elements of Colorado’s plan without analyzing whether that approval would interfere with Colorado’s ability to attain other NAAQS for ozone and nitrogen oxides?

STATEMENT OF THE CASE

I. Legal Background

A. The Clean Air Act

Congress enacted the Clean Air Act to “speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1, 1, (1970) *as reprinted in* 1970 U.S.C.C.A.N. 5356, 5356. The NAAQS are arguably the most important tool in this war against air pollution. The NAAQS are concentration-based limits on air pollution that EPA must set at a level that protects human health and public welfare. 42 U.S.C. §§ 7408(a), 7409(a)–(b).

NAAQS exist for several harmful air pollutants, including ozone. *See id.* §§ 7409, 7511. Sources do not emit ozone directly. Instead, sources release volatile organic compounds (VOCs) and nitrogen oxides (NO_x), which are precursor pollutants that combine in the presence of sunlight to form ozone pollution. Accordingly, pollution control measures regulate VOCs and NO_x to reduce ozone pollution and attain the ozone NAAQS. *Id.* § 7511a(b)(1)(B). Additionally, NO_x has its own NAAQS because NO_x also harms human health and welfare. 75 Fed. Reg. 6,474 (Feb. 9, 2010).

Not only are there NAAQS for different pollutants, but some pollutants have multiple NAAQS. Notably, there are two ozone NAAQS relevant to Colorado: the 2008 Ozone NAAQS and the 2015 Ozone NAAQS. 73 Fed. Reg. 16,436 (Mar. 27, 2008); 80 Fed. Reg. 65,292 (Oct. 26, 2015). The 2008 Ozone NAAQS require that areas achieve below 75 parts per billion of ozone. 73 Fed. Reg. at 16,436. The 2015 Ozone NAAQS impose a more stringent requirement that areas achieve below 70 parts per billion of ozone. 80 Fed. Reg. at 65,292. While the Front Range area has repeatedly failed to meet both the 2008 and the 2015 Ozone NAAQS, this case involves the area's long-term noncompliance with the 2008 Ozone NAAQS.

After EPA promulgates or revises a NAAQS, it must identify which areas of the country are in compliance with the NAAQS, called "attainment areas," and which are not, called "nonattainment areas." 42 U.S.C. §§ 7407(d), 7502 (a)(1)(A). For a nonattainment area, the Clean Air Act imposes a statutory deadline for that area to come into compliance with the NAAQS. *Id.* §§ 7502 (a)(2), 7407(B).

There are several levels of nonattainment under the Clean Air Act, and if an area continues to fail to meet a NAAQS by its statutory deadlines, it is "downgraded" through these classifications. Ozone nonattainment areas can be classified as Marginal, Moderate, Serious, Severe, or Extreme. *Id.* §

7511(a)(1). As a nonattainment area’s classification worsens, the Clean Air Act subjects the area to increasingly stringent regulatory requirements and timelines intended to push the area into attainment. *See, e.g., id.* §§ 7502, 7503, 7511a.

For example, the Front Range area failed to attain the 2008 Ozone NAAQS and was downgraded from “Moderate” to “Serious” nonattainment effective January 27, 2020. 84 Fed. Reg. 70,897 (Dec. 26, 2019). This required Colorado to submit a new plan to EPA with stricter pollution controls and analyses designed to bring the Front Range area into attainment by the Serious attainment date of July 20, 2021. *Id.* at 70,898. The Front Range area again failed to attain the NAAQS by that date and was downgraded from Serious to Severe nonattainment effective November 7, 2022. 87 Fed. Reg. 60,926 (Oct. 7, 2022). On November 9, 2022—well after it was required to act under the Clean Air Act—EPA proposed approving elements of Colorado’s Serious ozone plan, even though the plan had already failed and the Front Range area had been downgraded to Severe nonattainment. 87 Fed. Reg. 67,617 (Nov. 9, 2022).

B. State Implementation Plans

The Clean Air Act requires states to create plans called State Implementation Plans (SIPs) that detail how the state’s nonattainment areas

will attain each NAAQS. 42 U.S.C. § 7407(a). SIPs explain how much air pollution there is in the area and what steps the state will take, including specific pollution control measures, to reduce that pollution to meet the relevant NAAQS. *Id.* § 7410(a). The Clean Air Act contains specific requirements for SIPs that pertain to nonattainment areas, as well as additional requirements specific to ozone nonattainment areas. *Id.* §§ 7502, 7511a.

The Clean Air Act requires states to submit proposed SIPs, as well as any revisions or updates to SIPs, to EPA for approval or disapproval before the plan can become effective. *Id.* § 7410. EPA reviews these “SIP submittals” for consistency with the requirements of the Clean Air Act. Frequently, states will adopt emissions control regulations under state law prior to including them in a SIP submittal to EPA. *See, e.g.*, 88 Fed. Reg. 29,827, 29,828 (noting regulations Colorado adopted under state law and included in the Serious Ozone SIP submitted to EPA). EPA approval then makes the SIP submittal and any state regulations an official part of the state’s SIP, thereby making those state regulations federally enforceable under the Clean Air Act. 42 U.S.C. § 7410(a)(2). Federally enforceable means that the federal government or citizens, through the Clean Air Act’s citizen suit provision, can challenge failures to follow the SIP. *See id.* § 7604.

If a state fails to put forward a plan that meets the requirements of the Clean Air Act, the Act requires EPA to step in and impose a plan called a Federal Implementation Plan. *Id.* § 7410(c)(1)(A), (B). In this way, the Clean Air Act is an example of cooperative federalism; states take the lead, but the Act imposes ultimate responsibility for protecting human health and public welfare under each NAAQS on EPA. *Id.* § 7401.

C. Nonattainment SIP Requirements

This case implicates four requirements for SIPs in nonattainment areas for ozone pollution.

1. Reasonable Further Progress

The Clean Air Act requires that ozone nonattainment SIP submittals include annual reductions in emissions of VOCs and NO_x necessary to attain the relevant ozone NAAQS by the attainment date. *Id.* § 7511a(b)(1). These reductions are referred to as the plan’s “reasonable further progress” or RFP provisions and, as their name demonstrates, the purpose of RFP provisions is to make consistent progress towards attainment. *Id.* § 7501(1).

Each time an area fails to attain the NAAQS by its attainment date and is downgraded to a worse nonattainment classification, the state must submit SIP revisions with stricter RFP provisions intended to push the area into attainment. *Id.* §§ 7511a(b)(1)(A), 7511a(c)(2)(B). For example, Moderate

nonattainment area plans must require a reduction of VOC emissions by fifteen percent from baseline emission levels. *Id.* § 7511a(b). Serious nonattainment areas are required to meet the fifteen percent emissions reduction as well as at least an additional three percent emission reduction from baseline emissions each year. *Id.* § 7511a(c).¹ In all cases, RFP provisions must bring the area into attainment by the attainment date. *Id.* § 7501(1).

2. Motor Vehicle Emissions Budgets

Motor vehicle emissions budgets (MVEBs) are the portion of the total allowable emissions under a SIP that is allocated to highway and transit vehicle use. 40 C.F.R. § 93.101. EPA must ensure that states set MVEBs in line with the purpose of the SIP, including meeting reasonable further progress milestones and ultimately attaining. *Id.* MVEBs can be set for RFP “milestone years” and “attainment years.” *Id.* § 93.118(b)(1)(i). A milestone year refers to an intermediate year before the attainment deadline, while an attainment year refers to the last year that monitoring data is assessed prior to the attainment deadline. *Id.* § 93.101; 42 U.S.C. § 7511a(g)(1).

¹ SIP requirements are cumulative. For example, Serious SIP requirements incorporate Moderate SIP requirements for nonattainment areas. *See* 42 U.S.C. § 7511a(c).

3. State-Only Emissions Reductions

The Clean Air Act prohibits EPA from approving a SIP submittal that relies on emissions reductions from control measures that are not included in the submittal—what are called "state-only" emissions reductions. 42 U.S.C. § 7511a(b)(1)(C). Specifically, Section 7511a says that state plans can only take credit for emissions reductions that "actually occurred" from "the implementation of [control] measures required under the applicable implementation plan." *Id.* Put differently, states cannot rely on emissions reductions caused by measures not included in the federally approved and enforceable plan—these are "state only" emissions reductions. For this reason, EPA cannot approve a plan that takes credit for state-only emissions reductions. *Id.*; *see also* 40 C.F.R. § 51.1110(a)(5).

4. Interference with other NAAQS

Section 110(l) of the Clean Air Act prohibits EPA from approving a revision to a plan to attain one NAAQS that would interfere with any applicable requirements concerning the attainment of any other NAAQS. 42 U.S.C. § 7410(l). Put plainly, violating one NAAQS to attain another NAAQS is barred by the Clean Air Act and would undermine the Act's overarching goal to reduce air pollution. *Id.* § 7401.

D. Other SIP Requirements

Although not directly implicated in this case, understanding two other SIP requirements provides helpful context.

The first requirement is the emissions inventory, which is simply an inventory of the relevant air pollution covered by the SIP. *Id.* §§ 7511a(a)(1), 7502(c)(3). States compile this inventory largely based on statements and emissions estimates submitted to the state by owners or operators of stationary sources of air pollution. *Id.* § 7511a(a)(3)(B). This emissions inventory serves as the foundation for determining whether a SIP can ensure an area will reach attainment by the statutory deadline, as well as the basis for setting a SIP's RFP provisions and MVEBs. *Id.* § 7511a(a); 40 C.F.R. § 93.118(e)(4)(iv).

The second requirement is the attainment demonstration. The attainment demonstration is a state's statistical or photochemical model showing that the SIP will attain the NAAQS by the applicable attainment date. 42 U.S.C. § 7511a(c)(2)(A). It shows how the pollution reduction measures in the SIP will bring the pollution estimated in the emissions inventory below the level required by the NAAQS. Because a plan's RFP provisions and MVEBs must incorporate emissions reductions necessary for the area to achieve attainment by the statutory deadline, EPA must assess the sufficiency of these

elements by referring to the SIP submittal's attainment demonstration. *Id.* If a plan cannot demonstrate attainment by the required date, then the plan's RFP provisions and MVEBs were not designed to attain by the deadline as required by the Clean Air Act and EPA must reject the RFP and MVEBs.

II. Factual and Procedural Background

A. Ozone Impacts to Human and Environmental Health

For over a decade, Colorado has failed to bring the Front Range area into attainment with ozone NAAQS. *See* 87 Fed. Reg. at 60,926; 87 Fed. Reg. 60,897 (Oct. 7, 2022). As noted, ground-level ozone pollution forms when pollutants known as ozone precursors, namely VOCs and NO_x, react in heat and sunlight. In Colorado, the largest sources of these pollutants include vehicles, other equipment that runs on gasoline, and oil and gas industry operations. AR0014198.

While ozone in the stratosphere (the ozone layer) is critical to protecting people from harmful ultraviolet rays, ground-level ozone is a dangerous air pollutant that attacks the lungs and other parts of the body, contributing to respiratory problems, cardiovascular issues, and premature deaths. *See* 80 Fed. Reg. at 65,302–17. Evidence also suggests a causal relationship between exposure to ozone and adverse reproductive and developmental effects, including adverse birth outcomes. *Id.* at 65,338.

Children, the elderly, people with respiratory conditions like asthma, and people who spend time outdoors are most at risk from ozone. *See id.* at 65,322. Ozone also damages commercial crops and other vegetation, harming the economy and diminishing ecosystem services—the life-sustaining services that ecosystems provide to people for free, like clean air, clean water, and carbon sequestration. *Id.* at 65,372–78.

B. Front Range Nonattainment

On July 20, 2012, EPA determined that the Front Range had ozone pollution at levels that violated the 2008 Ozone NAAQS and designated the Front Range as a Marginal nonattainment area. 77 Fed. Reg. 30,088 (May 21, 2012). The Front Range nonattainment area includes more than eight counties that, all together, are home to over 3.3 million Coloradans. EPA, Green Book: 8-Hour Ozone (2015) Designated Areas by State/County/Area (Sept. 30, 2022), <https://www3.epa.gov/airquality/greenbook/jbcty.html>. Following EPA’s determination of nonattainment, EPA and Colorado became obligated under the Clean Air Act to bring the area into attainment by the attainment deadline. 42 U.S.C. § 7502(a)(2)(A).

Since this initial nonattainment designation, EPA and Colorado have failed to bring the area into attainment by the statutory deadlines three times. On June 3, 2016, EPA downgraded the Front Range nonattainment area from

Marginal to Moderate nonattainment. 81 Fed. Reg. 26,697 (May 4, 2016). On January 27, 2020, EPA downgraded the area to Serious nonattainment. 84 Fed. Reg. 70,897 (Dec. 26, 2019). These downgrades required Colorado to submit stricter SIP revisions to EPA for approval. 42 U.S.C. § 7511a(b) and (c). The Serious nonattainment revisions are the subject of this case, and we broadly refer to them as Colorado's Serious SIP submittal. Colorado submitted these revisions over several years, from 2017 to 2022, while attempting to address identified deficiencies in its submittal. 88 Fed. Reg. at 29,827. Ultimately, EPA delayed acting on the Serious SIP submittal, until after both its deadline to review the revisions and after the Serious attainment deadline. See 87 Fed. Reg. 67,617. In other words, EPA acted well after Colorado's Serious SIP submittal was supposed to be in full effect. See 87 Fed. Reg. at 67,617.

EPA's failure to act before the July 20, 2021 deadline led to the third, most recent failure to attain the 2008 Ozone NAAQS. 87 Fed. Reg. at 60,926. The Center for Biological Diversity and other groups sued EPA after EPA and Colorado missed this statutory deadline to reach attainment, initiating the process of downgrading the Front Range nonattainment area from Serious to Severe nonattainment. *Ctr. for Biological Diversity v. Regan*, Case No. 3:22-cv-01855 (N.D. Cal., Mar. 24, 2022). In October 2022, EPA downgraded the Front

Range nonattainment area to a Severe nonattainment area effective November 7, 2022. 87 Fed. Reg. at 60,926. The Severe attainment deadline is July 20, 2027. *Id.* at 60,929.

C. Comments on EPA’s Proposed Approval of Serious SIP Submittal

On November 9, 2022—two days after the Front Range nonattainment area was downgraded to Severe nonattainment because it failed to attain by the Serious deadline—EPA nevertheless proposed to approve elements of Colorado’s Serious SIP submittal. 87 Fed. Reg. at 67,617. In other words, EPA’s significant delays meant the agency was taking action on Colorado’s Serious SIP submittal after EPA knew the measures Colorado implemented under the plan had already failed to attain the NAAQS by the statutory deadline.

Notably, EPA did not propose to approve the Serious SIP submittal’s attainment demonstration because Colorado could not demonstrate that its Serious SIP submittal achieved attainment. 42 U.S.C. § 7511a(c)(2)(A); 87 Fed. Reg. at 67,617. Rather, EPA’s proposed approval targeted isolated elements of the Serious SIP submittal without addressing the fact that the plan had already failed to bring the area into attainment by the Serious attainment deadline. 87 Fed. Reg. at 67,617. The Public Interest Groups submitted comments on December 9, 2022, highlighting that EPA’s proposed actions

were unlawful. *See* AR0020286–318. The comments raised four issues relevant in this case.

First, the comments noted that EPA must disapprove the attainment demonstration because the nonattainment area did not meet the NAAQS by the attainment deadline. Specifically, relevant monitoring data from 2018-2020 showed 81 parts per billion of ozone for the Front Range nonattainment area—much higher than the 75 parts per billion threshold of the 2008 Ozone NAAQS.² AR0020293–96. Because Colorado’s Serious SIP submittal had failed to demonstrate how it would bring the area into attainment, EPA must disapprove the attainment demonstration.

Second, the comments similarly explained that EPA cannot approve the RFP provisions and MVEBs because the Front Range nonattainment area did not attain by the attainment deadline. AR0020297–301. The Clean Air Act requires that states design a plan’s RFP provisions and MVEBs to attain the NAAQS by the attainment deadline. AR0020299–301. Because the Front Range nonattainment area failed to attain by the Serious deadline, there was no basis for EPA to approve the Serious RFP provisions and MVEBs as

² EPA determines attainment or nonattainment of the 2008 Ozone NAAQS based on air quality monitoring data from the three calendar years prior to the attainment deadline. 87 Fed. Reg. at 60,927.

consistent with the Clean Air Act. Those elements of the submittal had demonstrably failed to achieve attainment. AR0020297–301.

Third, the comments further explained that EPA must disapprove elements of Colorado’s submittal because it takes credit for emissions reductions from state-only control measures. For emissions reductions to count, they must stem from regulations included in the SIP submittal and must be federally enforceable, i.e., enforceable not only by states but by citizens and the federal government. AR0020302. Because Colorado’s Serious SIP submittal relied on emissions reductions that did not meet those requirements, the comments called for EPA to disapprove it.

Finally, the comments explained that EPA could not approve Colorado’s submittal because doing so would violate Section 110(l) of the Clean Air Act by approving elements of a SIP submittal that interfere with attainment of other NAAQS. AR0020310–311. Approving the Serious SIP submittal may have delayed attainment of the 2008 ozone NAAQS. In addition, the SIP submittal may have interfered with the attainment of related NAAQS, including the 2015 Ozone and NO_x NAAQS.

Despite the Public Interest Groups’ comments, on May 9, 2023, EPA approved many elements of the SIP submittal, including the elements that are the subject of this direct appeal, disapproved certain parts, and took no action

on the attainment demonstration. 88 Fed. Reg. at 29,827. The Public Interest Groups timely petitioned for review of EPA's approval actions before this Court on July 10, 2023.

STANDARD OF REVIEW

The standard for judicial review of final action by EPA under the Clean Air Act comes from the federal Administrative Procedure Act. *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013).

The Court must set aside EPA's action, in this case approving the SIP submittal, if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see *Sierra Club v. EPA*, 99 F.3d 1551, 1555 (10th Cir. 1996). An agency's action is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision which runs counter to the evidence before the agency[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Additionally, if the action fails to meet statutory requirements, the court must vacate the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971). The reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *State Farm*, 463 U.S. at 43. The grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. *Id.* at 40. Additionally, "[i]f the agency has failed to provide a reasoned explanation for its action, or if

limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision making . . . it may not simply affirm.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). “The duty of a court reviewing an agency action under the arbitrary or capricious standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.” *Id.* at 1574.

When the statute’s text is unambiguous and congressional intent is clear, an agency is bound by the statute’s plain language. The standard for reviewing an agency’s interpretation of an unambiguous statute is provided in *Sinclair Wyoming Refinery Company v. EPA*, 874 F.3d 1159, 1163, 1169–70 (10th Cir. 2017), and *New Mexico v. Department of Interior*, 854 F.3d 1207, 1224–25, 1230–31 (10th Cir. 2017).

This is similar to the familiar *Chevron* two-step analysis. Under *Chevron* step one, if a statute is not ambiguous, then “the agency must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Under *Chevron* step two, EPA’s interpretation of ambiguous statutory provisions must be rejected if, among other things, “the agency has [not] offered a reasoned explanation for why it chose that interpretation.” *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660

(D.C. Cir. 2011). An agency is also bound by plain language when interpreting its own regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). When courts consider a regulatory interpretation put forward by an agency, they must first determine if the regulation is truly ambiguous and then apply the analysis in *Kisor v. Wilkie* to determine if deference to the agency's interpretation is warranted. *Id.* at 2415, 2423–24. Among other requirements, an agency's interpretation of its regulation must be "reasonable" in order to receive deference. *Walker v. BOKF, N.A.*, 30 F.4th 994, 1006 (10th Cir. 2022).

SUMMARY OF THE ARGUMENT

EPA's decision to approve elements of Colorado's Serious SIP submittal, even though it failed to attain by the statutory deadline, must be vacated for three reasons. First, EPA approved inadequate RFP provisions and MVEBs that did not bring the Front Range area into attainment. Second, EPA approved elements that improperly credited state-only emissions reductions. And third, EPA approved elements that unlawfully interfered with attainment of several NAAQS.

RFP provisions are directly tied to attainment, so EPA cannot approve RFP provisions that did not achieve attainment. Failure to reach attainment by the Serious attainment deadline means the RFP provisions did not satisfy the Clean Air Act's requirements and therefore must be disapproved. The Act similarly ties MVEBs to both attainment and RFP requirements. When MVEBs apply for both an attainment year and RFP milestone year, MVEBs must be designed to bring the nonattainment area into attainment. Because the Front Range area did not attain, which is undisputed, the MVEBs did not satisfy the Clean Air Act's requirements and must also be disapproved.

Moreover, EPA violated the Clean Air Act by approving Colorado's submission that credits state-only emissions reductions. There are criteria for which emissions reductions count in a SIP submittal, and one of these criteria

is that emissions reductions must come from control measures that are federally enforceable and enforceable by citizens. Not including certain emissions reductions in the SIP submittal renders them unable to be enforced under federal law or by citizens, contrary to the Clean Air Act's requirements. Thus, any reduction in emissions resulting from rules not included in the SIP submittal cannot be credited. EPA violated this requirement by approving Colorado's submittal that relied on state-only emissions reductions resulting from rules not included in the SIP submittal.

Finally, EPA violated the Clean Air Act by approving the SIP submittal even though it interferes with attainment of other NAAQS. Despite evidence in the record showing that EPA's approval could interfere with other NAAQS that protect human health and welfare, EPA failed to provide any meaningful analysis of this issue or otherwise support its conclusion that its approval would not threaten the other NAAQS.

All told, EPA's decision to approve elements of Colorado's Serious SIP submittal was arbitrary, capricious, contrary to law, and delays legally required protections of public health and welfare. This Court must vacate EPA's action.

ARGUMENT

I. EPA cannot approve elements of a failed SIP submittal.

EPA unlawfully approved the RFP provisions and MVEBs of Colorado's Serious SIP submittal even though these elements demonstrably did not provide reductions in emissions of VOCs and NO_x sufficient for the Front Range nonattainment area to attain the 2008 Ozone NAAQS by the July 20, 2021 attainment deadline. Under the Clean Air Act, the purpose of the RFP provisions and MVEBs in a SIP submittal is to achieve attainment of the NAAQS by the attainment deadline. Here, EPA had already determined that Colorado's Serious SIP submittal failed to attain the NAAQS by the relevant deadline and had downgraded the Front Range area from Serious to Severe nonattainment. Yet EPA then approved the RFP provisions and MVEBs anyway. This approval violated the Clean Air Act.

A. EPA cannot approve RFP provisions that failed to attain.

As discussed in detail below, the plain language of the Clean Air Act states that the purpose of RFP provisions is to achieve attainment of the ozone NAAQS by the relevant deadline. 42 U.S.C. §§ 7501(1), 7511a(c). This is consistent with the Act's purpose to protect public health and welfare by enforcing ozone emissions reductions in nonattainment areas. Because the plain language of the Act ties RFP provisions to attainment, EPA cannot

approve RFP provisions that have already failed to attain. EPA's decision to approve the RFP provisions of Colorado's failed plan was therefore contrary to law and thus must be "set aside" pursuant to 5 U.S.C. § 706(2)(A).

1. EPA's approval of the failed RFP provisions violated the plain language of the Clean Air Act.

The statutory connection between RFP provisions and attainment is unambiguous; both the general and ozone-specific portions of the Clean Air Act require that RFP provisions must reach attainment. The Clean Air Act defines RFP as "annual incremental reductions in emissions of the relevant air pollutant as required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." 42 U.S.C. § 7501(1). The sections of the Clean Air Act specific to ozone nonattainment areas also mandate that a plan's RFP provisions "shall provide . . . annual reductions in emissions . . . as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter." *Id.* at §§ 7511a(b)(1)(A)(i), 7511a(c)(2)(B).

Because Section 7511a requires that RFP provisions achieve attainment by the relevant date, EPA violated the Clean Air Act by approving RFP provisions that did not meet that requirement. As noted above, EPA must

abide by the plain language of the Clean Air Act and any departure renders its decision contrary to law. *New Mexico v. Dep't of Interior*, 854 F.3d at 1224–25; *Sinclair*, 874 F.3d at 1163, 1169–70. Under the cooperative federalism structure of the Clean Air Act, EPA's central obligation is to approve elements of a SIP submittal that meet the requirements of the Clean Air Act.

When Colorado submitted the RFP provisions as part of its Serious SIP submittal, EPA could only approve them if they ensured the area would “attain the national primary ambient air quality standard for ozone by” July 20, 2021, as required by Section 7511a. Yet EPA failed to take timely action on Colorado's Serious SIP submittal and the Front Range nonattainment area failed to attain the ozone NAAQS by July 20, 2021. EPA recognized the area's failure to attain (prompted by a suit from the Center for Biological Diversity) by downgrading the Front Range area to Severe nonattainment effective November 7, 2022. 87 Fed. Reg. 60,926 (Oct. 7, 2022). By the time EPA proposed to approve the RFP provisions, it already knew that the RFP provisions would not attain the ozone NAAQS by the attainment date as required by Section 7511a. For this reason, EPA's decision to approve the RFP provisions violated the Clean Air Act: EPA approved an element of a SIP submittal that did not meet the Act's requirements.

2. EPA's argument that it can sever RFP from attainment is meritless.

The necessary connection between RFP and attainment in the text of the Clean Air Act demonstrates why EPA cannot “sever” RFP from attainment whenever it wants to. In its response to the Public Interest Groups’ comments (hereinafter Response to Comments), EPA does not dispute that Colorado’s RFP provisions failed to achieve attainment of the 2008 Ozone NAAQS by the Serious attainment deadline. Instead, EPA argued that its ability to approve RFP provisions is “severable” from whether a SIP submittal attains the NAAQS. AR0021569–70. Specifically, EPA argued that it can approve RFP provisions so long as they will meet the relevant percentage of emissions reductions associated with the RFP provisions, regardless of whether those reductions will ultimately ensure attainment. *Id.* This argument fails for two reasons.

First, EPA’s reading that RFP is ‘severable’ from attainment is incompatible with the plain text of the Clean Air Act. 42 U.S.C. §§ 7511a(b)(1)(A)(i), 7511a(c)(2)(B) (“[RFP] shall provide . . . annual reductions in emissions . . . as necessary to attain the national primary ambient air quality standard for ozone by the attainment date.”). By selectively citing its own regulatory definition to support this argument, EPA put forward an

interpretation that would render those regulations incompatible with the Clean Air Act. AR0021568. As discussed above, *supra* Argument I.A.1, under the plain language of the Act, RFP provisions must ensure attainment by the attainment deadline. Acting late on separate SIP submittal elements does not mean EPA can ‘sever’ those elements from their statutory requirements.

Even in cases where an EPA regulation has been in effect for years, the statute controls and EPA cannot apply its regulatory interpretation if the regulation cannot be reconciled with the statutory text. *See, e.g., Sierra Club v. EPA*, 551 F.3d 1019, 1021, 1027–28 (D.C. Cir. 2008) (vacating long-standing EPA regulations that exempted major sources of emissions from normal standards during periods of startups, shutdowns, and malfunctions for “being inconsistent with the plain text of . . . the Clean Air Act”).

Importantly, agency interpretations of their regulations are not entitled to deference where the agency's interpretation is inconsistent with statutory language and prescribed deadlines. *Kisor*, 139 S. Ct. at 2415. Here, EPA's reading of its regulations to allow it to approve RFP provisions that it knows did not attain the NAAQS by the attainment deadline would do just that—render its regulations irreconcilable with the plain language of the Clean Air Act that RFP provisions “shall provide” emissions reductions “necessary to attain the” NAAQS “by the attainment date.” 42 U.S.C. § 7511a(b)(1)(A)(i), *id.*

§ 7511a(c) (incorporating requirements from 42 U.S.C. § 7511a(b)). EPA cannot render the attainment language in the Clean Air Act superfluous by interpreting the Act as excluding this requirement for RFP provisions. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128–31 (2018) (holding that courts of appeals did not have exclusive jurisdiction over challenges to the “waters of the United States” administrative rule because finding such exclusive jurisdiction would render a subparagraph of the Clean Water Act superfluous).

Second, EPA takes this regulatory definition out of context. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (stating “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”). The purpose of the SIP submittal and its elements is to show how the state will bring its nonattainment areas into compliance with the ozone NAAQS and protect public health. As an element of the SIP submittal, RFP is necessarily tied to the mandate to reach attainment by the attainment deadline. *Id.* §§ 7407(a), 7410(a)(1), 7511a(c). In EPA’s own regulations—the Ozone SIP Requirements Rule, 80 Fed. Reg. 12,264 (March 6, 2015)—EPA repeatedly connects RFP to the goal of attainment, consistent with the Clean Air Act. For example, in the ‘Overview of RFP Requirements’ section of the

Ozone SIP Requirements Rule, EPA states “[a]reas that are designated nonattainment for ozone must achieve RFP toward attainment of the ozone NAAQS.” *Id.* at 12,271. EPA further notes that “the purpose of the RFP requirement is to ensure areas achieve percentage reductions in emissions that will help an area attain the NAAQS and to not delay emission reductions until close to the attainment date.” *Id.* at 12,272. Given the statutory and regulatory context, EPA cannot dodge the connection between RFP and attainment as a requirement by postponing action on the attainment demonstration.

EPA’s strained interpretation here is an attempt to solve a problem of its own making at the cost of undermining the Clean Air Act’s health and environmental protections. EPA delayed acting on Colorado’s Serious SIP submittal for so long that, by the time EPA proposed to act, the agency already knew the RFP provisions and the attainment demonstration had failed to move the Front Range nonattainment area into attainment. 87 Fed. Reg. at 60,926; 87 Fed. Reg. at 67,617. EPA’s attempt to “sever” RFP from attainment is its only way out of the issue it created, but doing so requires ignoring the timing, text, and purpose of the Clean Air Act which is to protect public health by ensuring attainment. Allowing EPA’s interpretation here would effectively give the agency discretion to ignore the text and structure of the Act because it

failed to review Colorado's SIP submittal in a timely manner. Moreover, endorsing EPA's interpretation would transform RFP provisions that fail to move an area into attainment into an alternate path for states to avoid more stringent regulations without ever attaining the NAAQS.

Indeed, EPA made clear in the administrative process that its approval of these RFP provisions was not intended to attain the relevant NAAQS by the applicable deadline. AR0021569. EPA's policy argument for taking RFP requirements out of context is that, because the Front Range nonattainment area has been reclassified as Severe, "[t]he 2020 RFP demonstration serves as an increment of progress toward the July 20, 2027 attainment date." *Id.* But to meet the requirements of the Clean Air Act, the RFP provisions must attain by the relevant date: July 20, 2021. EPA does not cite to a provision of the Clean Air Act that allows it to defer the requirements for one classification to a later classification. And this Court has explained that simply because the Clean Air Act does not address a situation that runs contrary to its other requirements, that does not indicate the presence of ambiguity. *Ctr. for Biological Diversity v. EPA*, 82 F.4th 959, 966–68 (10th Cir. 2023). Where the Act provides explicit requirements, it need not include a separate provision mandating that the agency cannot violate the requirements. *See id.*

Instead, EPA needs to approve the SIP submittal based on whether it would attain by the relevant date, not another date. This is consistent with the demand that states achieve attainment “as expeditiously as practicable.” 42 U.S.C. §7502(a)(2)(A), (B). Allowing EPA to use elements of a failed SIP submittal to count toward requirements for a worse nonattainment classification, while postponing the attainment deadline, creates incentives for states to submit plans they know will fail in hopes that EPA shifts some regulatory requirements to a later date.

The Clean Air Act already provides a procedure for states to voluntarily downgrade or reclassify a nonattainment area, but EPA is not following that procedure. Voluntary reclassification is a mechanism whereby states can push the attainment deadline back but are then required to meet the more stringent pollution controls of a worse nonattainment classification. 42 U.S.C. § 7511(b)(3); *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 896–98 (D.C. Cir. 2006). Colorado did not voluntarily reclassify the Front Range area to Severe nonattainment, and EPA cannot overlook the Act’s procedural requirements by inventing its own process to transform the failed Serious RFP provisions to an increment of progress toward meeting Severe nonattainment requirements. Serious RFP provisions cannot replace the more stringent controls mandated under the Act for Severe nonattainment areas, especially

when the Serious SIP submittal already failed to ensure attainment. EPA and Colorado cannot ignore the Serious SIP nonattainment requirements just to correct the problem of their own delays resulting in such a late approval of the Serious SIP submittal.

Rather, the Clean Air Act dictates what happens when a state's SIP fails to attain: states must submit revisions with *new* RFP provisions to meet the *new* attainment deadline. 42 U.S.C. § 7511a. Upon reclassification to Severe nonattainment, EPA stated Colorado's deadline to submit SIP revisions was within eighteen months after the reclassification went into effect. 87 Fed. Reg. at 60,927. Here, EPA must approve and implement Colorado's new RFP provisions and attainment demonstration no later than eighteen months after the state submits Severe SIP revisions, provided they ensure attainment by the Severe attainment deadline of July 20, 2027. 42 U.S.C. § 7410(k)(1)(B), (2). And if Colorado failed to submit an approvable plan, EPA must step in and make a plan of its own. *Id.* § 7410(c)(1). Allowing EPA to shift SIP attainment deadlines at its own discretion undermines this statutory scheme. If EPA is allowed to proceed as it is here, what is preventing EPA and Colorado from rendering the Severe ozone nonattainment requirements meaningless, when the Front Range area is in Extreme nonattainment? EPA must meet its duty to protect public health by holding Colorado accountable to the terms of the

Clean Air Act and, if Colorado cannot meet those requirements, by exercising its own authority to protect Colorado's citizens.

B. EPA cannot approve the MVEBs that failed to attain the NAAQS by the attainment deadline.

The Clean Air Act requires states with nonattainment areas to develop motor vehicle emissions budgets to ensure the state's SIP submittal achieves attainment by the attainment deadline. The purpose of these budgets is to cap motor vehicles' emissions in the nonattainment area because vehicle pollution contributes significantly to ozone pollution and the threat to public health.

AR0014194. Here, EPA approved the MVEBs from Colorado's Serious SIP submittal even though EPA had already determined that the plan failed to attain by the Serious attainment deadline. EPA's decision to find adequate and approve the MVEBs in the Serious SIP submittal was contrary to law because the Clean Air Act ties MVEBs to attainment of the NAAQS. And even if MVEBs can be tied only to RFP provisions, as EPA argues in the administrative process, EPA's decision was still unlawful because the RFP provisions failed to bring the Front Range nonattainment area into attainment by the applicable date.

1. EPA's decision to approve the failed MVEBs violated the Clean Air Act and its implementing regulations.

MVEBs must be designed to bring the nonattainment area into attainment by the relevant attainment deadline. 87 Fed. Reg. at 67,627. The direct purpose of MVEBs is to limit the amount of emissions coming from transportation activities in the area. In setting these limits, MVEBs must not allow federal actions that “delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.” 42 U.S.C. § 7506(c)(1)(B)(iii). EPA defines MVEBs as elements of the SIP submittal that allocate a portion of allowable emissions to motor vehicle use in the nonattainment area “for the purpose of meeting [RFP] milestones or demonstrating attainment or maintenance of the NAAQS for any critical pollutant or precursors” by a set date. 40 C.F.R. § 93.101.

EPA must follow regulatory requirements to find an MVEB “adequate,” which is a regulatory designation that can occur prior to SIP submittal approval. *NRDC v. EPA*, 638 F.3d 1183, 1187–88 (9th Cir. 2011). This includes 40 C.F.R. § 93.118(e)(4)(iv), which states that MVEBs must be “consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission).” In other words, states must synchronize MVEBs with RFP

provisions that move an area into attainment, or with the attainment demonstration, or, assuming an area has attained, with a maintenance plan.

While states may design MVEBs to achieve RFP milestones, attainment, or maintenance of the NAAQS, each of these elements of a SIP submittal require the area to achieve attainment by the statutory deadline. 42 U.S.C. § 7407(a). For this reason, MVEBs must ensure attainment by the relevant date. For example, when MVEBs apply for an attainment year, MVEBs must necessarily conform to attainment projections. 40 C.F.R. § 93.118(e)(4)(v). Here the attainment year was 2020, because it is the last year included in the three years of ozone monitoring data, 2018-2020, that EPA used in its nonattainment determination. 87 Fed. Reg. at 60,927.

EPA's decision to approve the MVEBs after the SIP submittal had failed to attain the NAAQS by the attainment date was therefore unlawful under 5 U.S.C. § 706(2)(A). MVEBs must ensure attainment in an attainment year, as was the case here with EPA's approved MVEBs. Despite postponement of action on the Serious SIP submittal, Colorado derived the MVEBs for NO_x and VOCs from its 2020, Serious attainment year, Front Range nonattainment area emissions inventory. AR0021572. Because EPA postponed action on the attainment demonstration, there is no means of measuring whether a transportation plan requiring federal action will delay attainment, a primary

function of MVEBs. *Id.* MVEBs cannot be disconnected from attainment, especially when, as here, the RFP milestone and attainment year is the same.

EPA tries to get around this by saying they can tie MVEBs only to RFP, AR0021572, but this is a misreading of their regulation, 40 C.F.R. § 93.118(e)(4)(iv). EPA claims that it has the discretion to approve MVEBs independently of the attainment demonstration because they are connected to RFP. AR0021573. Specifically, EPA looks to 40 C.F.R. § 93.118(e)(4)(iv) and the “or” language, claiming this gives them discretion to ignore the attainment demonstration. But EPA cannot separate RFP from attainment for the sole purpose of approving MVEBs. Regulations require that MVEBs are consistent with RFP and the attainment demonstration, as both are relevant to the SIP submittal for the milestone and attainment year, 2020. 40 C.F.R. § 93.118(e)(4)(iv). MVEBs for the RFP milestones and attainment demonstration are not disjunctive when they are required and submitted for the same year.

2. Even if MVEBs can be tied only to RFP provisions, EPA’s approval of the MVEBs here would still be unlawful because the RFP provisions failed to attain.

Even if EPA can connect MVEB only to achieving the RFP reductions, as EPA argues it can in its Response to Comments, EPA’s approval was still unlawful. As elements of the SIP submittal, the budgets must contribute to the

RFP provisions and the goal of attainment by being sufficiently stringent on motor vehicle emissions. But because the RFP provisions did not bring the area into attainment, there is no basis to assess and approve the MVEBs.

EPA only relies on *NRDC v. EPA*, 638 F.3d 1183 (9th Cir. 2011), to support its assertion that it has discretion to find an MVEB to be adequate for the specific purpose of determining whether a transportation plan is in conformity for an RFP milestone year without considering attainment.

AR0021573. In this case, EPA found an MVEB in California to be adequate for the purpose of limiting transportation activities in the state despite environmental groups asserting that the agency cannot use MVEBs that are unable to demonstrate attainment by the applicable date. *NRDC*, 638 F.3d at 1187–88. The court found that, because the MVEBs applied only to a milestone and not an attainment year, it did not matter that the MVEBs could not demonstrate attainment because the attainment date had not yet passed. *Id.* at 1195. The court therefore determined such an adequacy finding was appropriate and upheld the agency's action. *Id.*

However, *NRDC v. EPA* does not hold that EPA may approve MVEBs for a SIP submittal that already failed to achieve attainment by the area's attainment deadline. Although the court grants agency discretion in *NRDC*, this is only because the nonattainment area's attainment deadline had not

passed. *Id.* Crucially, in the Colorado Serious SIP submittal, EPA already knew this plan had failed to reach attainment before proposing to approve the MVEBs. Additionally, in this matter, EPA is not merely making an adequacy finding but has approved the flawed and failed MVEBs for both an RFP milestone and an attainment year, 2020. AR0021572–73.

NRDC v. EPA does not support EPA’s approval and finding that the MVEBs are adequate, separate from the SIP submittal, for an attainment year. 638 F.3d at 1189. The opinion states “[b]ecause a milestone year occurs before the attainment year, it is not necessary to demonstrate that the state has implemented sufficient measures to reach attainment by the eventual attainment year.” 638 F.3d at 1191. The opposite applies here because the milestone year and attainment year are the same; therefore, it is necessary to demonstrate that the state has implemented sufficient measures to reach attainment. That the MVEBs here apply to both a milestone and attainment year distinguishes EPA’s action in *NRDC* from EPA’s action here.

Given the difference of when agency action occurred in *NRDC*, the case supports Petitioners’ position. Importantly, in *NRDC* the area had not failed to attain by the relevant attainment deadline prior to the agency’s adequacy determination. 638 F.3d at 1188; *see also Sierra Club v. EPA*, 294 F.3d 155, 158–59 (D.C. Cir. 2002) (highlighting the importance of attainment deadlines).

Moreover, contrary to EPA's responses, *NRDC v. EPA* supports vacatur of agency approval of a failed plan. The court states "it is also indisputable that its SIP must demonstrate attainment." *NRDC*, 638 F.3d at 1195. Here, the SIP submittal failed to bring the nonattainment area into attainment, and, therefore, the MVEB elements must be disapproved.

II. EPA cannot allow Colorado to take credit for state-only emissions reductions that are not federally enforceable.

The Clean Air Act prohibits EPA from approving submittals that take credit for emissions reductions resulting from pollution control measures that are not "federally enforceable," that is, they are only enforceable by states. 42 U.S.C. §§ 7511a(b)(1)(C) and (D); *see Comm. For a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015). The Clean Air Act prohibits states from taking credit in SIPs for emissions reductions that result from emissions control measures that are not included in the SIP submittal and, therefore, are not subject to federal or citizen enforcement. 42 U.S.C. § 7410(a)(2)(A). Federal enforceability requires a tripartite enforcement scheme, where states, EPA, and the public are able to enforce the requirements. *See* 42 U.S.C. §§ 7604, 7414. Here, EPA violated the Clean Air Act by approving elements of Colorado's Serious SIP submittal that took credit for these "state-only"

emissions reductions. AR0014238–40. In other words, EPA allowed Colorado to claim more emissions reductions than the Clean Air Act allows.

A. EPA’s approval of Colorado’s SIP submittal that takes credit for state-only emissions reductions violated the Clean Air Act.

Section 7511a(b)(1)(C) requires that any creditable emissions reduction be federally enforceable as a part of either measures under the “implementation plan, rules promulgated by the Administrator [of EPA], or a [applicable] permit.” *See* 42 U.S.C. § 7511a(c) (incorporating requirements from 42 U.S.C. § 7511a(b)). Importantly, these reductions are used to calculate whether the state has met RFP provision requirements. *See* 42 U.S.C. § 7511a(c). They also serve as the basis for EPA’s approval of MVEBs. 40 C.F.R. § 93.118(e)(4)(iv). EPA regulations also require that any emissions reductions required by RFP provisions be federally enforceable. *Id.* § 51.1110(a)(5)–(7). In these ways, EPA’s decision to approve a state plan that takes credit for emissions reductions that are not federally enforceable would violate the Clean Air Act and various aspects of its implementing regulations.

Committee For a Better Arvin v. EPA confirms that any emissions reduction measures relied on to achieve compliance with NAAQS must be federally enforceable. 786 F.3d at 1176. If an emissions reduction measure is not a part of the SIP, then EPA cannot enforce it, only the state can. *Id.* This is

a problem because it is the “primary responsibility of EPA to ensure that Congress’s aims to ensure healthy air quality have been carried out” and it is “fundamentally error if any of the standards necessary for federal compliance are not within the SIP so as to be enforceable directly by the responsible federal agency.” *Id.* at 1176–77.

Here, Colorado’s SIP submittal demonstrates that the state is not deducting state-only emissions reductions in their reporting, and thus the submittal relies on emissions reductions that are not federally enforceable. AR0014238–40. For example, Colorado’s Serious SIP submittal used emissions data reported by the oil and gas industry to develop an estimate of condensate and oil tank emissions on a per facility basis. AR0014220. Colorado regulates emissions from oil and gas operations under state law, but facilities do not differentiate between emissions reductions required by federal law and those required by state law when reporting their emissions to the state. AR0014218, AR0014220–21, AR0014242–45; *see also* 87 Fed. Reg. 67, 617, at 67,620.

Another example is that Colorado’s submittal also does not differentiate between the legal source of emissions reductions when collecting emissions data from industry, such as data collected in 2017 that was converted into emissions estimates and did not differentiate between federal or state sources

of emissions reductions. AR0014218, AR0014238–40. The information that created the 2017 emissions estimates, or emissions inventories, also went into developing the 2020 attainment year inventory. AR0014244–45. These inventories served as the basis for other elements of the SIP submittal, including the RFP provisions and MVEBs. AR0014251–52; 87 Fed. Reg. at 67,621. These examples demonstrate that Colorado did not deduct state-only emissions reductions from its analysis and relies on those emissions reductions in various elements of its SIP submittal. For this reason, EPA’s approval of the Serious SIP submittal’s elements that relied on state-only emissions reductions violated the Clean Air Act.

Despite contradictory statements elsewhere in the record, Colorado confirms in the documents it submitted to EPA that it has not deducted state-only emissions from its emissions statements. First, Colorado expressly says that its emissions reductions are “due to state and federal regulatory requirements, [and] greater state and federal compliance and enforcement efforts” but makes no effort to differentiate between the two in their emissions calculations. AR0014221. Second, Colorado explains that deductions from state emissions rules are “difficult to quantify” and then fails to quantify them. AR0014273, AR0014285. If the emissions from state-only emissions reduction measures are not quantified, then EPA does not know

what impact such measures had on the emissions reductions that Colorado took credit for.

Thus, it was arbitrary and capricious for EPA to approve Colorado's SIP submittal without a quantification of the state-only emissions reductions, and its approval must be vacated. 5 U.S.C. § 706(2)(A); *see Sierra Club*, 99 F.3d 1551 at 1555 (holding courts must vacate EPA's determinations if it is arbitrary, capricious, or otherwise not in accordance with law).

B. EPA's assertion that Colorado's reliance on state-only emissions reductions was "inconsequential" is arbitrary and not supported by the record.

In its Response to Comments, EPA stated that "even if the state were crediting some state-only measures for purposes of demonstrating RFP. . . such credit would be inconsequential for purposes of demonstrating RFP." AR0021576. Colorado taking credit for federally unenforceable emissions reductions is not "inconsequential" and EPA's assertion is not supported by the record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

To start, EPA's assertion that any state-only emissions reductions are "inconsequential" has no basis in the record. How does EPA know the emissions reductions from state-only measures are inconsequential if the impact has never been quantified? AR0014285. EPA has offered no

explanation. And if Colorado says that it cannot quantify the state-only emissions it is taking credit for, how can EPA know what impact those emissions have on Colorado meeting its RFP provisions? *Id.* For example, states can use a combination of VOC and NO_x reductions for purposes of complying with RFP provisions. AR0021575. Colorado chose to only use VOC reductions to reach the nine percent reduction “with a comfortable margin” counting only VOC reductions. *Id.* Without knowing how much of Colorado’s VOC reductions are state-only reductions, how can EPA confirm that deducting those emissions will not affect Colorado’s compliance with its RFP provisions? It cannot. EPA’s approval of Colorado’s Serious SIP submittal without knowing the impact that state-only reductions had on Colorado’s compliance was therefore unsupported by the record and unlawful. *State Farm*, 463 U.S. at 43–44.

C. Colorado has a checkered past of air quality control compliance.

In its Response to Comments, EPA also implied that Colorado’s reporting and efforts should be trusted. *See* AR0021574. This trust runs counter to Colorado’s history of noncompliance with air quality standards. Instead, this history demonstrates the need for federally enforceable pollution control measures, where EPA and the public must pick up the slack in enforcement left by the state.

Colorado's failure to deduct state-only emissions reductions in its Serious SIP submittal is just another example in Colorado's long history of noncompliance with Clean Air Act requirements. Colorado has failed to reach attainment of ozone NAAQS for a decade and a half. 87 Fed. Reg. 67,617 at 67,618. Additionally, Colorado state enforcement and permitting has a checkered history. In 2020, an air permit was issued to a mining corporation that the Director of the Colorado Air Pollution Control Division had held as a client while previously working at a private firm. AR0021309. While holding the mining corporation as a client, the Director worked on applying for the permit that he later helped issue after joining the Division. *Id.* Despite this blatant conflict of interest, the Director remains employed at the Division and the air permit remains valid. *Id.*; AR0021363-77.

EPA itself has recognized Colorado's lack of compliance with the Clean Air Act, particularly when it comes to enforceability of air quality measures by the EPA and citizens. In the same Serious SIP submittal at issue here, Colorado included deficient reporting requirements for oil and gas well pads that EPA rejected because they inhibit the public's ability to enforce Colorado's SIP. 88 Fed. Reg. 29,827 at 29,828. Colorado historically did not require polluters to share proof of their compliance with permits with the state. *Id.* EPA stated that the public needs access to such information and that

this lack of reporting requirements “undermines citizens’ ability to participate in the enforcement of the SIP as allowed by [Clean Air Act] section 304.” *Id.*

Not only does this history warrant apprehension, but it also emphasizes the importance of citizens’ ability to verify that the state is working towards compliance. Verification happens through citizen enforcement. *Comm. For a Better Arvin*, 786 F.3d at 1176–77; *see also* 42 U.S.C. § 7604. One purpose of citizen enforcement is “to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.” *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976). Citizen enforcement of the Clean Air Act promotes government accountability and increases overall enforcement of the Act’s requirements. *Utah Physicians for a Healthy Env’t v. Diesel Power Gear*, 21 F.4th 1229, 1243 (10th Cir. 2021). A central problem with state-only emissions reductions is neither citizens nor the federal government can ensure those reductions will occur because they lack the ability to enforce those reductions under the Clean Air Act. *Comm. For a Better Arvin*, 786 F.3d at 1176–77. From this perspective, EPA’s decision to approve Colorado’s Serious SIP submittal, despite its reliance on state-only emissions reductions, violates both the letter and spirit of the Clean Air Act by foreclosing citizen enforcement.

III. EPA violated Section 110(l) of the Clean Air Act.

Section 110(l) of the Clean Air Act states that “the Administrator [of EPA] shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress.” 42 U.S.C. § 7410(l). EPA’s approval of Colorado’s Serious SIP submittal directly interferes with attainment of several NAAQS requirements.

As part of its obligation to ensure that any SIP submittal meets the Clean Air Act’s requirements, EPA must analyze whether “the ultimate effect of a State’s choice of emission limitations is in compliance with the [NAAQS].” *Train v. NRDC*, 421 U.S. 60, 79 (1975). This analysis should reflect “consideration of the prospects of meeting current attainment requirements under a revised air quality plan.” *Hall v. EPA*, 273 F.3d 1146, 1161 (9th Cir. 2001). For a court to uphold an EPA decision to approve a SIP submittal, EPA’s analysis must “rationally connect its approval of a particular plan revisions before it to its assessment of an area’s prospects for meeting current attainment requirements.” *Id.*

A. EPA violated Section 110(I) by failing to analyze whether its approval would interfere with other NAAQS.

Here, EPA failed to conduct an analysis of Colorado's Serious SIP submittal for possible interference with other NAAQS, despite evidence in the record that suggested likely interference.

First, evidence in the record suggested that approving Colorado's Serious SIP submittal would allow for NO_x NAAQS violations by the Suncor Petroleum Refinery (Suncor). AR0020323. As noted, NO_x is a precursor pollutant for ozone but also has its own NAAQS because NO_x endangers human health. 83 Fed. Reg. 17,226 (April 18, 2018). Expert evidence in the record submitted by the Public Interest Groups showed that Colorado issued a permit to Suncor pursuant to the SIP submittal's requirements, that allows the facility to emit NO_x pollution in amounts that result in an ambient concentration of 235.21 micrograms per cubic meter—well above the NO_x NAAQS requirement that an area be below 188 micrograms per cubic meter. AR0020323. Even the Colorado Air Pollution Control Division's own modeling, conducted in response to the Public Interest Groups' expert evidence, showed Suncor causing NO_x NAAQS violations under its permit. AR0020323. Such evidence, demonstrated through independent and state modeling, should have required EPA to conduct an analysis of whether

approving the Serious SIP submittal would interfere with the Front Range area's ability to attain the NO_x NAAQS. *See Hall*, 273 F.3d at 1161.

EPA's approval of Colorado's Serious SIP submittal also interferes with the Front Range nonattainment area's ability to comply with both ozone NAAQS. As noted above, there are two current ozone NAAQS: the 2008 Ozone NAAQS, with a standard of 75 parts per billion, and the 2015 Ozone NAAQS, with a more stringent requirement of 70 parts per billion. 80 Fed. Reg. at 65,292. The two ozone NAAQS are on independent timelines and require independent SIP submittals from Colorado. 77 Fed. Reg. at 30,161; 80 Fed. Reg. at 65,292. EPA did not analyze whether its approval of Colorado's Serious SIP submittal would interfere with the 2015 Ozone NAAQS despite evidence in the record that the Serious SIP submittal would interfere with the area's ability to attain the 2015 standards. *See* 88 Fed. Reg. at 29,827. This evidence takes the form of Colorado's own admission:

To the disappointment of some environmental groups, the division still plans to proceed with a separate plan to bring ozone levels in line with the tougher 70-parts-per-billion standard [the 2015 Ozone NAAQS], even though regulators have already acknowledged that it's not sufficient to meet the threshold by the 2024 federal deadline. Mike Silverstein, the director of the Regional Air Quality Council, has said there's no chance the Front Range will meet the deadline and that submitting the inadequate plan is a strategy to buy more time. AR0021369.

Provisions of the approved Serious SIP submittal reflect state law that is in effect, and because that law is already insufficient to meet the 2015 Ozone NAAQS, EPA's approval of these insufficient provisions interfered with the Front Range nonattainment area's ability to attain the 2015 Ozone NAAQS.

Finally, EPA's approval of Colorado's Serious SIP submittal is also interfering with the Front Range nonattainment area's ability to attain the 2008 Ozone NAAQS because it is causing the Front Range area to fail to meet its Severe nonattainment area deadlines. AR0021363-69. EPA has already determined that the Front Range area did not attain the 2008 Ozone NAAQS by its Serious attainment date. 87 Fed. Reg. 67,617 at 67,625. EPA's approval of elements of Colorado's Serious SIP submittal that have already been shown to fail to reach attainment directly interfere with the area's ability to attain the 2008 Ozone NAAQS by its Severe deadline.

B. *WildEarth Guardians* is not controlling for this case.

In its Response to Comments, EPA responded to concerns that its approval would violate Section 110(l) by citing *WildEarth Guardians v. EPA*, 759 F.3d 1064 (9th Cir. 2014). AR0021592. *WildEarth Guardians* held that a petitioner must identify an element of a SIP submittal that weakens or removes pollution controls, in order to trigger Section 110(l)'s requirements

and that a SIP submittal that maintains the status quo would not interfere with the attainment or maintenance of NAAQS. *WildEarth Guardians*, 759 F.3d at 1074. This case is not controlling here for two reasons.

First, EPA's obligation to conduct an analysis under Section 110(l) is not a binary or a threshold; rather EPA must engage in some level of analysis to ensure compliance with Section 110(l) based on the relevant circumstances. *See Train*, 421 U.S. at 79; *see also Hall*, 273 F.3d at 1161. Here, EPA did not engage in a substantive analysis that their approval would not interfere with other NAAQS, even with evidence in the record demonstrating interference with several NAAQS, therefore violating Section 110(l). 88 Fed. Reg. at 29,827. Accordingly, EPA's citation to *WildEarth Guardians* does not resolve EPA's requirement to undertake an analysis under Section 110(l).

Second, this case differs from *WildEarth Guardians* because the status quo here results in NAAQS violations—specifically, modeled violations of the NO_x NAAQS, planned violations of the 2015 Ozone NAAQS, and persistent violations of the 2008 Ozone NAAQS. It cannot be right that the *WildEarth Guardians* ruling means that EPA can keep approving plans that violate the NAAQS year after year without violating Section 110(l). That would render Section 110(l) meaningless, as its intent is to ensure states meet all NAAQS requirements. EPA's approval of Colorado's Serious SIP submittal, even if just

maintaining the status quo, is continuing nonattainment—a clear violation of Section 110(l) and the purpose of the Clean Air Act.

IV. EPA’s approval of the Serious SIP submittal must be set aside because the action is arbitrary, capricious, and contrary to law.

The Public Interest Groups respectfully request that this Court vacate EPA’s approval of Colorado’s Serious SIP submittal including the RFP provisions and MVEBs. Vacatur is necessary because EPA’s approval violates the plain language of the Clean Air Act. Vacatur is the appropriate and expected remedy when an agency’s action is arbitrary, capricious, and contrary to law. 5 U.S.C. § 706(2)(A); *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) (“[v]acatur of agency action is a common, and often appropriate form of injunctive relief”). This Court has adopted the *Allied-Signal* test for determining whether to deviate from the standard course of vacating illegal agency actions. *See Diné Citizens Against Ruining Our Env’t v. Haaland*, 59 F.4th 1016, 1049 (10th Cir. 2023). This Court considers the “seriousness of the agency action’s deficiencies” and “the disruptive consequences of an interim change that may itself be changed.” *Id.* at 1049 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

Here, EPA's approval of elements of Colorado's Serious SIP submittal is seriously deficient because it violates the plain language of the Clean Air Act and undermines the integrity of the Act's structure. EPA cannot approve elements of a SIP submittal that are meant to reach attainment when the plan has failed to attain by the statutory deadline. EPA's policy justifications are inconsistent with the Clean Air Act's requirement that EPA approve plans that will reach attainment of the relevant NAAQS by the relevant deadline. By approving elements of the Serious SIP submittal that did not attain the 2008 Ozone NAAQS, EPA's action is an egregious violation of the law.

Because EPA is already considering Colorado's Severe SIP submittal, vacating EPA's approval will not disrupt that administrative process and will instead restore the integrity of the Clean Air Act when applied to that process. EPA's decision to adopt a failed plan postpones the development of a plan that meets legal requirements under the Clean Air Act. EPA must work with Colorado to approve a new SIP submittal that will adequately address the ozone pollution problem, protect public health, and attain the NAAQS—a task beyond the scope of a remand. Rather, remand would keep focus on the flawed Serious SIP process rather than moving the process forward as required by the Clean Air Act so that meaningful, robust revisions can be implemented through the Severe SIP submittal process or through EPA

implementation of a FIP. The Court should therefore vacate EPA's action as arbitrary, capricious, and contrary to law.

CONCLUSION

For the reasons stated above, EPA's approval of the RFP provisions and MVEBs was contrary to law and this Court should vacate EPA's action approving those elements. Moreover, EPA unlawfully allowed Colorado to take credit for state-only emissions reductions and failed to conduct a Section 110(l) analysis, and this Court should vacate aspects of EPA's approval affected by those errors. For these reasons, this Court should vacate EPA's approval.

ORAL ARGUMENT STATEMENT

The Center for Biological Diversity and 350 Colorado believe that oral argument would be useful in this case because it presents multiple issues of first impression, and it is relatively rare that Clean Air Act cases are litigated in this Court.

Dated March 6, 2024.

Respectfully submitted,

s/ Ken Fowler
Ken Fowler

s/ Erin Kincaid
Erin Kincaid

s/ Wyatt Sassman
Wyatt Sassman
Asha Brundage-Moore
Environmental Law Clinic
University of Denver
Sturm College of Law
2255 E. Evans Ave.
Denver, Colorado 80208
Phone: 303-871-6140
kfowler24@law.du.edu
ekincaid24@law.du.edu
wsassman@law.du.edu
abrundage-moore@law.du.edu

Ryan Maher
Center for Biological Diversity
1411 K St. NW, Suite 1300
Washington, DC 20002
Phone: 781-325-6303
rmaher@biologicaldiversity.org
Attorneys for Petitioners
Center for Biological Diversity and 350 Colorado

CERTIFICATE OF SERVICE

I certify that on March 6, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will serve this filing on all Counsel of Record.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program and according to the program are free of viruses.

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Date: March 6, 2024.

s/ Wyatt Sassman

Wyatt Sassman
Environmental Law Clinic
University of Denver
Sturm College of Law
2255 E. Evans Ave.
Denver, Colorado 80208
Phone: 303-871-6140
wsassman@law.du.edu
*Counsel for Center for Biological Diversity and
350 Colorado*