No. 07-311

IN THE

Supreme Court of the United States

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, *et al.*
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The National Environmental Development Association's Clean Air Project ("NEDA/CAP") was an intervenor in support of the United States Environmental Protection Agency ("EPA") in the D.C. Circuit below, and is a respondent in this case. The petition lists all the parties to the proceeding. *See* Pet. ii-iii. NEDA/CAP is a non-profit association of manufacturers that has no parent corporations and has issued no stock. NEDA's members include the following: Alcoa, Inc., The Boeing Company, Chrysler, LLC, ConocoPhillips, Inc., Eli Lilly & Company, ExxonMobil, General Electric, Inc., Georgia Pacific, LLC, Intel Corporation, Invista, LLC, Koch Industries, Merck & Company, Occidental Petroleum Corporation, Procter & Gamble, and Weyerhaeuser Corporation.

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Pursuant to S. Ct. Rule 12.6, respondent NEDA/CAP respectfully submits this response in support of the petition for certiorari filed by the National Petrochemical & Refiners Association, *et al.*, seeking review of the judgment of the United States Court of Appeals for the D.C. Circuit below. NEDA/CAP intervened in support of EPA in the D.C. Circuit below. Its members are manufacturers representing major industrial sectors, including the aerospace, aluminum, automobile manufacturing, natural resource exploration,

refining and petrochemicals, pharmaceuticals, electronics, and home products industries. The D.C. Circuit invalidated significant aspects of an EPA rule—the Phase I Ozone Implementation Rule—which implements EPA's replacement of the prior national ambient air quality standard ("NAAQS") for ozone with a new standard more protective of public health and the environment. The court's decision adversely affects thousands of regulated entities nationwide, as well as the federal, state, and local regulators who oversee them. The petition should be granted.

1. Under the Clean Air Act ("CAA"), EPA is required to review and revise, as appropriate, the NAAQS for a regulated pollutant every five years. 42 U.S.C. § 7409(d). In 1997, based on "a new scientific understanding that prolonged ozone exposure was more harmful to public health than the short-term exposure then regulated," Pet. App. 7a, EPA replaced the existing "1-hour standard" for ozone—0.12 parts per million ("ppm") averaged over one hour—with a new "8-hour standard"—0.08 ppm averaged over eight hours. The Phase I Ozone Implementation Rule implements the new 8-hour standard. As the D.C. Circuit below explained, the 8-hour standard is "marginally more stringent, as EPA recognized that an eight-hour level of 0.09 ppm would have 'generally represent[ed] the continuation of the present level of protection.' " *Id.* (quoting 62 Fed. Reg. 38,856, 38,858 (July 18, 1997)).

Section 172(e) of the CAA—the so-called "anti-backsliding provision"—provides that if EPA "relaxes" a NAAQS it must provide for "controls" which are "not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). As EPA observed, "the Act does not specifically address what requirements apply when [EPA] strengthen[s] a NAAQS." Pet. App. 648a. In view of that statutory gap and the ambiguity of certain terms in the CAA, EPA concluded that States would be required to retain in their state

implementation plans ("SIPs") certain measures designed to attain the revoked 1-hour standard. EPA concluded, however, that States would not be required to retain other measures relating to the revoked 1-hour standard, including: (1) Section 185 penalties for failure to meet applicable attainment deadlines for the old 1-hour standard, and (2) New Source Review ("NSR") requirements based on an area's classification under the revoked 1-hour standard.

2. The D.C. Circuit expressly recognized that, "[b]y its terms, Section 172(e) applies *only* when EPA 'relaxes' a primary NAAQS." Pet. App. 30a (emphasis added). In the court's view, however, "[c]onsidered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter." *Id.* Thus—in a virtual about-face—the court held that "EPA *is required by statute* to keep in place measures intended to constrain ozone levels—*even the ones that apply to outdated standards*—in order to prevent backsliding." Pet. App. 40a (emphases added). Accordingly, the court held that EPA lacked authority to allow States to remove *any* measures relating to the 1-hour standard—including those of only contingent future applicability—even though EPA had replaced that standard with the more stringent 8-hour standard.

3. As the petition explains, the D.C. Circuit's decision runs afoul of this Court's established precedents. The decision violates the fundamental principle that courts are not free to ignore the plain terms of a statute in an attempt to further some divined congressional purpose. *See* Pet. 15-18. The decision also subverts basic *Chevron* principles by failing to defer to EPA's reasonable interpretation of ambiguous statutory language and its reasonable policy choices. *See* Pet. 21-29. In effect, the D.C. Circuit substituted its judgment for that of Congress and the agency. For these reasons alone, certiorari is warranted. The need for

certiorari is even more pressing, however, in view of the harmful consequences of the D.C. Circuit's decision.

a. The CAA establishes five categories of ozone nonattainment areas with corresponding applicable attainment dates: marginal, moderate, serious, severe, and extreme. *See* 42 U.S.C. § 7511(a)(1). Section 185 of the Act imposes penalties on major stationary sources in severe and extreme areas that fail to meet the ozone NAAQS by the applicable attainment date. Indeed, *each* major stationary source in a severe or extreme area that fails to meet the ozone NAAQS by the applicable attainment date must pay a penalty if its VOC emissions exceed certain levels, even if the source is in full compliance with its permits and the SIP that EPA approved as adequate to attain the ozone NAAQS by the applicable attainment date. *See id.* § 7511d(a) ("if the area to which such plan revision applies has failed to attain the [NAAQS] for ozone by the applicable attainment date, *each* major stationary source of VOCs in the area shall * * * pay a fee to the State as a penalty for such failure") (emphasis added).

In the Phase I Ozone Implementation Rule, EPA concluded that Section 185 penalties need not apply if an area fails to meet the revoked 1-hour standard by that standard's applicable attainment date. Instead, Section 185 penalties need only apply if an area fails to meet the applicable attainment date for the new, more stringent 8-hour standard which, because of its stringency, will necessarily take more time to be attained. In holding that Section 185 penalties must remain in place for an area's failure to attain the 1-hour standard by that standard's applicable attainment date, the D.C. Circuit's decision effectively requires sources to *indefinitely* comply with—*i.e.*, meet—a revoked standard that EPA has determined is inadequate to protect public health and the environment.

If Section 185 penalties are assessed for the failure to meet the revoked 1-hour standard, the amounts of such penalties will be staggering. Section 185 penalties are assessed at $5,000 per ton of VOC emissions exceeding 80 percent of a baseline calculated by reference to a source's actual or allowable emissions. *See id.* § 7511d(b)(1), (2). Adjusting for inflation since 1990, *see id.* § 7511d(1), (3), the current penalty has reached nearly $8,000 per ton of emissions exceeding baseline amounts. Moreover, Section 185 penalties are not merely a one-time penalty, but are imposed *annually* until an area attains the ozone NAAQS. *Id.* § 7511d(b)(1). As petitioner NPRA estimates, the imposition of Section 185 penalties for failing to meet the revoked 1-hour standard could amount to about $100 million annually in the Houston area alone, and hundreds of millions nationwide. *See* Pet. 6 n.4.[1] Thus, if left to stand, the D.C. Circuit's decision could have a crippling effect on certain segments of industry—with corresponding ripple effects in the Nation's economy—even though no area has yet failed to meet the 8-hour ozone NAAQS currently in place.

b. The CAA's NSR program imposes extensive review and permitting requirements on major stationary sources when they make a "major modification"—*i.e.*, a change resulting in a significant net emissions increase of a pollutant. *See* 42 U.S.C. § 7501 *et seq.*; 40 C.F.R. § 52.21(b)(32)(i). For ozone, the applicability of NSR and the NSR requirements imposed if triggered are tailored to the severity of the ozone problem in a particular nonattainment area. The higher an area's classification, the lower the threshold for deeming a source a "major" source subject to NSR and for determining whether a source has made a "modification" under the Act. For example, in marginal areas, a major source is defined as a source with annual VOC emissions of

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[1] Some States include both VOC and NOx emissions in calculating emissions for purposes of Section 185.

100 tons or more and a modification is defined as an increase in VOC emissions of 40 tons or more; in extreme areas, a major source is defined as a source with annual VOC emissions of 10 tons or more and a modification is defined as *any* increase in VOC emissions. *Id.* §§ 7502(b)(6), 7511a(e), 7602(j); 40 C.F.R. § 51.165(a)(1)(x)(A), (E). Likewise, the higher an area's classification, the more stringent the NSR requirements with which a major source must comply when it makes a modification under the Act. For example, if a major source triggers NSR, it must obtain an emissions "offset" from another source (or sources) within the designated nonattainment area. In marginal areas, the offset ratio is 1.1 to 1; in extreme areas, the offset ratio is 1.5 to 1. *Id.* § 7511a(a)(4), (e)(1).[2]

In the Phase I Ozone Implementation Rule, EPA decided that sources would have to comply with NSR based only on an area's classification under the new 8-hour standard, and not on an area's previous classification under the old 1-hour standard. Among other things, EPA reasoned that the purpose of NSR is not to reduce emissions, but to mitigate emissions increases resulting from economic growth, and "States cannot reliably estimate the benefits of mitigating emissions increases for SIP planning purposes." 70 Fed. Reg. 17,018, 17,022-23 (Apr. 4, 2005). *See also id.* at 17,024 (noting that EPA has "discouraged States from including offsets as a source of emissions reductions in the attainment model because of the difficulties in accurately predicting the number of sources that will trigger offset reductions and the number of offsets actually achieved"). Although some areas had higher classifications under the 1-

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[2] There are also "internal" netting provisions applicable in serious, severe, and extreme areas which require consideration of all units at a plant and not just the unit or units involving the proposed modification. The internal offset ratio is 1.3 to 1. *Id.* § 7511a(c)(7), (8), (d)(2), (e)(2).

hour standard than under the 8-hour standard, EPA reasoned that NSR requirements are more appropriately based on current air quality data, as reflected by an area's classification under the 8-hour standard. *See id.* at 17,025 ("area's ability to accommodate economic growth is related to its current air quality conditions").

Rejecting EPA's reasoning, the D.C. Circuit held that sources must continue to comply with NSR based on an area's previous classification under the revoked 1-hour standard. Indeed, under the D.C. Circuit's decision, sources must continue to comply with those requirements *indefinitely*, even if the 1-hour standard is eventually attained. NSR for any pollutant is always burdensome, time-consuming, and expensive. *See, e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 840 (1984) (NSR imposes "stringent" requirements); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) ("substantial regulatory costs" imposed by similar program in attainment areas); EPA, *New Source Review: Report to the President* 20 (2002) (NSR permitting process can last 7 to 22 months). In severe and extreme ozone nonattainment areas—in which *more* sources are potentially subject to NSR—the CAA imposes especially stringent and costly NSR requirements. For example, in the Houston area, one NEDA/CAP member recently paid more than $150,000 for a one-ton NOx offset. In the Los Angeles area, the same NEDA/CAP member recently paid more than $180,000 for a one-ton NOx offset.[3]

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[3] The prices for offsets of other pollutants can be just as exorbitant. NEDA/CAP understands that at a September 21, 2007 meeting of the Federal Clean Air Act Advisory Committee it was reported that in the Los Angeles area the price of an offset for a *pound* of PM-10 (or fine particulate) is $100,000. As the D.C. Circuit's ruling arguably applies any time EPA strengthens a NAAQS, the decision below has implications far beyond this case.

Implementation of NSR requirements involves the expenditure of considerable resources by often financially-strapped federal, state, and local permitting authorities. *See, e.g.*, *Alabama Power*, 636 F.2d at 400, 405 (recognizing administrative burden imposed by similar program); *Interior, Environment, and Related Agencies Appropriations for 2007 Part 7: Hearings Before the Subcomm. on Interior, Environment and Related Agencies of the House Comm. on Appropriations,* Prepared Statements of Outside Witnesses, 109th Cong. 591 (2006) (statement of State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials) (protesting budget cuts "[i]n a time of limited state and local resources, where state and local governments are straining to maintain existing programs"). Thus, the D.C. Circuit's decision imposes substantial costs and burdens on regulators and regulated entities alike, even though, as EPA concluded, NSR has no measurable effect on the attainment of the ozone NAAQS.

c. The CAA gives EPA and the States considerable flexibility to determine appropriate measures to attain the NAAQS. In dictating the measures that States must include in their SIPs to attain the new 8-hour standard, the D.C. Circuit's decision usurps that regulatory authority. That is troubling, because it is the EPA and the States, not the courts, which have the knowledge and expertise necessary to determine which measures are best-suited to attain the NAAQS. The science of ozone is continually evolving. We now know that different types of pollutants are responsible for the formation of ozone in the atmosphere. For example, it is now understood that hydrocarbons do not form ozone by themselves, but that VOCs and nitrogen oxides combine in the atmosphere to form ozone under sunlight and certain weather conditions. Scientists also understand that no VOC reacts to such conditions in exactly the same way (*i.e.*, styrene is more reactive than benzene, which is more reactive than toluene or ethanol). Just recently, the State of Texas

relied on the latest science on ozone formation in revising its SIP to substitute an existing control measure for NOx reduction with a more effective VOC control measure. *See* http://www.tceq.state.tx.us/assets/public//implementation/air/sip/hgb/hgb_sip_2007/06027SIP_adoCh1.pdf.

It is critical that those with a scientific understanding of ozone determine which measures are best to combat ozone. Certain SIP measures adopted in the past have actually *exacerbated* ozone conditions in certain areas. National Research Council, *Rethinking the Ozone Problem in Urban and Regional Air Pollution* 10 (1991). Review should therefore be granted to ensure that the experts on ozone and other pollutants, not Article III judges, are making decisions about how best to protect public health and the environment.

CONCLUSION

For the foregoing reasons, and those stated in the petition for certiorari, the petition should be granted and the D.C. Circuit's judgment reversed.

Respectfully submitted,

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