IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 04-1200 (and consolidated cases)

DEPT. OF JUSTICE - ENRD
ENVIRONMENT DIVISION
2 MAR 26 P12:26

PETITION FOR PANEL REHEARING

Petitioners American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Louisiana Environmental Action Network, Conservation Law Foundation, Southern Alliance for Clean Energy, and South Coast Air Quality Management District (collectively, Environmental/SCAQMD petitioners), hereby petition for panel rehearing for two limited purposes set forth below.

1. **Request to modify remedial order**: The Court's decision of December 22, 2006 provides a well-reasoned analysis of the Clean Air Act and correctly identifies key defects in EPA's 2004 ozone implementation rule. Having carefully disapproved some portions of the rule, however, and upheld others, the opinion's last sentence vacates the entire rule instead of limiting vacatur to the portions of the rule held invalid in the Court's opinion. *South Coast Air Quality Management Dist v. EPA*, 472 F.3d 882, 886, 905 (D.C. Cir. 2006)("we vacate the 2004 Rule and remand the matter to EPA").

Plea
90-5-2-3-17358

Vacatur of the entire rule is not necessary to effectuate the Court's ruling, and has the effect of discontinuing unchallenged and lawful provisions of the rule.[1] To avoid such a result, Environmental/SCAQMD petitioners move the Court to clarify that vacatur of the 2004 Rule extends only to those portions of the rulemaking that this Court disapproved. Specifically, petitioners propose that the Court modify its remedial order to read as follows:

> Page 3: Because EPA has failed to heed the restrictions on its discretion set forth in the Act, we grant the petitions in part, vacate the rule in part, and remand the matter to EPA for further proceedings.
>
> Page 40: Accordingly, we vacate those portions of the 2004 Rule that provide for regulation of 8-hour nonattainment areas under Subpart 1 in lieu of Subpart 2, and those portions of the 2004 Rule that allow backsliding with respect to the measures addressed in parts VI.C.1 through VI.C.5 of this opinion, and remand the matter to EPA.

Counsel for EPA states that EPA concurs with proposal of the foregoing modifications to the Court's opinion, and that EPA will separately so petition. Environmental/SCAQMD petitioners move separately because they anticipate that EPA's rehearing petition will contain statements and requests for other relief with which petitioners do not agree.

2. Request to clarify ruling relative to conformity: Petitioners also ask the Court to clarify the text of the opinion that explain why conformity requirements establish "controls" that may not be relaxed under section 172(e) of the Act. The opinion concludes that "one-hour conformity determinations constitute controls under section 172(e)." Although the Environmental/SCAQMD petitioners believe that the Court's language is clear in context, it can be argued that the term "determinations" is ambiguous because it could refer to all the ways in which conformity must be determined. Determinations include the obligation to demonstrate

[1] Petitioners emphasize that they do not read the Court's opinion as in any way authorizing or justifying any delay in implementing the Act.

that the statutory conformity tests in §176(c)(1)(A) and (B) will be met, in addition to the obligation to show that the "motor vehicle emission budgets" (MVEB) established by the State Implementation Plan (SIP) will also be met pursuant to §176(c)(2)(A). *See Environmental Defense Fund v. EPA*, 167 F.3d 641, 647 (D.C. Cir. 1999). Petitioners here challenged only EPA's elimination of the obligation to demonstrate conformity with the motor vehicle emission budgets contained in the one-hour ozone SIPs, and not EPA's decision to eliminate the use of the one-hour NAAQS when making the statutory conformity determinations required by § 176(c)(1)(A)and (B). Therefore to avoid any possible implication that the Court struck down EPA's decision with respect to both kinds of determinations, we ask the Court to clarify its decision by limiting the text of the opinion to the motor vehicle emission budgets in the one-hour SIPs.

Petitioners and EPA have conferred on the above concerns, and have agreed to propose the following modification to clarify the Court's opinion (at 39-40) with respect to conformity issue:

> Although section 176 provides a floor above which conformity determinations are required, EPA cannot conclude that conformity ~~determinations~~ using 1-hour SIP emission budgets are unnecessary without confronting section 172(e). Because one-hour conformity emission ~~determinations~~ budgets constitute "controls" under section 172(e), they remain "applicable requirements" that must be retained. EPA cannot well respond to commenters' concerns that removing ~~one-hour~~ conformity demonstrations using one-hour SIP budgets would "allow large increases in motor vehicle emissions" by acknowledging that "requiring conformity for both ozone standards at the same time would be overly burdensome and confusing." Transportation Conformity Rule Amendments, 69 Fed. Reg. at 40,009-10. 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. This principle encompasses conformity ~~determinations~~ based on 1-hour SIP emission budgets. *See* 40 C.F.R. § 93.109(e), *Environmental Defense et al. v. E.P.A.*, 467 F.3d 1329 (D.C. Cir. 2006).

EPA has indicated that it will petition the Court to amend its opinion as indicated above. Again, Environmental/SCAQMD petition separately because they anticipate that EPA's rehearing motion will contain statements and requests for other relief with which petitioners do not agree.

DATED this 22nd day of March, 2007.

Respectfully submitted,

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