JURISDICTIONAL STATEMENT

(A) Agency: The Environmental Protection Agency (EPA) has jurisdiction to make national ambient air quality (NAAQS) designations. 42 U.S.C. § 7407(d).

(B) Court of Appeals: This Court has jurisdiction to review EPA's final NAAQS designations and denials of petitions for reconsideration. *Id.* §§ 7607(b)(1), (d)(7)(B).

(C) Timeliness: The Clean Air Act (CAA or Act) requires Petitions for Review to be filed within sixty days. *Id.* § 7607(b)(1). EPA published the 2008 ozone designations on May 21, 2012. 77 Fed. Reg. 30,088 (May 21, 2012). WildEarth Guardians, Southern Utah Wilderness Alliance, and Utah Physicians for a Healthy Environment (collectively "Guardians") and Sierra Club filed their respective Petitions on July 20, 2012. EPA published notice of its denial of all petitions for reconsideration on January 7, 2013. 78 Fed. Reg. 925 (Jan. 7, 2013). Sierra Club and Guardians filed Petitions challenging EPA's denials on February 12 and 14, 2013, respectively.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum.

STATEMENT OF THE ISSUES PRESENTED

This Joint Brief addresses four Petitions for Review. Sierra Club's two Petitions involve fifteen counties located throughout the U.S. Guardians' two Petitions involve the Uinta Basin, located in northeastern Utah.

Sierra Club: Whether EPA acted arbitrarily and contrary to the CAA by allowing states to choose to have EPA designate fifteen areas attainment despite the most recent monitoring showing violations of the ozone NAAQS, while EPA designated other areas nonattainment based on the most recent monitoring.

Guardians: Whether EPA's refusal to designate the Uinta Basin as a nonattainment area despite undisputed, EPA-mandated monitoring demonstrating significant violations of the 2008 ozone NAAQS violates the CAA and is arbitrary.

STATEMENT OF THE FACTS

I. General Background

Ground-level ozone forms when volatile organic compounds ("VOCs") and nitrogen oxides ("NOx") react in sunlight. 77 Fed. Reg. at 30,089. Ozone is a dangerous pollutant that impairs breathing, aggravates asthma, increases emergency room visits, and even leads to premature deaths. 73 Fed. Reg. 16,436, 16,476 (Mar. 27, 2008). Children, the elderly, and people with respiratory conditions are most at risk from ozone pollution. *Id.* at 16,471.

On March 12, 2008, EPA revised the ozone NAAQS. *Id.* at 16,436.

Recognizing that existing standards were inadequate to protect public health and welfare, EPA lowered the standard from 0.08 parts per million (ppm) to 0.075 ppm. *Id.* EPA determines compliance through ambient air quality monitoring. Compliance is based on the "3-year average of the annual fourth-highest daily maximum 8-hour average concentration." 40 C.F.R. § 50.15(b).[1]

Once EPA promulgates a new NAAQS, it must designate all areas of the country as either attainment, nonattainment, or unclassifiable. 42 U.S.C. § 7407(d)(1)(B)(i). Attainment is defined as "any area . . . that meets the [NAAQS] for the pollutant." *Id.* § 7407(d)(1)(A)(i). Nonattainment is "any area that does not meet . . . the [NAAQS]." *Id.* § 7407(d)(1)(A)(ii). Unclassifiable is an area that "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]." *Id.* § 7407(d)(1)(A)(iii). Nonattainment designations trigger additional CAA mandates to reduce pollution. *See* 42 U.S.C. §§ 7502(c), 7511.

Although states and tribes submit initial designation recommendations for areas within their jurisdiction, EPA may make any modifications it "deems necessary." 42 U.S.C. § 7407(d)(1)(B)(ii). EPA must make final designations

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[1] Monitors must use a "reference or equivalent method" to measure ozone and report the daily maximum concentration averaged over any eight hour period. 40 C.F.R. § 50.15(a) & App. P § 2.1. EPA calculates a monitor's "design value" by taking the fourth-highest, eight-hour concentration each year for three years and averaging them. *Id.* App. P § 2.2, 2.3. There is a violation if the "design value" exceeds 0.075 ppm. *Id.* § 2.3, 3.

within two years of revising a NAAQS, subject to a one year extension if there is "insufficient information." *Id.* § 7407(d)(1)(B)(i).

II. EPA Failed to Designate Fifteen Counties Nonattainment Despite the Most Recent Monitoring Data Showing NAAQS Violations

On December 4, 2008, EPA issued guidance for states to use in making 2008 ozone designation recommendations, in which it explained: "We expect to base the final designations in March 2010 on the most recent quality-assured data which would be from 2006-2008 or 2007-2009." AR-0002 at 2 [JA-].[2] In other words, EPA gave states a choice of which ambient monitoring data EPA would use to make designations.

EPA required states and tribes to submit their initial recommendations by March 2009, but EPA missed the statutory deadline for finalizing designations. 77 Fed. Reg. at 30,090-91.[3] Guardians sued EPA, settling with a consent decree that required EPA to sign a final rule by May 31, 2012. *Id.* at 30,091. States were required to certify 2011 ozone ambient monitoring data to EPA by no later than May 1, 2012, which is obviously before the May 31, 2012 deadline. *Id.*

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[2] Documents in the administrative record labeled with document number EPA-HQ-OAR-2008-0476-#### will be cited as AR-####.

[3] EPA stalled the designation process in 2009 to reconsider the 2008 ozone standard. EPA proposed lowering the standard to the 0.060-0.070 ppm range, based upon a unanimous finding by EPA's independent scientific advisors that the 0.075 ppm standard "fails . . . [to] ensure an adequate margin of safety for all individuals." 75 Fed. Reg. 2,938, 2,992 (Jan. 10, 2010). EPA never finalized this proposal.

EPA issued another guidance memorandum on September 22, 2011. AR-0105 [JA-]. In it, EPA explained that because it had states' recommendations as well as quality-assured monitoring data for 2008-2010, the states did not need to do anything until EPA issued its proposed modifications, which it refers to as "120-day letters" because EPA must issue any proposed modifications 120 days before taking final action. *Id.* at 1-2.

On December 9, 2011, EPA notified the states and tribes via 120-day letters of any "preliminary" modifications to their initial designation recommendations. 77 Fed. Reg. at 30,091. EPA requested "states submit any additional information they wanted EPA to consider by February 29, 201[2], including any certified 2011 air quality monitoring data." *Id.* Seven states chose not to submit certified 2011 air quality monitoring data for fifteen counties where monitors showed violations of the ozone standard based on 2009-2011 data. Instead, the states continued to rely on 2008-2010 data.

The fifteen counties include: Montgomery (Ohio); Macomb, Wayne, Allegan and Muskegon (Michigan); Clinton (Missouri); Gregg and Jefferson (Texas); Jefferson and Oldham (Kentucky); Jefferson and Bossier Parishes (Louisiana); Oklahoma and Tulsa (Oklahoma); and Manitowoc (Wisconsin). The metropolitan statistical areas containing these counties collectively have a population of approximately ten million people.

On January 31, 2012, EPA "sent revised 120-day letter responses to Illinois, Indiana, and Wisconsin based on updated ozone air quality data for 2009-2011, submitted by the state of Illinois two days before the EPA sent the December 9, 2011 letters." *Id.* EPA informed these states that it intended to designate certain counties in Metro-Chicago nonattainment based on 2009-2011 monitoring data. EPA did not send similar letters to the states containing the fifteen counties. *See* AR-0420, at 3, Table 1 [JA-]. EPA acknowledged that it could and would make final nonattainment designations for the Metro-Chicago nonattainment area based on 2009-2011 monitoring data by the May 31, 2012 consent decree deadline. 77 Fed. Reg. at 30,091.

EPA then provided an opportunity for public comment on its proposed designations, with a comment deadline of February 3, 2012. *Id.* Sierra Club submitted comments identifying fifteen counties plus counties in Metro-Chicago that were violating the 2008 ozone NAAQS based on the most recent monitoring data (2009-2011) available in EPA's Air Quality System (AQS). AR-0420 at 2-3 [JA-]. Not only was the 2009-2011 data the most recent available, it was also less influenced by the Great Recession of 2008, which saw ozone levels drop as the economy did the same.

The relevant 2009-2011 monitoring data for these fifteen counties was required to be edited and validated, that is quality assured, by the time Sierra Club

submitted it on February 3, 2012. *See* 40 C.F.R. § 58.16(a)-(c). For these areas, the relevant data for 2011 is the first three quarters of the year because the ozone season, when ozone is typically worst, is from May 1 to September 30. 76 Fed. Reg. 48,208, 48,264 (Aug. 8, 2011). States were required to submit air quality data and associated quality assurance data to EPA's AQS for the first three quarters by December 30, 2011. 40 C.F.R. § 58.16(a)-(c). Although the relevant 2011 data was required to be in the AQS and quality assured before Sierra Club submitted its comments on February 3, 2012, states were not required to submit their annual monitoring data certification letter, which covers all ambient monitoring data including that based on annual averages, until May 1, 2012. *Id.* § 58.15(a). Notably, this certification deadline was still prior to EPA's consent decree deadline for finalizing designations. On February 14, 2012, EPA reopened the public comment period only to accept comments on its proposal to designate Metro-Chicago as nonattainment based on 2009-2011 data. 77 Fed. Reg. at 30,091.

Although its deadline under the consent decree was not until May 31, 2012, EPA signed the final designations on April 30, 2012 and published notice in the Federal Register on May 21, 2012. *Id.* at 30,095. EPA signed the final rule designating Metro-Chicago as nonattainment based on 2009-2011 data on May 31, 2012. 77 Fed. Reg. 34,221, 34,227 (June 11, 2012).

III. EPA Failed to Make a Nonattainment Designation for the Uinta Basin Despite Severe Ozone Pollution

A. The Uinta Basin Has Some of the Worst Ozone Pollution in the Nation

While ozone was long thought to be primarily an urban problem, recently EPA has acknowledged severe wintertime ozone violations in rural areas with significant oil and gas and other industrial development, such as the Uinta Basin and the Upper Green River Basin in Wyoming. *See* 77 Fed. Reg. at 30,089; AR-0205 at 4 [JA-]; AR-0215 at 2 [JA-]. The Uinta Basin is a geologic basin that includes much of the northeastern corner of Utah, extending into northwestern Colorado. *See* AR-0711 App. 1.

In the Uinta Basin, NOx and VOC emissions are trapped near the ground by stagnant air and converted to ozone by intense sunlight reflecting off snow. *See* AR-0205 at 4 [JA-]. When these conditions occur, these areas experience ozone levels exceeding those of the most heavily populated American cities. *See* AR-0711 at 2 & App. 112-123 [JA-] (showing that, in 2010 and 2011, Uintah County's ozone levels exceeded Los Angeles County's worst ozone days).

B. Monitoring Demonstrates that Air Quality in the Uinta Basin Exceeds the NAAQS

EPA does not usually require states to monitor in rural areas like the Uinta Basin. 40 C.F.R. § 58, App. D, Tables D-1 & D-2; *accord* AR-0622 at 12-13 [JA-]

(confirming that Utah does not operate an ozone monitor in the Uinta Basin).[4] In response to growing ozone pollution from oil and gas development, however, EPA required private oil and gas companies to begin ozone monitoring in the Uinta Basin in 2009.

In 2007, EPA brought a CAA enforcement action against Kerr-McGee. EPA and Kerr-McGee settled through a consent decree, which required Kerr-McGee to fund, install, and operate ambient air quality monitors in the Uinta Basin to monitor ozone and other pollutants. AR-0711 App. 166-67; *see also id.* at 225-227, 275-76 [JA-] (providing for continued funding and operation of the monitors through subsequent consent decrees). The two monitors are known as the Redwash and Ouray monitors.

Private monitoring is not subject to EPA's regulations governing state monitoring networks found at 40 C.F.R. Part 58. But the consent decrees mandate that the two monitors "shall meet the siting, methodology and operation requirements of 40 C.F.R. Part 58." *Id.* App. 167 [JA-]. Accordingly, the private

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[4] Although states must establish a minimum ozone monitoring network, 40 C.F.R. § 58.2(a)(5), EPA only requires monitoring in urban areas during warmer months. *Id.* App. D, Tables D-1 & D-2. EPA has recognized the need to update its regulations to address wintertime violations in less-populated areas. *See* 73 Fed. Reg. at 16,502-03. EPA even issued a proposal to do so, which specifically identified the wintertime ozone problems in Wyoming and Utah. 74 Fed. Reg. 34,525, 34,533 (Jul. 16, 2009); 75 Fed. Reg. 69,036 (Nov. 10, 2010) (supplementing the record with Uinta Basin monitoring data). However, EPA has not finalized any changes and recently stated the schedule for doing so "remains unclear at this time." 78 Fed. Reg. 34,178, 34,203 (June 6, 2013).

companies were required to use EPA-approved measurement technologies and locate the monitors at certain elevations, in the path of the predominant wind direction, and away from obstructions like buildings. *See* 40 C.F.R. § 58, Apps. C, E. EPA admits the monitors meet these standards. AR-0675 at 72 [JA-]. The monitors were installed in two widely-separated areas within the heart of the Uinta Basin, at locations approved by EPA. *See* AR-0711 App. 28-29, 167 [JA-].

EPA's consent decree also mandated that "[a]ll monitoring data shall be collected in a manner reasonably calculated to meet EPA's quality assurance/quality control . . . requirements of 40 C.F.R. Part 58, App. A." *Id.* App. 167 [JA-]. EPA admits that the private contractor hired to install and operate the monitors developed a quality assurance plan, and that the 2009-2011 data was collected in a manner reasonably calculated to meet the requirements of Appendix A. AR-0675 at 73 [JA-].

Since 2009, the Redwash and Ouray monitors have measured numerous, significant exceedances of the 2008 ozone standard of 0.075 ppm. In 2010, the Redwash and Ouray monitors each measured more than 30 exceedances (that is, individual instances when the eight-hour ozone levels exceeded the standard). *See* AR-0711 App. 113 [JA-]. In 2011, the monitors each measured more than 20 exceedances, and the Ouray monitor recorded an eight-hour concentration of 0.139 ppm—nearly twice the federal standard. *Id.* App. 115 [JA-]. The design value for

the Redwash monitor between 2009 and 2011 was 0.088 ppm and for the Ouray monitor was 0.100 ppm, both of which violate the 0.075 ppm standard by wide margins. AR-0440 at 14-16 [JA-]; *see supra* n.1.

Other monitors that EPA also considers "non-regulatory" have confirmed the high ozone levels in the Basin. As part of a study conducted between December 2010 and March 2011, the State of Utah compiled data from six existing monitors and ten new monitors installed throughout the Uinta Basin. AR-0711 App. 13 [JA-]. All but two monitors recorded ozone levels well above the federal standard; ten monitors recorded eight-hour concentrations above 0.100 ppm. *Id.* App. 49 [JA-]. The Myton monitor in the Uinta Basin and the National Park Service's Dinosaur National Monument monitor, just east of the Uinta Basin, also confirmed significant ozone violations in 2011.[5] The Myton monitor recorded nineteen exceedances, and the Dinosaur monitor recorded eight. AR-0711 at 4-5, App. 115 [JA-].

EPA has acknowledged that the Redwash and Ouray monitoring data is "*reliable and of good quality*." *Id.* App. 320 (emphasis added). In fact, EPA has urged federal agencies to rely on the data when assessing the impacts of oil and gas development in the Uinta Basin. *Id.* App. 325 [JA-] (EPA notifying the Bureau of Land Management that "[m]easured ambient concentrations of ozone in the Uinta

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[5] The Myton monitor is operated by Ute Indian Tribe of the Uintah and Ouray Reservation. A large part of the Uinta Basin is tribal land.

Basin during the period of January through March 2010 reached levels that are considerably above the NAAQS"); *id.* App. 368-69 (EPA commenting that the Forest Service needed to strengthen its analysis of an oil and gas project "given recent ambient concentrations of ozone measured in the project area, which exceed the NAAQS"). According to EPA, "it is clear that the measured values are a concern for public health." *Id.* App. 359 [JA-].

C. Despite Uncontroverted Evidence Showing a Serious Ozone Problem, EPA Failed to Designate the Uinta Basin Nonattainment

EPA recognized that the Redwash and Ouray monitors "detected levels of wintertime ozone that exceed the NAAQS [between 2009-2011]." AR-0215 at 2 [JA-]. But EPA declined to rely on this data to make a nonattainment designation, claiming the data was "non-regulatory." 77 Fed Reg. at 30,089; AR-0751 at 1, Enclosure at 3 [JA-] (arguing that reliance on EPA-mandated private monitoring would not be "defensible" or "withstand court challenge").

Although EPA does not claim the data is flawed, EPA argues it cannot use the data for regulatory purposes because private companies are not bound by Part 58. AR-0675 at 72-73 [JA-]. Without support or explanation, EPA claims that the consent decrees do not provide the level of EPA-oversight that is "inherent" in Part 58. *Id.* at 73. EPA also objects that it failed to approve the monitors' quality assurance plans, and that certain quality checks have not been reported to AQS. *Id.*; AR-0751 Enclosure at 4.

Although EPA refused to rely on the data to make a nonattainment designation, EPA nonetheless relied on it to designate the Uinta Basin as the only "unclassifiable" area in the country. 77 Fed. Reg. at 30,089.[6] For all other areas not designated nonattainment, EPA made an "unclassifiable/attainment" designation, meaning there was either no monitoring data or that the data demonstrated attainment. *Id.* For the Uinta Basin, EPA carved out an "unclassifiable" designation based on the "non-regulatory" data.

STANDARD OF REVIEW

At issue is whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). Agency action is arbitrary if the agency's rationale is unsupported by or runs counter to the evidence in the record. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

"[I]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron* step one). This Court looks to the plain language, legislative history, and purpose of the statute to determine Congress' intent. *Bell Atl. Tel. Cos. v. FCC*,

[6] In contrast with the fifteen counties addressed in Sierra Club's argument *supra*, EPA relied on the 2009-2011 Redwash and Ouray data. AR-0215 at 2[JA-].

131 F.3d 1044, 1047 (D.C. Cir. 1997). If Congress' intent is ambiguous, the agency's interpretation may be upheld only if it is reasonable. *Chevron*, 467 U.S. at 843 (*Chevron* step two).

SUMMARY OF THE ARGUMENT

Sierra Club: EPA allowed states to choose whether EPA would base area designations on monitoring data from 2008-2010 or 2009-2011. As a result, EPA failed to make nonattainment designations for fifteen counties even though those counties are in nonattainment based on 2009-2011 data. Yet, EPA designated Metro-Chicago nonattainment based on 2009-2011 monitoring data. EPA arbitrarily treated similarly situated areas differently in making these area designations. EPA's arbitrary failure to designate these fifteen counties nonattainment violates the CAA and leaves approximately ten million people exposed to dangerous air pollution.

Guardians: EPA concedes that reliable monitoring data shows violations of the ozone NAAQS within the Uinta Basin, posing a threat to the health of its residents. Although EPA mandated monitoring to address the growing ozone problem, it now claims that it must turn a blind eye to the data because it is "non-regulatory." In doing so, EPA is allowing an area suffering from some of the country's worst ozone pollution to avoid a nonattainment designation. EPA's actions violate the Act, defy Congressional intent, and lack a rational explanation.

STANDING

Petitioners have standing because their members have suffered (1) injury in fact, (2) that is fairly traceable to the challenged rule, and (3) that is redressable by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

Petitioners' members live, work, and recreate in the fifteen counties and the Uinta Basin and are harmed by pollution that exceeds the 2008 ozone NAAQS. *See* Attached Declarations. Ozone pollution exposes them to increased health risks, forces them to refrain from or curtail their activities, and diminishes their enjoyment of recreational and aesthetic activities. For example, Beth Young of Dayton, Ohio—which lies within one of the fifteen counties—has twice been admitted to the emergency room because of poor air quality and diagnosed with deep respiratory infections. Ex. 3 ¶ 5 (Declaration of Beth Young).

EPA's failure to make nonattainment designations for the disputed area means these areas will not be required to implement emission reduction measures designed to achieve the NAAQS. *See* 42 U.S.C. §§ 7502(c), 7511. A favorable decision from this Court would redress Petitioners' injuries by providing greater protection for their members' health. Petitioners therefore have standing. *See, e.g., Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672-73 (D.C. Cir. 2013).

ARGUMENT

I. EPA's Allowing States to Choose Whether They Would Have Nonattainment Designations, Regardless of Whether They Were Violating the 2008 Ozone NAAQS, Was Arbitrary, Capricious and Contrary to the Act

A. EPA Violated a Fundamental Tenet of the Act that EPA Must Designate Areas that Are Violating the NAAQS as Nonattainment

The CAA is "an emphatic expression of Congress's intent that the air Americans breathe be clean." *New Jersey v. EPA*, 626 F.2d 1038, 1040 (D.C. Cir. 1980). Moreover, "Congress . . . understood that the 'non-attainment of air quality standards in a wide and densely populated region could result in a phenomenal health impact, measured in terms of millions of days of aggravated disease, asthma attacks and lower respiratory disease episodes.'" *Id*. (quoting legislative history).

To implement Congress' intent, "[a]reas are to be designated nonattainment if they . . . violate the [NAAQS]." *ATK Launch Sys., Inc. v. EPA*, 669 F.3d 330, 334 (D.C. Cir. 2012). Contrary to Congress' intent, here, EPA made designations for the 2008 ozone NAAQS for fifteen counties based on 2008-2010 monitoring data even through their 2009-2011 data showed NAAQS violations. At the same time, EPA made designations for other areas based on 2009-2011 monitoring data. The only determinant of which data EPA used was which data the individual states chose to use.

All states were capable of using the 2009-2011 data. Thus, Sierra Club's issue is not technical in nature. Nor is this an issue about new evidence which must be excluded based on the necessity for all administrative processes to come to an end, although EPA struggles to make it such. Rather, the issue is whether EPA violated a fundamental tenet of the Act: that "those areas that do not comply [with the NAAQS] will ultimately be required to do so." *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4, 9 (D.C. Cir. 1999) *affirmed in part, rev'd in part on other grounds* 531 U.S. 457 (2001).

B. EPA Violated the Act by Not Designating Fifteen Counties Nonattainment Based on the Most Recent Air Quality Data While Designating Metro-Chicago Nonattainment Based on the Most Recent Air Quality Data

"Areas are to be designated nonattainment if they . . . violate the [national ambient air quality] standard[.]" *ATK*, 669 F.3d at 334. The Act does not state and no court has ever held that EPA has discretion to allow states to choose to have areas designated attainment if they are violating the NAAQS. Also, this Court has held that treating areas of the country inconsistently "is evidence of an arbitrary designation[.]" *Catawba Cnty. v. EPA*, 571 F.3d 20, 48, 51 (D.C. Cir. 2009). Finally, this Court has held that an agency has "an obligation to deal with newly acquired evidence in some reasonable fashion." *Id.* at 45 (quotation omitted).

Quality-assured ambient monitoring data gathered by states and contained in EPA's AQS shows that from 2009-2011, fifteen counties were violating the 2008

ozone NAAQS. *See* AR-0420 at 2-3, Table 1, Attachment [JA-]; AR-0712 Table 1 [JA-]. However, EPA failed to designate the fifteen counties nonattainment in violation of the Act. *ATK*, 669 F.3d at 334.

Moreover, EPA treated different areas of the country inconsistently. EPA designated Metro-Chicago nonattainment based on violating 2009-2011 data. 77 Fed. Reg. at 34,224. In contrast, EPA arbitrarily designated the fifteen counties attainment even though their 2009-2011 monitoring data showed NAAQS violations. *Catawba*, 571 F.3d at 48, 51.

Sierra Club submitted the 2009-2011 data for the fifteen counties to EPA in Sierra Club's comments and again in its Petition for Reconsideration. At the time of both submissions, the relevant data was required to be quality-assured. 40 C.F.R. § 58.16(a)-(c). At the time of Sierra Club's comments, the states had not yet submitted their annual certifications, but the Court can presume that if the data was required to be quality assured, it was.

This data was not actually newly acquired, although EPA tries to paint it as such. The states containing the fifteen counties generated the data and uploaded it into EPA's AQS. Nevertheless, if the Court were to consider it newly acquired information, it should find that EPA did not deal with it "in some reasonable fashion." *Catawba*, 571 F.3d at 45. EPA did not use the 2009-2011 monitoring

data in its decision to designate the fifteen counties attainment. Ignoring data showing that ten million people are exposed to unsafe ozone is not reasonable.

Ignoring this data is also unreasonable because for other NAAQS, EPA has used monitoring data that was not certified at the time EPA issued its original 120-day letters to let areas out of nonattainment. *See Catawba*, 571 F.3d at 28. However, for the 2008 ozone NAAQS, EPA refused to use the most recent data on its own, when Sierra Club submitted it with its comments and when Sierra Club submitted it a second time, certified at this point, with its petition for reconsideration. In doing so, EPA let states decide if EPA was to ignore "the best available information." *ATK*, 669 F.3d at 337 (quoting *Catawba*, 571 F.3d at 44). This, the Act does not permit. *Id.*

C. EPA's Excuses for Not Using the Most Recent Air Quality Data for the Fifteen Counties Are Not Rational

1. EPA's excuses in response to Sierra Club's comments are not rational

In its response to comments, EPA explained that states were not required to submit their certification that their previously-submitted, quality-assured ozone monitoring data was indeed complete until May 1, 2012. AR-0675 at 7 [JA-]. According to EPA, "such [certification] if submitted on May 1, 2012, would not be available in sufficient time for the EPA to complete the 120-day notice process required by the CAA prior to the EPA's deadline for designating areas pursuant to

a Consent Decree." *Id.* This is not true. EPA could have sent its 120-day recommendations by January 31, 2012 based on 2011 data, which was required to be submitted to EPA and quality assured before that date. Indeed, EPA sent the 120-day recommendation for Metro-Chicago on January 31, 2012. Then EPA could have confirmed the 2011 data when EPA got the certification letter on May 1, 2012. Indeed, EPA took action based on quality-assured data that had yet to be certified in this action and has done so in other designation actions as well. *See* 77 Fed. Reg. at 30,091; 77 Fed. Reg. 34,810, 34,813 (June 12, 2012).[7]

In the end, EPA failed to make nonattainment designations for the fifteen counties based on 2009-2011 data not because it was impossible to comply with the Act's procedural requirements, but rather because EPA gave states a choice of whether to use 2009-2011 data. This violated the Act when it resulted in EPA designating violating areas attainment.

2. EPA's excuses in response to Sierra Club's petition for reconsideration are not rational

On July 20, 2012, Sierra Club submitted an administrative petition for reconsideration of EPA's refusal to designate the fifteen counties nonattainment, despite the 2009-2011 data showing these counties violate the NAAQS. AR-0712

[7] Actually, if the 2009-2011 data was truly new "data," EPA would not even need to send a new 120-day letter to use it in its final designations according to *Catawba*, 571 F.3d at 51-52, as it would represent a "change in data."

[JA-]. At this point, EPA's excuse that the data was not certified and not having enough time to send states a 120-day letter had fallen by the wayside. AR-0716 at 1 [JA-] (admitting that 2009-11 air-quality data was "now-certified").

Despite this fact, EPA reasserted its claims, rebutted above, that it could not have issued 120-day letters and met the consent decree deadline if it used 2009-2011 data. *Id.* Enclosure at 2. EPA also claimed that it does not use uncertified air quality data for designations, despite the fact that it admitted it relied on uncertified data in this rulemaking for certain states and other examples of that approach cited above. *Id.* at 2 n.1.

EPA also claims that the appropriate process for dealing with the 2009-2011 data is the redesignation process in 42 U.S.C. § 7407(d)(3). AR-0716, Enclosure at 2. EPA's excuse rings hollow given that it takes the position that once it has designated an area attainment, the agency has no obligation to subsequently redesignate to nonattainment, even if the area is violating the standard. *See, e.g.,* 71 Fed. Reg. 61,236, 61,240 (2006) ("EPA has no legal obligation to redesignate an area even if a monitor should register a violation of that standard"). Indeed, more than a year has passed since EPA failed to designate the fifteen counties nonattainment, but EPA has not started the redesignation process. As this Court has admonished, EPA cannot "promise to do tomorrow what the Act requires today." *Sierra Club v. EPA*, 356 F.3d 296, 298 (D.C. Cir. 2004).

EPA goes on to say that new technical data becomes available on a regular basis so granting petitions for reconsideration based on new data would result in a "never-ending process." AR-0716 Enclosure at 2 [JA-]. This argument goes too far as it would eliminate petitions for reconsideration, which must be based on new information. *See* 42 U.S.C. § 7607(d)(7)(B). Moreover, factually, the 2009-2011 data was not new. EPA had the quality-assured 2009-2011 data more than six months prior to making its final decision. As explained above, in this designation process and others, EPA has relied on uncertified, but quality-assured data during the process so long as the states will certified the data before EPA takes final action. Plus, the certification happens once a year on a predictable schedule so this is not a case of new data repeatedly and unexpectedly interjecting into the process.

Finally, EPA claims that if it granted the petition, EPA would finish the reconsideration process around the same time the 2012 data would be certified and thus EPA "could receive a further petition to then consider air quality data from 2010-2012." AR-0716 Enclosure at 3 [JA-]. EPA's alleged preferred mechanism for dealing with this situation, Section 107(d)(3), would face the exact same challenge. Moreover, at the time it issued this decision, EPA had the data showing that fourteen of the fifteen counties were still violating the 2008 ozone NAAQS in 2010-2012.[8] Ultimately, EPA's response fails because ambient pollution levels do

[8] *See* http://www.epa.gov/airtrends/values.html, at Table 2.

change. The Act does not let EPA allow people to remain unprotected if these changes are for the worse.

II. EPA'S Failure to Designate the Uinta Basin Nonattainment Violates the CAA and is Arbitrary

A. EPA's Refusal to Rely on Sound, Available Data Is Inconsistent with the CAA

The CAA's plain language, legislative history, and purpose demonstrate that Congress intended EPA to rely on sound, available data to make NAAQS designations. The Act defines "nonattainment" as "any area that does not meet . . . the [NAAQS]." 42 U.S.C. § 7407(d)(1)(A)(i). An unclassifiable area is defined as an area that "*cannot* be classified on the basis of *available information* as meeting or not meeting the [NAAQS]." *Id.* § 7407(d)(1)(A)(iii) (emphasis added). Under the plain language of the Act, EPA may only designate an area unclassifiable if it cannot determine on the basis of available information whether an area meets the NAAQS. *See New York v. EPA*, 443 F.3d 880, 885, 887 (D.C. Cir. 2006) (adopting the "common meaning" of words used in the CAA).[9]

[9] For example, EPA would be unable to determine if an area was meeting the NAAQS if there was no ambient air quality data available. *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1307 (7th Cir. 1983) (stating that "the only situation in which designation of an area as unclassifiable would be proper" is "if [] data [does] not exist.").

The legislative history to the 1990 Amendments confirms that "available information" includes any "*sound data that is available*, preferably air quality monitoring data, but in some cases where appropriate and necessary, the Agency may rely on modeling or on statistical extrapolation from monitored concentrations of another pollutant." S. Rep. No. 101-228, at 15 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3401 (emphasis added); *see also Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1185 (9th Cir. 2012) (recognizing "the legislative history underlying the 1990 amendment clarifies that the EPA may rely on any 'sound data' that is available" to determine nonattainment). Congress was not only clear that EPA should use all sound monitoring data available to the agency, but also that EPA could rely on other techniques, like modeling, that produced sound data.

Here, EPA's own actions ensured that there is sound monitoring data available. EPA required installation of multiple monitors in the Uinta Basin and ensured those monitors would meet the substantive standards of Part 58, including reasonable quality assurance. *See supra* at 9-10. EPA concedes the data collected is sound, that both monitors' design values exceed the NAAQS, and that the high ozone levels are a "concern for public health." *See supra* at 11-12. EPA's designation of the Uinta Basin as unclassifiable in the face of this undisputed

evidence violates the plain language of the Act and flies in the face of Congress' intent.[10]

EPA's refusal to rely on sound, available data further conflicts with Congress' overriding goal in requiring compliance with NAAQS: protecting public health. 42 U.S.C. §§ 7407(d)(1)(B)(i), 7409(b); *see also Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (affirming the Act takes a "preventative" and "precautionary" approach). Congress strengthened the area designation process in 1990 to provide EPA with "significant authority" to "respond to new information about pollution levels" in response to concerns that 150 million people were still living in areas that exceeded one or both of the ozone and carbon monoxide NAAQS. 1990 U.S.C.C.A.N. 3397, 3400. This Court has cautioned against interpreting the Act in a way that "would produce a "'strange' if not 'indeterminate,' result." *New York*, 443 F.3d at 886 (rejecting EPA interpretation because it would mean "a law intended to limit increases in air pollution would allow sources . . . to increase significantly the pollution they emit without government review"). Allowing EPA to avoid a nonattainment designation where

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[10] EPA argues that the regulatory monitoring requirement "derives" from Section 319, which authorizes EPA to establish a nationwide air quality monitoring system. 42 U.S.C. § 7619; *see* AR-0751 Enclosure at 2 [JA-]. But nothing in Section 319 mandates that EPA rely solely on state-collected Part 58 monitoring data to make NAAQS designations. 42 U.S.C. § 7619. Section 319 says nothing about NAAQS designations.

sound data demonstrates that people are suffering some of the country's worst air pollution would be a similarly "strange" result that defeats Congress' intent.

B. EPA Offers No Rational Explanation for Refusing to Rely on the Redwash and Ouray Data

EPA cannot rationally have it both ways with respect to the Redwash and Ouray monitors. One the one hand, EPA concedes that the data is reliable and the monitors meet the substantive requirements of Part 58, including reasonable quality assurance. *See supra* at 10-12. EPA has urged other federal agencies to rely on the data. *See supra* at 11-12. In fact, EPA admits that it relied on the data in this rulemaking. *See* AR-0751 Enclosure at 2 [JA-] ("EPA did not disregard the non-regulatory data from the Uinta Basin; in fact, the data are the reason the EPA designated the Uinta Basin of Utah as unclassifiable."). On the other hand, EPA claims that it cannot use the data to support a nonattainment designation. EPA provides no rational explanation as to why the data is sound and may be used for one purpose, but not another. *See Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (rejecting agency decision as arbitrary because "the Secretary ha[d] inadequately explained why the 1984 data were suitable for one significant calculation but unreliable for another").

EPA offers three excuses for not relying on the monitoring data: (1) the consent decrees do not provide the same level of EPA oversight as Part 58, (2) EPA failed to approve the monitors' quality assurance plan, and (3) reports of

quality control checks in EPA's AQS are not complete. None of these justifications provides a rational basis for EPA's decision.

First, EPA objects that the consent decrees do not provide the same level of EPA oversight as that "inherent" in Part 58. *See* AR-0675 at 73 [JA-] (arguing that there is no mechanism "authorizing regulatory agencies to direct corrective actions should quality assurance issues be identified"). There is no support for this claim. EPA has ample authority under the consent decrees to oversee the monitoring operations and ensure they produce sound data.

The consent decrees require the operators to provide EPA substantial information regarding the monitoring operations, including the recorded data and an annual report describing all work and other activities performed under the decree. *See* AR-0711 App. 180-81, 278-79. EPA may use any of this information to enforce the decrees. *See id.* App. 182-83, 228, 280. EPA also has authority to enter any facility covered by the decrees for the purpose of monitoring compliance and inspecting equipment. *Id.* App. 198-99, 237, 290. Moreover, because the courts that approved the consent decrees retain jurisdiction to enforce them, EPA can direct corrective action through a contempt proceeding. *See id.* App. 207, 243, 297; Fed. R. Civ. P. 70(e); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 518 (1986).

Second, EPA objects that it never approved the quality assurance plan provided by the private contractor. AR-0675 at 72-73 [JA-]. EPA admits that the private contractor developed a quality assurance plan that was "reasonably calculated" to meet the requirements of Part 58, but that EPA never approved the plan. *Id.* Other than the alleged oversight deficiency, EPA has not identified any problems with the plan. AR-0751 Enclosure at 3 [JA-] (arguing that the quality assurance plan prepared for the monitors is "not complete enough," but providing no details with respect to what is missing). Lack of plan approval, standing alone, does not indicate that the data is flawed. There is also no evidence that EPA attempted to resolve any perceived deficiencies with the private contractor—even after EPA realized the monitors were recording pollution at levels that pose a serious threat to public health.

Third, EPA objects that its AQS records for the monitors are incomplete. States must report their monitoring data to AQS along with evidence of bi-weekly quality control checks and annual independent audits. 40 C.F.R. § 58 App. A §§ 3.2.1, 3.2.2. Although not required by Part 58 or the consent decrees, the Redwash and Ouray monitoring data has also been reported in AQS. According to EPA, AQS contains evidence of bi-weekly quality checks for the monitors between August 2009 and January 2010, but not thereafter, and no evidence of yearly audits. AR-0751 Enclosure at 4 [JA-]. Regardless of what is in AQS, EPA offers

no evidence that the private contractors were not conducting sufficient quality control checks. In fact, EPA concedes the data substantially complied with its quality assurance requirements. Moreover, numerous other sources confirmed that ozone levels substantially exceeded the NAAQS during the time period in which EPA claims reported records are lacking. *See supra* at 11.

Finally, EPA's rejection of the private Redwash and Ouray monitoring data conflicts with how EPA assesses whether state monitoring data is sufficient for NAAQS designations. *See Catawba*, 561 F.3d at 51-52 ("[I]nconsistent treatment is the hallmark of arbitrary agency action."); *Cnty. of Los Angeles*, 192 F.3d at 1022 ("A long line of precedent has established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (quotation omitted). Just one month after the final designations, EPA recognized that "while it is essential to require a minimum set of checks and procedures in appendix A to support the successful implementation of a quality system, the success or failure of any one check or series of checks does not preclude the EPA from determining that data are of acceptable quality to be used for regulatory decision-making purposes." 77 Fed. Reg. 38,890, 39,014 (June 29, 2012). Accordingly, EPA revised Part 58 to "clarify" that EPA could decide whether to use monitoring data based on "data quality" and "overall compliance" with Appendix A. 40 C.F.R. § 58, App. A § 1(b).

Here, EPA concedes data quality as well as overall compliance with Appendix A but still arbitrarily refused to rely on the data to make a nonattainment designation. This Court should reject EPA's attempt to tie its own hands in the face of an undeniable threat to public health.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court reverse EPA's attainment designation for the fifteen counties and EPA's unclassifiable designation for the Uinta Basin with instructions to designate these areas nonattainment.

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Respectfully submitted,

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