

**ORAL ARGUMENT HELD DECEMBER 10, 2013**  
**DECIDED APRIL 15, 2014**

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No. 12-1100 (and consolidated cases)

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WHITE STALLION ENERGY CENTER, LLC, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondents.

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On remand from the United States Supreme Court

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**RESPONSE OF CERTAIN STATE AND INDUSTRY PETITIONERS TO  
MOTIONS TO GOVERN FURTHER PROCEEDINGS OF RESPONDENT  
AND  
RESPONDENT-INTERVENORS**

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The Supreme Court’s ruling, the Administrative Procedure Act, and this Court’s precedent all require that the Rule be vacated.

The Supreme Court held that the foundation for the entire Rule—EPA’s finding under 42 U.S.C. § 7412 that it is “appropriate” to regulate hazardous air pollutants emitted by power plants—is unlawful. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). By “stray[ing] far beyond” the statute’s bounds, *id.* at 2707, EPA enacted the Rule without authority. Under the APA, agency action taken in excess

of statutory authority “shall” be “set aside.” 5 U.S.C. § 706(2). Because the Supreme Court determined the Rule has no lawful basis, the whole Rule exceeds EPA’s statutory authority and so must be vacated.

EPA and the other parties seeking remand without vacatur never cite this on-point, controlling statute or address EPA’s lack of authority. Instead, they skip to the test in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). But even if that test applies to agency action taken without authority, it leads to the same conclusion. Under *Allied-Signal*, vacatur is required when there is no possibility an agency can clarify or explain its action; in that situation, any disruptive consequences of vacatur deserve no weight. Here, EPA fully explained its interpretation that costs are irrelevant when deciding whether regulation is appropriate, and the Supreme Court held that interpretation was unreasonable. Under *Allied-Signal*, this Court must vacate the Rule.

Further, EPA’s claim that it *might* adopt a new rationale on remand to justify regulating hazardous air pollutants from power plants under § 7412 does not support leaving the Rule in place. EPA plans to rely on the benefits from addressing a different environmental problem (emissions of fine particulate matter, which is not a hazardous air pollutant) that EPA already regulates under a different Clean Air Act provision (the national ambient air quality standards under § 7409). Indeed, EPA has already imposed standards under § 7409 that regulate fine

particular matter at a level that, in EPA's own judgment, protect public health by an "adequate margin of safety." If EPA now believes that public health is not adequately protected from fine particulate matter and wants to impose stricter regulations on that pollutant, it should do so under § 7409. Any benefits from further reducing *fine particulate matter* are not relevant for deciding whether regulating *hazardous air pollutants* is appropriate under § 7412. And that rationale is not a clarification of EPA's action; it is a new basis for a different "appropriate" finding and thus does not support leaving the Rule in place under *Allied-Signal*.

## ARGUMENT

### **I. The Rule must be vacated under the Administrative Procedure Act.**

The APA states that a court "shall . . . set aside agency action" that is "in excess of statutory . . . authority . . . ." 5 U.S.C. § 706(2)(C). Here, the Supreme Court held that "EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan*, 135 S. Ct. at 2712. EPA cannot regulate hazardous air pollutants emitted by power plants under § 7412 until it first makes a finding that regulation is "appropriate" based on its review of both the "advantages *and* the disadvantages" of regulation and whether the benefits are worth the cost of \$9.6 billion each year. *Id.* at 2707.

EPA failed to satisfy that essential prerequisite before it promulgated the Rule, and therefore had no authority to promulgate it. That lack of authority means

*all* of the Rule's requirements have no legal underpinning and are invalid.

Pursuant to the APA, the unlawful Rule must be set aside and vacated.

What other governmental entity could, in the absence of authority, impose a rule that binds private citizens? Imagine if a court did what EPA did. Imagine if a federal court issued a permanent injunction when the court lacked jurisdiction. No reviewing court would leave that ultra vires injunction in place on the theory that the lower court might acquire jurisdiction later.

That situation directly parallels this one: like federal courts, federal agencies have limited jurisdiction—"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). And just as courts cannot issue permanent injunctions without first having jurisdiction (authority), here EPA lacks authority—still, to this day—to regulate power plants because it has not yet fulfilled the substantive precondition of considering costs.

The attempt by Industry Respondent Intervenors to bifurcate EPA's unlawful finding and the Rule is without merit. The Supreme Court ruled that EPA has no authority to promulgate the Rule until it first makes a lawful "appropriate" finding. If anything, thinking of the two separately highlights that the finding is a substantive precondition to EPA's authority to promulgate the Rule.

## II. The Rule must also be vacated under *Allied-Signal*.

EPA's claim—that this Court should weigh both the possibility that EPA might better explain its “appropriate” finding and the consequences of vacating the Rule—misapplies the Court's precedent.

Under this Court's decisions, remand without vacatur is available only in “certain, limited circumstances.” *EME Homer City Generation, LP v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015). “The decision whether to vacate depends on [1] ‘the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed.’ ” *Allied-Signal*, 988 F.2d at 150–51.

The first *Allied-Signal* factor addresses the likelihood an agency that has not adequately explained that its action was lawful can do so on remand. If there is little doubt the agency's action was lawful, then the Court may presume the agency acted within its statutory authority and that it need only provide a better explanation. *Heartland Reg'l Med. Ctr v. Sibelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (“When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur.”). The cases that EPA and its allies cite reinforce that point. E.g., *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (remanding without vacatur where there was a “failure of explanation”); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999)

(remanding “for further explanation by EPA”); *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013) (“we remand to EPA portions of its rule for further explanation”); *Mississippi v. EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013) (same); *Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 641 (D.C. Cir. 2000) (“we remanded to [EPA] for further explanation”). But if there is “little or no prospect” of a rule “being readopted upon the basis of a more adequate explanation of the agency’s reasoning, the court’s practice is ordinarily to vacate the rule.” *Ill. Pub. Telecomms. Ass’n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1998).

This Court cannot presume that EPA acted within its authority when it promulgated the Rule. Quite the opposite, the Supreme Court has held that EPA did not. There is no doubt whether EPA chose correctly; the Supreme Court ruled that EPA chose *incorrectly* when it concluded it had authority to regulate power plants without first considering costs.

EPA’s assertion that it simply needs to “reaffirm” its finding is also incorrect. Motion at 10. The Supreme Court ruled that EPA must undertake a *new* analysis of both the costs and benefits of regulation. On remand, EPA must, *for the first time*, do what it steadfastly has refused to do: decide whether the benefits of regulating power plants under § 7412 are worth the costs.

Moreover, EPA is mistaken when it asserts “there should be little doubt” that regulating hazardous air pollutants from power plants under § 7412 is appropriate.

Motion at 12. EPA argues the Rule's costs are justified because of the benefits from reducing a pollutant that is *not* a hazardous air pollutant: fine particulate matter. Pursuant to an executive order, EPA estimated that nearly all of the Rule's benefits (\$37 to \$90 billion) are from reduced emissions of fine particulate matter (\$36 to \$89 billion). 77 Fed. Reg. 9304, 9306 (Feb. 16, 2012).

EPA cannot, however, rely on the benefits of reducing fine particulate matter to decide it is appropriate to regulate hazardous air pollutants. Congress directed EPA to address a particular problem in § 7412(n)(1)(A) (the emission of hazardous air pollutants from power plants) and to decide whether regulation is "appropriate" to address *that* problem. Indeed, co-benefits are not relevant even under EPA's own guidelines for cost-benefit analysis. The guidelines instruct EPA to identify the "relevant economic variables" based on the "environmental problem the regulation addresses." U.S. EPA, *Guidelines for Preparing Economic Analyses*, 5-3 (updated May 2014). Both § 7412's text and EPA's own guidelines show that benefits from reducing fine particulate matter are not relevant economic variables for finding it is appropriate to regulate hazardous air pollutants.

EPA cannot justify regulation based almost entirely on the benefits from addressing a wholly different problem, especially when Congress enacted a separate statutory program for fine particulate matter: the national ambient air quality standards ("NAAQS") under § 7409. Under § 7409, EPA sets NAAQS for

particulate matter and five other “criteria” pollutants considered harmful to public health and the environment (ozone, nitrogen oxides, carbon monoxide, sulfur dioxide, and lead). The standards set limits for those pollutants with an “adequate margin of safety” to protect public health. § 7409(b)(1). EPA must review the standards every five years and update them when needed to ensure they provide adequate health protection based on the latest scientific information. § 7409(d)(1).

EPA revised the standard for fine particulate matter in both 2006 and 2013 to make it more stringent. 71 Fed. Reg. 61,144 (Oct. 17, 2006); 78 Fed. Reg. 3086 (Jan. 15, 2013). If EPA has information demonstrating the standard is still not sufficiently protective, then it has authority *under* § 7409 to make further revisions. But EPA cannot claim it is “appropriate” to regulate hazardous air pollutants from power plants under § 7412 based on the benefits from additional reductions of fine particulate matter. Under § 7412’s text, those ancillary co-benefits are not relevant benefits for the appropriate finding. Indeed, at oral argument, Chief Justice Roberts described relying on co-benefits as “an end run” around § 7409’s restrictions. Tr. of Oral Argument at 59–61, *Michigan v. EPA*, No. 14-46. At the least, if EPA wants to rely on irrelevant co-benefits for a new appropriate finding on remand, it must do so through notice-and-comment rulemaking.

The second *Allied-Signal* factor (the disruptive consequences of vacatur) “is weighty only insofar as the agency may be able to rehabilitate its rationale for the



regulation.” *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). To cure the defect the Supreme Court identified, EPA cannot simply make minor adjustments to clarify its rationale. It must reverse course altogether and take costs into account when making a new appropriate finding. Any disruptive consequences from vacatur therefore deserve no weight.

But even if the disruptive consequences of vacatur could be considered, EPA and the Respondent Intervenors fail to identify any such effects. For example, they claim vacatur might result in some plants not operating some of the control equipment already installed, and that some hazardous air pollutants that would have otherwise been controlled may be emitted. But that consequence is not severe or disruptive; it just means that a portion of the modest \$4 to \$6 million in benefits EPA quantified may not occur during remand.

The purported disruptive effects on states’ environmental planning also do not withstand scrutiny. For example, EPA contends North Carolina has “relied on” the Rule to demonstrate the Charlotte area should be redesignated as having attained the NAAQS for ozone. Motion at 17. In fact, North Carolina’s demonstration is based on ozone levels in 2012 to 2014, before the Rule’s compliance deadline of April 16, 2015. Exhibit 1, at ii, iv. EPA also asserts that states are “permitted to rely on reductions under the Rule” to achieve the NAAQS for sulfur dioxide, but makes no showing that any have actually done so. Motion

at 17; McCabe Declaration ¶30. And EPA asserts some states have relied on the Rule to reduce mercury in lakes and streams, but the document EPA cites is from 2007, more than four years before EPA promulgated the Rule. *Id.*, Att. J.

The examples identified by Industry Respondent Intervenors fare no better. They assert that vacatur will undermine investments some companies have already made in air pollution control equipment. But financial impacts are not the environmentally disruptive impacts to which this Court typically gives weight. See *EME Homer*, 795 F.3d at 132 (vacatur would disrupt cap-and-trade system to achieve the NAAQS); *North Carolina v. EPA*, 550 F.3d 1176, 1178–79 (Rogers, J., concurring in granting rehearing in part) (vacatur would interfere with states' ability to meet the NAAQS). And the Industry Respondent-Intervenors would compound the financial impacts by imposing more costs to meet the unlawful Rule's requirements during remand. Neither power plants nor their customers should be required to bear those costs.

### **CONCLUSION AND RELIEF REQUESTED**

For these reasons, the undersigned State and Industry Petitioners respectfully ask this Court to grant their joint motion and issue a judgment vacating the Rule.

Dated: October 21, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 21, 2015, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

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# Exhibit 1

to

Response of Certain State and Industry Petitioners  
to Motions to Govern Further  
Proceedings of Respondent and Respondent-Intervenors

# **Redesignation Demonstration and Maintenance Plan**

**for**

**The Charlotte-Gastonia-Salisbury, North Carolina  
2008 8-Hour Ozone Marginal Nonattainment Area**



**Prepared by  
North Carolina Department of Environment and Natural Resources  
Division of Air Quality**

**April 16, 2015**

**Preface:** This document contains the technical support for North Carolina's Division of Air Quality to request the Charlotte-Gastonia-Salisbury 2008 8-hour ozone nonattainment area be redesignated as attainment for the 2008 8-hour ozone national ambient air quality standard pursuant to §§107(d)(3)(D) and (E) of the Clean Air Act, as amended.

## EXECUTIVE SUMMARY

### Introduction

Ozone is formed by a complex set of chemical reactions involving volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>) and to a lesser extent carbon monoxide (CO). These gases are generated by utilities, combustion processes, certain industrial processes and even by natural sources such as trees. Tailpipe emissions from mobile sources (vehicles) are also significant sources of these pollutants. Emissions from smaller sources such as boat engines, lawn mowers and construction equipment also contribute to the formation of ozone. Ozone formation is promoted by strong sunlight, warm temperatures and light winds and is hence a problem predominantly during the hot summer months.

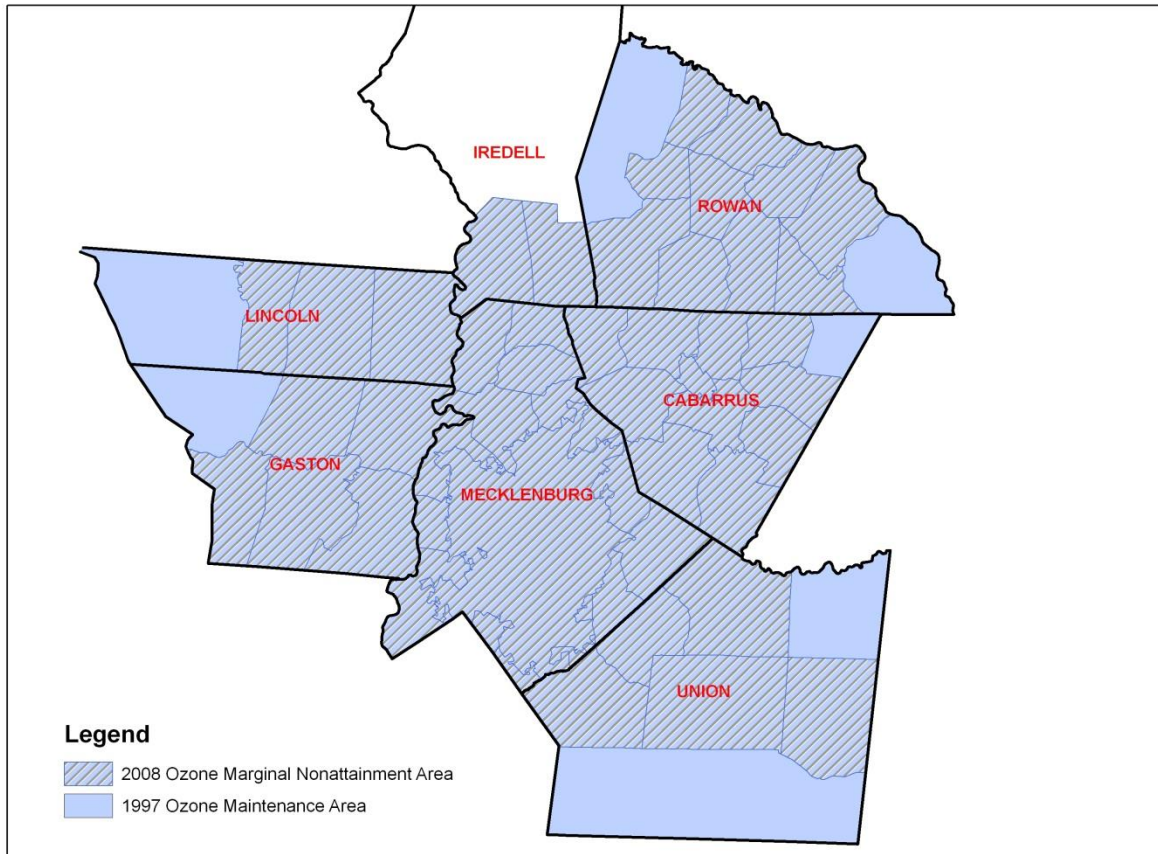
The 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS) is 0.075 parts per million (ppm). An exceedance of the 2008 8-hour ozone NAAQS occurs when a monitor measures ozone above 0.075 ppm on average for an 8-hour period. A violation of this NAAQS occurs when the average of the annual fourth highest daily maximum 8-hour ozone values over three consecutive years is greater than or equal to 0.076 ppm. This three-year average is termed the “design value” for the monitor. The design value for a nonattainment area is the highest monitor design value in the area.

### Charlotte-Gastonia-Salisbury Nonattainment Designation

The area surrounding Charlotte-Gastonia-Salisbury, North Carolina, called the Charlotte nonattainment area, was designated as marginal nonattainment for the 2008 8-hour ozone NAAQS on May 21, 2012 (77 Federal Register (FR) 30088). The nonattainment designation was an action taken by the U. S. Environmental Protection Agency (EPA) under Section 107(d) of the Clean Air Act (CAA). The CAA requires that some area be designated as nonattainment if a monitor is found to be in violation of a NAAQS. For the 2008 8-hour ozone NAAQS, the EPA took designation action in 2012 based on 2009-2011 design values. At that time, the design value for the Charlotte area was 0.079 ppm.

The Charlotte nonattainment area includes the entire county of Mecklenburg and parts of Cabarrus, Gaston, Iredell, Lincoln, Rowan and Union Counties (see Figure 1). The partial counties include the townships listed in Table 1. Note that the EPA also designated the portion of York County, South Carolina that is adjacent to the Charlotte nonattainment area for the 2008 8-hour ozone NAAQS. The South Carolina Department of Health & Environmental Control (SCDHEC) has developed a redesignation request and maintenance plan for the South Carolina portion of the Charlotte nonattainment area which is available upon request.

### Charlotte Nonattainment Area Boundary



**Table 1 Counties and Townships within the Charlotte Nonattainment Area**

<b>Cabarrus County Townships</b>					
Central Cabarrus	Concord*	Georgeville	Harrisburg	Kannapolis	Midland
Mount Pleasant	Odell	Poplar Tent	New Gilead	Rimertown	
<b>Gaston County Townships</b>					
Dallas	Crowders Mountain	Gastonia	Riverbend	South Point	
<b>Iredell County Townships</b>					
Coddle Creek	Davidson				
<b>Lincoln County Townships</b>					
Catawba Springs	Lincolnton	Ironton			
<b>Mecklenburg County – All Townships</b>					
<b>Rowan County Townships</b>					
Atwell	China Grove	Franklin	Gold Hill*	Litaker	Locke
Providence	Salisbury	Steele	Unity		
<b>Union County Townships</b>					
Goose Creek	Marshville	Monroe	Sandy Ridge	Vance	

\*Note: Concord Township in Cabarrus County and Gold Hill Township in Rowan County were inadvertently left out of North Carolina’s recommendation and EPA’s final designations. In a letter dated January 28, 2014, the DAQ requested the EPA to add the missing townships in the state’s 2008 marginal ozone nonattainment area definition.



## Current Air Quality

There are currently six ozone monitors located throughout the Charlotte nonattainment area and one monitor located in York County, South Carolina, just outside of the nonattainment area. The latest design value for the nonattainment area is 0.073 ppm based on the data from 2012-2014. The 2014 8-hour ozone monitoring data for the Charlotte nonattainment area was fully quality assured and officially submitted to the EPA for certification approval on December 12, 2014. The EPA concurred with the North Carolina Division of Air Quality (DAQ) and Mecklenburg County Air Quality (MCAQ) certification on December 15, 2014. A detailed discussion of air quality levels in the region is provided in Section 2.0.

## Maintenance Plan Requirements

The state of North Carolina has implemented permanent and enforceable state and federal actions to reduce ozone precursor emissions in the North Carolina portion of the Charlotte nonattainment area. In addition, MCAQ has implemented actions to reduce ozone precursor emissions. This combination of state, federal, and local actions has resulted in cleaner air in the Charlotte nonattainment area, and the anticipated future benefits from these programs are expected to result in continued maintenance of the 2008 8-hour ozone NAAQS in this region. State actions include the Clean Smokestacks Act; the on-board diagnostic (OBDII) vehicle inspection and maintenance (I/M) program that began on July 1, 2002; and voluntary programs to reduce emissions from diesel engines. Local actions implemented by MCAQ include a prohibition on open burning and a very effective voluntary program called Grants to Replace Aging Diesel Engines (GRADE).<sup>1</sup> The GRADE program is designed to reduce NO<sub>x</sub> emissions by providing businesses and organizations funding incentives to replace or repower heavy-duty non-road equipment with newer, cleaner, less polluting engines.

Several federal actions have resulted in lower emissions throughout the eastern portion of the country. For on-road and nonroad vehicles, federal actions include the Tier 2 engine standards for light- and medium-duty vehicles, heavy-duty engine standards, the low-sulfur gasoline and diesel requirements, and off-road engine standards. For stationary sources, federal actions include the Mercury and Air Toxics (MATS) rule for electricity generating units (EGUs) and the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and reciprocating internal combustion engines (RICE). In addition, there are several federal actions that will be implemented starting in 2015. These actions will provide for additional NO<sub>x</sub> emissions reductions in and near the Charlotte nonattainment area. For EGUs, the future federal actions include compliance with the Cross State Air Pollution Rule (CSAPR)

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<sup>1</sup> <http://charmeck.org/mecklenburg/county/LUESA/AirQuality/MobileSources/Pages/GRADE.aspx>.

and the Tennessee Valley Authority (TVA) consent decree. For on-road vehicles, the future federal actions include compliance with the Tier 3 vehicle emissions and fuel standards and corporate average fuel economy standards for on-road vehicles.

### **Emissions**

A base year inventory for NO<sub>x</sub> and VOC emissions was developed for 2014 since the design value for the 2012-2014 period shows attainment of the 2008 8-hour ozone NAAQS. Future year emissions inventories were also developed for the interim years 2015, 2018, 2022, and a final year emission inventory was developed for 2026. For each future year, the total NO<sub>x</sub> and VOC emissions is lower than the 2014 base year emissions. Furthermore, emissions modeling and air quality modeling for 2018 and 2030 performed by the EPA for the new Tier 3 engine and fuel standards and modeling performed by the Southeastern states for 2018 indicate that the area will be in attainment of the 2008 ozone NAAQS.<sup>2,3</sup> The emission inventory comparison demonstrates that the Charlotte area is expected to maintain the 2008 8-hour ozone NAAQS through 2026 since in no future year are the emissions expected to be greater than they were in the base year. The area is also in compliance with Section 110 and Part D requirements of the CAA.

### **Conclusion and Request for Redesignation**

Based on the information provided in this State Implementation Plan (SIP) and criteria established in Section 107(d)(3)(E) of the CAA, North Carolina is requesting that the EPA redesignate the Charlotte-Gastonia-Salisbury nonattainment area to attainment. The monitoring data clearly show that the region has attained the 2008 8-hour ozone standard, and the maintenance demonstration shows that the future emission inventories are expected to be lower than the attainment year inventory through the implementation of the various federal and state control measures.

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<sup>2</sup> US EPA, <http://www.epa.gov/otaq/documents/tier3/454r14002.pdf>.

<sup>3</sup> Southeastern States Air Resource Managers (SESARM); Southeastern Modeling, Analysis and Planning (SEMAP) study, <http://semap.ce.gatech.edu/sites/default/files/files/projections/base2018b-O3-DVFs-DDVFs-for-4configs.xls>.