AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

AASHTO

AMPO

March 16, 2018

The Honorable Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: EPA Response to D.C. Circuit Decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115

Dear Administrator Pruitt:

The American Association of State Highway and Transportation Officials (AASHTO) and the Association of Metropolitan Planning Organizations (AMPO) jointly request that the Environmental Protection Agency (EPA) file a petition for rehearing and request for stay of the February 16, 2018 decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115 in the U.S. Court of Appeals for the District of Columbia. This letter sets forth the reasons for this urgent request.

In the *South Coast* decision, the court vacated major portions of a 2015 final rule that established procedures for transitioning from the 1997 National Ambient Air Quality Standard (NAAQS) for ozone to the stricter 2008 NAAQS for the same pollutant.[1] The 2015 rule included several important provisions to avoid imposing duplicative and unnecessary regulatory burdens. Of most importance to transportation agencies, the 2015 rule ensured that areas designated as nonattainment or maintenance for the 1997 standard would not be subject to air quality conformity requirements if those areas are in attainment for the stricter 2008 standard.

The court decision overturned this common-sense provision in the 2015 rule, holding that areas designated as nonattainment or maintenance for the 1997 standard—but as attainment for the 2008 standard—must remain subject to conformity requirements for the 1997 standard to avoid "backsliding" on efforts to meet that standard. But the court also *agreed* with EPA's finding that the "measures that achieved attainment of both the 1997 NAAQS and the 2008 NAAQS should be adequate to maintain the same 2008 NAAQS that has already been attained." The contradiction is clear: on one hand, the court finds that conformity must continue to apply for the 1997 standard to avoid backsliding; but on the other, the court agreed that the measures already in effect in those areas should be sufficient to maintain compliance with the stricter 2008 standard.

[1] See "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Review Requirements," 80 Fed. Reg. 12,264 (Mar. 6, 2015).

The court also vacated several other provisions in the rule that provided flexibility in transitioning to the 2008 ozone standard, and appears to have invalidated EPA's revocation of the 1997 standard. If the revocation of the 1997 standard is invalidated, the implications of this decision are even broader: it would mean that areas designated as nonattainment or maintenance for the 2008 standard must make conformity determinations for the 1997 standard, in addition to making conformity determinations for the stricter 2008 standard for the same pollutant.

The practical effects of this decision on transportation agencies will be severe. As of February 16, 2018, air quality conformity requirements for the 1997 ozone standard have been re-imposed on dozens of areas around the country that have fully attained the stricter 2008 ozone standard, and possibly on dozens of additional areas that are in nonattainment or maintenance for the 2008 standard. The immediate re-imposition of conformity requirements will prevent States and metropolitan planning organizations (MPOs) from approving transportation plans and transportation improvement programs (TIPs) until the necessary air quality analysis and conformity determinations can be completed. Without an approved plan and TIP, the flow of federal funds for highway and transit projects in many areas will be halted.

Moreover, the invalidation of EPA's 2015 rule potentially calls into question the validity of *existing* every plan and TIP approvals made in reliance on that rule. MPOs across the country have approved plans and TIPs since March 2015 without making conformity determinations with respect to the revoked 1997 ozone standard. If EPA were to conclude that those previous plan and TIP approvals are now invalid, given the lack of a conformity determination for the 1997 standard, the effects of this decision would be even more immediate and far-reaching, potentially including a halt to ongoing construction projects.

As an indication of the potential magnitude of the problem, there were 35 nonattainment areas and 80 maintenance areas for the 1997 standard at the time the 1997 standard was revoked. These 115 areas are located in 32 states and 434 counties.[2] The immediate re-imposition of conformity requirements for the 1997 standard could disrupt transportation projects in all of those counties. In Atlanta alone, the MPO has approximately $1.5 billion of projects in its TIP; in Houston, the MPO has approximately $4.37 billion of projects in is TIP; in Hampton Roads, Virginia, the TIP includes $4.89 billion of projects. The re-imposition of the 1997 standard threatens the ability of these and other MPOs to continue moving forward with billions of dollars in projects.

To avoid immediate and far-reaching disruption to transportation projects, it is critical to seek every available means to obtain relief from this court decision. We therefore request that EPA file a petition for rehearing in the D.C. Circuit and seek a stay of the court's decision within the 45-day period allowed for such a petition (by April 2, 2018). If EPA files a petition for rehearing, our organizations intend to seek the court's permission to file an amicus brief in support of the rehearing request.

[2] See EPA website, https://www3.epa.gov/airquality/greenbook/gbtc.html.

In addition, we request that EPA issue interim guidance as soon as possible regarding implementation of the court decision, and that any such guidance provide maximum flexibility and minimize disruption to ongoing projects. Specifically, we ask EPA to confirm that:

- In nonattainment or maintenance areas where the 1997 ozone standard was revoked and no other conformity determinations for other pollutants or standards were required, all existing transportation plans, TIPs and projects are valid for twelve months from the date of the Court decision; at the end of the twelve-month period, a conformity determination for the 1997 ozone standard would be required.

- In areas where the 1997 ozone standard was revoked and conformity requirements for other pollutants or standards apply, all currently approved conformity determinations are valid until the next required conformity determination is made in each such nonattainment or maintenance area. At the time of the next required determination, the nonattainment or maintenance area would meet the conformity requirements for the 1997 ozone standard and any other pollutants or standards for which conformity is required.

While not a complete solution, such guidance may provide some relief from the regulatory burdens and project delays caused by this decision.

We also note that this court decision highlights the need for a permanent legislative solution to resolve the uncertainty about what the Clean Air Act requires when EPA issues a new, stricter NAAQS to replace a previous one for the same pollutant. In its recent infrastructure reform proposal, the White House specifically recommended "[a]mending the Clean Air Act to clarify that conformity requirements apply only to the latest NAAQS for the same pollutant."[3] We strongly support this recommendation for legislative change.

We appreciate your attention to this urgent request. We would welcome the opportunity to meet with you and your staff to discuss these issues. Should you have any questions, please contact: Melissa Savage from AASHTO at (202) 624-3638, or Bill Keyrouze from AMPO at (202) 624-3683.

Sincerely,

Bud Wright
Executive Director
AASHTO

DeLania Hardy
Executive Director
AMPO

[3] "Legislative Outline for Rebuilding Infrastructure in America," (Feb. 12, 2018), p. 44.

cc:
Brandye Hendrickson, Acting Administrator, Federal Highway Administration, U.S. Department of Transportation
K. Jane Williams, Acting Administrator, Federal Transit Administration, U.S. Department of Transportation
Jeffrey Wood, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
D.J. Gribbin, Special Assistant to the President for Infrastructure, The White House
Alex Herrgott, Associate Director for Infrastructure, Council for Environmental Quality, The White House