

The EPA Administrator, Gina McCarthy, signed the following notice on 7/21/2016, and EPA is submitting it for publication in the Federal Register (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2014-0616. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 56

[EPA-HQ-OAR-2014-0616; FRL-XXXX-XX-OAR]

RIN 2060-AS53

Amendments to Regional Consistency Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating revisions to its Regional Consistency regulations to more clearly address the implications of adverse federal court decisions that result from challenges to locally or regionally applicable actions.

Specifically, the EPA is introducing a narrow procedural exception under which an EPA Regional office no longer needs to seek Headquarters concurrence to diverge from national policy in geographic areas covered by such an adverse court decision. The revisions will help to foster overall fairness and predictability regarding the scope and impact of judicial decisions under the Clean Air Act (CAA or Act).

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2014-0616. All documents in the docket are listed on the

<http://www.regulations.gov> Web site. Although listed in the index, some information is not

publicly available, i.e., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For further general information on this rulemaking, contact Mr. Greg Nizich, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C504-03), Research Triangle Park, NC 27711, by phone at (919) 541-3078, or by email at Nizich.greg@epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated entities. The Administrator determined that this action is subject to the provisions of CAA section 307(d). *See* CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to “such other actions as the Administrator may determine). These are amendments to existing regulations and could affect your facility if a CAA-related ruling by a federal court affects your operations.

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this final rulemaking include the EPA and any state/local/tribal governments implementing delegated EPA programs. Entities potentially affected indirectly by this final rule include owners and operators of sources of air emissions that are subject to CAA regulations.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at: <https://www.epa.gov/nsr/nsr-regulatory-actions>. Upon publication in the *Federal*

Register, only the published version may be considered the final official version of the notice, and will govern in the case of any discrepancies between the *Federal Register* published version and any other version.

C. *How is this document organized?*

The information presented in this document is organized as follows:

- I. General Information
 - A. Does this action apply to me?
 - B. Where can I get a copy of this document and other related information?
 - C. How is this document organized?
- II. Background for Final Rulemaking
- III. Final Revisions to the Regional Consistency Regulations and Response to Significant Comments
 - A. What are the final revisions to the 40 CFR part 56 Regional Consistency regulations?
 - B. What is the basis for the EPA's approach?
- IV. Environmental Justice Considerations
- V. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act (CRA)
 - L. Judicial Review
- VI. Statutory Authority

II. Background for Final Rulemaking

On August 19, 2015, the EPA proposed revisions to the Regional Consistency regulations. The preamble to the proposal provided a history of the Regional Consistency

regulations, as well as a discussion of a recent D.C. Circuit Court decision, *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014), that led to the EPA's proposed revisions to alter the agency's internal process to address court decisions having local or regional applicability. *See* 80 FR 50252-54, August 19, 2015. This discussion addressed the basis for the proposed changes and our rationale for why we believe the revisions are necessary. This final rulemaking notice does not repeat that discussion, but refers interested readers to the preamble of the proposed rule for this background.

The 60-day public comment period for the proposed rule was extended 15 days in response to commenters' requests and closed on November 3, 2015. In Section III of this document, we briefly summarize the revisions and summarize and respond to significant comments.

III. Final Revisions to the Regional Consistency Regulations and Response to Significant Comments

A. What are the final revisions to the 40 CFR part 56 Regional Consistency regulations?

In this action, we are making three specific revisions to the general consistency policy reflected in the Regional Consistency regulations, 40 CFR part 56, to accommodate the implications of judicial decisions addressing locally or regionally applicable actions. First, we are revising 40 CFR 56.3 to add a provision to acknowledge an exception to the "policy" of uniformity to provide that a decision of a federal court adverse to the EPA that arises from a challenge to locally or regionally applicable actions will not automatically apply uniformly nationwide. This ensures that only decisions of the U.S. Supreme Court and decisions of the United States Court of Appeals for the D.C. Circuit Court that arise from challenges to "nationally applicable regulations ... or final action" will apply uniformly to the challenged

regulations or action nationwide in all instances.¹ Second, we are revising 40 CFR 56.4 to add a provision to clarify that the EPA Headquarters offices' employees will not need to issue mechanisms or revise existing mechanisms developed under 40 CFR 56.4(a) to address federal court decisions adverse to the EPA arising from challenges to "locally or regionally applicable" actions. Lastly, we are revising 40 CFR 56.5(b) to clarify that EPA Regional offices' employees will not need to seek Headquarters office concurrence to diverge from national policy or interpretation if such action is required by a federal court decision adverse to the EPA arising from challenges to locally or regionally applicable actions.²

B. What is the basis for the EPA's approach?

In the proposed rule, we explain in detail why the revisions are reasonable and consistent with general principles of common law and the CAA. *See* 80 FR 50254. We summarize those discussions in Sections III.B.1 through 6 of this document.

1. The Revisions are Consistent with General Principles of Common Law

a. Summary of the EPA's Position

As explained more fully in the proposed rule, federal courts are courts of limited jurisdiction and only have the authority to hear and decide cases granted to them by Congress. A

¹ While a decision of the United States Court of Appeals for the D.C. Circuit in cases involving "nationally applicable" action applies nationwide as a general proposition, the EPA notes that in particular cases there may be questions as to the precise contours of the decision that applies nationwide. For example, there may be questions as to the effect of dicta or other subsidiary analysis in the court's decision, or (typically in non-rulemaking contexts) questions arising out of the limited nature of the agency action under review itself. The EPA believes that specific questions such as these are best addressed on a case-by-case basis, and are not intended to be addressed in this action.

² As discussed in Section III.B of this preamble, we are revising in this final rule the proposed revisions to 40 CFR 56.5(b) in response to public comment.

court of appeals generally hears appeals from the district courts located within its circuit, and the circuit is delineated by the states it contains. As a general matter, while an opinion from one circuit court of appeals may be persuasive precedent, it is not binding on other courts of appeals. *See Hart v. Massanari*, 266 F. 3d 1155, 1172–73 (9th Cir. 2001).

By revising the regulations in part 56 to fully accommodate intercircuit nonacquiescence, the EPA is acting consistently with the purpose of the federal judicial system by allowing the robust percolation of case law through the circuit courts until such time as U.S. Supreme Court review is appropriate.³ As the U.S. Supreme Court has noted, preventing the government from addressing an issue in more than one forum “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” *United States v. Mendoza*, 464 U.S. 154, 160 (1984). In light of this important function, the U.S. Supreme Court has sought to preserve government discretion to relitigate an issue across different circuits. *Id.* at 163. Thus, though circuit conflict may undermine national uniformity of federal law to some degree for some period of time, it also advances the quality of decisions interpreting the law over time. *See generally Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 446 (7th Cir. 1994) (J. Easterbrook, concurring) (agencies and courts balance whether “it is more important that the applicable rule of law be settled” or “that it be settled right”) (internal quotation and citation omitted).

³ As discussed in the proposed rule preamble, the revisions apply to decisions of the district courts as well as circuit courts. 80 FR 50258. The jurisdiction of district courts is even more limited than that of circuit courts.

b. Response to Comments

(1) Summary of Comments

Various commenters stated that intercircuit nonacquiescence is inappropriate or bad policy. One commenter stated that the EPA's preference for pursuing intercircuit nonacquiescence to promote judicial resolution is not the appropriate approach. The commenter said that the current Regional Consistency regulations allow for judicial appeals, but also ensure uniformity pending the resolution of conflicting court opinions. The commenter also noted that it is uncertain whether ultimate resolution of circuit splits will ever occur under the proposed revisions. The commenters cited to the EPA's reference to the U.S. Supreme Court's review of *EDF v. Duke*, 549 U.S. 561, 581 (2007) as evidence that the EPA can do what the D.C. Circuit advised in *NEDACAP*, which is to request review of an adverse decision and put regulated entities on notice that the EPA disagreed with the lower court's decision.

A couple of commenters noted that some courts, as well as law review articles and legal commentary, have taken an unfavorable view of the doctrine of intercircuit nonacquiescence. The commenters state that the EPA failed to account for the criticisms in its proposal notice. They also took the position that the doctrine is particularly ill-suited for the CAA and its myriad of regulations.

Another commenter stated that the EPA's proposal to follow intercircuit nonacquiescence is an attempt to refuse to adjust policies in the face of clear, adverse judicial decisions. The commenter suggested that if the EPA disagrees with a court over a matter of enormous import, then the issue should either be elevated to the U.S. Supreme Court or addressed in rulemaking reviewable by the D.C. Circuit.

One commenter argued that intercircuit nonacquiescence is not the only path to judicial resolution. Rather, following an adverse decision the EPA could apply a policy change nationwide and allow the various circuits courts to review that new interpretation, while maintaining consistency in the meantime.

(2) EPA Response

The EPA disagrees with the commenters; the approach advocated by these commenters would grant every court unlimited nationwide jurisdiction. Rather than being merely persuasive, a decision in one circuit thus would become binding precedent in other circuits; such a result is inconsistent with the court system established by Congress and years of case law. Robust review by a variety of courts, to allow for percolation of an issue before it reaches the U.S. Supreme Court, leads to a more thorough analysis of an issue.

In response to those commenters who claim the EPA failed to account for arguments against intercircuit nonacquiescence, the EPA disagrees. The fact that the EPA reaches a different conclusion regarding the benefits of intercircuit nonacquiescence does not mean that the EPA has failed to consider all sides of the argument. Moreover, as explained more fully in Section III.B.2 of this document, the EPA's position recognizes the unique aspects of CAA § 307(b) and its specific placement of review of nationally applicable regulations and policies in the D.C. Circuit.

The EPA has reviewed the case law and law review articles cited by the commenters and notes that some of the commenters appear to confuse the concept of *intracircuit* nonacquiescence, which involves an agency not following a court decision even within the circuit which issued the decision, and *intercircuit* nonacquiescence, which involves an agency following a court decision in the circuit that issued the decision, but not in other circuits. Some

of the cases and law review articles cited by commenters in support of their arguments against intercircuit nonacquiescence involved intracircuit nonacquiescence. *See, e.g., Johnson v. U.S. R.R. Retirement Board*, 969 F.2d 1082, 1090 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993) (involving the intracircuit nonacquiescence of the Retirement Board); *Lopez v. Heckler*, 713 F.2d 1432, 1434 (9th 1983) (involving intracircuit nonacquiescence of the Secretary of Health and Human Resources); *Holden v. Heckler*, 584 F. Supp. 463 (N.E. Ohio 1984) (involving the Secretary of Health and Human Resources failure to follow Sixth Circuit precedent); Diller & Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law*, 881 Yale L.J. 801 (1990) (analyzing intracircuit nonacquiescence); Coen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339 (1991) (same).⁴ Upon close reading, many of the materials cited by commenters support the EPA's revisions. For example, the D.C. Circuit stated that:

[o]rdinarily, of course, the arguments against intercircuit nonacquiescence (which occurs when an agency refuses to apply the decision of one circuit to claims that will be reviewed by another circuit) are much less compelling than the arguments against intracircuit nonacquiescence. Although the decision of one circuit deserves respect, we have recognized that “it need not be taken by the Board as the law of the land.” *Givens v. United States R.R. Retirement Bd.*, 720 F.2d 196, 200 (D.C. Cir. 1983). When the Board's position is rejected in one circuit, after all, it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion. And there is an additional value to letting important legal issues “percolate” throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984).

⁴ Most of the majority or concurring opinions cited by commenters in support of their argument against intercircuit nonacquiescence were written before the U.S. Supreme Court decided *Mendoza* in 1984 and thus did not benefit from the Court's reasoning in that case. *See, e.g., in May Dep't Stores Co. V. Williamson*, 549 F.2d 1147 (8th Cir. 1977) (concurring opinion cited); *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462 (3rd Cir. 1977) (concurring opinion cited). At least one of the cases cited does not appear to involve nonacquiescence whatsoever. *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).

Johnson, 969 F.2d at 1093. And two legal scholars cited by commenters recognize that:

[t]he judicial branch is structured to ensure uniformity and stability of legal standards within each regional circuit while permitting disuniformity among the circuits.... As long as parties can discern which circuit law applies to any given conduct, the parties can shape their action to conform to legal standards. Furthermore, permitting circuits to independently examine issues contributes to resolution of important legal questions on a national basis. Accordingly, each circuit remains completely free to accept or reject the reasoning of other courts of appeals. This mixture of uniformity and diversity strikes a balance that permits legal issues to receive independent examination by a number of courts, while at the same time maintaining a unitary rule of law in any given geographic location.

Diller & Morawetz, *infra*, 881 Yale L.J. at 805 (citations omitted). *See also*, Coen, *infra*, 775

Minn. L. Rev. at fn. 23 (“The legality of intercircuit nonacquiescence is widely accepted.”).

Notably, these revisions accommodate intercircuit nonacquiescence while rejecting intracircuit nonacquiescence by providing that an EPA Regional office impacted by an adverse court decision should follow that decision, even if that results in an EPA Regional office acting contrary to otherwise applicable national policy.

While some commenters stated that intercircuit nonacquiescence is particularly ill-fitted to the CAA because of its myriad of regulations, the EPA concludes that it is the vast array of regulations which makes these revisions appropriate. A facility may already have to track compliance with a variety of CAA regulations, and the revisions allow that facility to presume that the national interpretation or policy applicable to those regulations will continue to apply to it, unless a court with jurisdiction over the facility issues a court decision or the EPA undertakes appropriate procedures to change that national interpretation or policy. It arguably would be more burdensome on regulated entities to track not only the national interpretation of all the regulations and policies that apply to their facilities, but also all the court decisions across the

country regarding those regulations or policies. These revisions to the Regional Consistency rule are intended to provide, as much as possible, a stable policy environment for facilities.

The approach suggested by one commenter that the EPA could provide uniformity by applying an adverse court decision nationally, without otherwise changing the underlying national policy or interpretation, is not feasible when different circuits issue different interpretations. When circuit splits occur, the EPA would have to apply different interpretations in the conflicting circuits; the only question is which interpretation applies in those circuits that had not ruled on the issue. The final revisions to the Regional Consistency regulations answer this question by establishing the presumption that the EPA will continue to apply the national policy nationwide, except for those geographic areas impacted by the adverse decision. However, the approaches set forth by commenters fail to address the situation when a second court addresses an issue already ruled on by another court, and issues a conflicting decision. The EPA's final revisions account for this possibility by maintaining national policies nationwide, except in those limited geographic areas covered by adverse court decisions. A particular advantage of these revisions is that they can be implemented in a predictable and straightforward manner regardless of the number of lower court decisions or the potential conflicts among those decisions.

To the extent commenters are concerned that circuit splits would never be resolved by the U.S. Supreme Court, this possibility is not caused by, or unique to, the revised Regional Consistency regulations. First, as noted in the proposed rule, the U.S. Supreme Court is more likely to grant review if such a split between two or more circuits occurs. 80 FR 50255. Second, when the EPA successfully maintains its position before a court, the entity challenging that position may seek further review. Finally, the public will still have the option to file a petition

with the EPA requesting a change in the nationally applicable regulations or policy in the event that EPA declines to change national policy in response to an adverse ruling in a lower court. Assuming statutory timing and other jurisdictional prerequisites are met, the EPA's final response to that petition may be challenged in the D.C. Circuit, which is, under the CAA, the appropriate venue for obtaining a nationally applicable court decision on the national policy. *See, e.g., Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).

We disagree with the commenter who stated that the revisions are an attempt by the EPA to ignore adverse decisions.⁵ Quite the contrary, the final revisions clearly establish a mechanism whereby the EPA Regions located in the geographic area(s) covered by an adverse decision may and should begin following that decision in those geographic areas immediately, without having to seek concurrence from Headquarters. The revisions also recognize that the EPA may, as appropriate, change national policy in response to an adverse decision. But until the EPA undertakes the appropriate process to effectuate that change, national policy continues to apply elsewhere nationwide.

2. The Revisions are Consistent with the CAA Judicial Review Provisions

a. *Summary of the EPA's Position*

Revisions ensure that the Regional Consistency regulations are in harmony with the CAA's judicial review provisions at section 307(b). The ability of the various courts of appeals

⁵ The *Duke* case is more complicated than the commenters acknowledge, and is not a clean example of how the EPA can merely seek U.S. Supreme Court review of an adverse decision. In fact, the EPA did not ask the U.S. Supreme Court to review the Fourth Circuit's decision in *Duke*. Rather, the EPA objected to the petition for *certiorari* submitted by environmental petitioners, on the grounds that the petitioners had not identified either a square circuit court split, or a sufficient reason for U.S. Supreme Court review. *See* Brief of the United States in Opposition (05-548). Only once the U.S. Supreme Court granted review, did the EPA successfully argue to the Court that the Fourth Circuit's decision was in error.

to hear appeals of decisions of the EPA is specifically addressed in the statute. In 1977, at the same time it added the directive for the EPA to promulgate what would ultimately become the Regional Consistency regulations, Congress amended the Act to ensure that the D.C. Circuit Court, and no other circuit courts, would review nationally applicable regulations. By placing review of nationally applicable decisions in the D.C. Circuit Court alone, Congress struck the balance between the countervailing values of improved development of the law on the one hand and national uniformity on the other. At the same time, Congress left the door open to intercircuit conflicts by granting jurisdiction over locally or regionally applicable final actions to the regionally-based courts of appeal. These revisions maintain the balance that Congress struck in CAA section 307(b)(1). There is nothing in the language or intent of CAA § 301(a)(2) that trumps the clear statutory directive of CAA § 307(b)(1) establishing which courts have jurisdiction over which final agency actions.

b. Response to Comments

(1) Summary of Comments

A few commenters suggested that if the EPA is concerned about local court decisions impacting national policy, the EPA should have those cases transferred to the D.C. Circuit for decision. The commenters stated that CAA § 307(b)(1) requires final actions “of nationwide scope or effect” be heard by the D.C. Circuit. The commenters contended that this provision, in combination with the existing Regional Consistency regulations, is enough to ensure fairness and uniformity in the application of policies nationwide.

One commenter stated that intercircuit nonacquiescence is in conflict with CAA § 307(b)(1), through which Congress tried to prevent the very intercircuit conflicts that the proposed revisions will allow. The commenter noted that if locally and regionally applicable

actions with nationwide scope and effect are properly heard by the D.C. Circuit, there should be relatively few situations where a circuit court addresses an issue that can create inconsistency in the interpretation or implementation of CAA requirements. Another commenter contended that CAA § 307(b) does not stand for the proposition that the EPA can ignore decisions of non-DC Circuit courts simply because they arose in the context of a permitting decision. In fact, they maintain, CAA § 301 stands for the opposite proposition.

(2) EPA Response

The EPA agrees that CAA § 307(b)(1) requires final actions “of nationwide scope or effect” be heard by the D.C. Circuit. This may include regional rulemaking that the EPA has identified and designated as having national scope and effect. However, when the EPA is applying regulations of nationwide scope to a particular circumstance, another appropriate circuit court should hear that decision of local or regional impact.

We agree with commenters that if the D.C. Circuit were the only court to rule on the reasonableness of the EPA’s interpretation of its national regulations, there would be very little need for intercircuit nonacquiescence because the only action being reviewed by the court would be the EPA’s application of that interpretation to the facts of the case. However, sometimes a court other than the D.C. Circuit (or U.S. Supreme Court) renders an adverse decision that rejects the EPA’s interpretation of nationally applicable regulations in a manner that could be argued to have general rather than merely case-specific implications. This can happen, for example, where the court does not merely find that the facts do not support the EPA’s application of national policy, but instead finds fault with the national policy itself. The Sixth Circuit decision in *Summit Petroleum Corp. v. U.S. EPA*, 690 F3d 733 (6th Cir. 2012) is the quintessential example of a final action of local or regional application; in the context of reviewing that local action, the

Sixth Circuit rejected the EPA's longstanding interpretation of the applicable national regulations. Revisions to the Regional Consistency regulations will minimize, not exacerbate, the disruption to the smooth implementation of the CAA caused by locally or regionally applicable circuit court decisions by limiting their applicability to those areas covered by the circuit court, and leaving national policy in place in the rest of the country. Parties that agree with the decision of the regional circuit and believe it should be followed nationally are, of course, free to advocate that position to the EPA (and, if necessary, reviewing courts) in specific cases arising in other circuits. Revisions merely make clear that EPA will not *automatically* be bound to follow locally or regionally applicable circuit court decisions in cases arising in other circuits.

It would be contrary to the division of responsibility among the circuit courts that Congress established in CAA § 307(b) for the EPA to eliminate their review by moving any case that could potentially affect national policy to the D.C. Circuit. Such an approach also would disrupt the timeline for review created by the CAA. Challenges to nationally applicable regulations must be filed within 60 days of the regulations being published in the *Federal Register*. Treating any challenge to each and every application of those regulations as challenges to the underlying regulations that must be heard by the D.C. Circuit would either render those challenges untimely (to the extent they occur outside the 60-day window) and thus require their dismissal, or render the 60-day window superfluous by allowing challenges to the regulations any time they are applied. *See, e.g., Sierra Club de Puerto Rico, et al. v. EPA*, 815 F.3d 22 (D.C. Cir. 2016) (dismissing a challenge to a 1980 regulation as untimely because the purported after-arising ground involved the mere application of that old regulation). Neither result is consistent with the judicial review provisions established in CAA § 307(d). In fact, given the clear language of § 307(b), it is not clear whether a court would transfer a challenge to a decision of local or

regional nature to the D.C. Circuit. *See, e.g., Dalton Trucking, Inc. v. United States EPA*, 808 F.3d 875 (D.C. Cir. 2015) (finding that the D.C. Circuit was not the proper court to hear a challenge to a preemption waiver for California because the waiver decision did not have national applicability, nor did the EPA make or publish a finding that the decision was based on a determination of nationwide scope or effect). Finally, sometimes adverse decisions arise in the context of enforcement cases, which must be heard in particular district courts, and then any appeal must be heard by the circuit court with jurisdiction over that district court. Thus, the EPA simply cannot ensure that all court decisions potentially involving review of national policy are heard in the D.C. Circuit.

Finally, the EPA is not ignoring decisions of other circuits by revising the Regional Consistency regulations. Rather, these revisions help to ensure that we are clearly following the applicable law of the circuit in the geographic areas covered by the decision. But the EPA also is respecting the judicial review provisions of the CAA by limiting decisions reviewing locally or regionally applicable actions to those locations and regions covered by the circuit court.

3. The Revisions are Consistent with CAA Section 301

a. Summary of the EPA's Position

The revisions also are consistent with CAA § 301. As described in the proposed rule, § 301(a)(2) requires the EPA Administrator to develop regulations to “assure fairness and uniformity” of agency actions. Notably, there is nothing in the text of CAA § 301(a)(2) or its limited legislative history that suggests Congress intended to either upset the balance Congress struck when establishing judicial review provisions in CAA § 307, or disrupt the general principles of common law that have allowed for the percolation of issues up through the various

circuit courts, as discussed previously. Section 301(a)(2) of the Act does not specifically address how the agency should respond to adverse court decisions.

In addition, the text of CAA § 301(a)(2)(A) necessitates a balance between uniformity and fairness; however, promoting either one of these attributes does not always guarantee maximizing the other attribute in all circumstances. These revisions would ensure the EPA has the flexibility to maintain that balance, as appropriate.

b. Response to Comments

(1) Summary of Comments

Several commenters maintained that the EPA’s proposed amendments to the Regional Consistency regulations are inconsistent with the clear and unambiguous language of CAA § 301(a)(2). The commenters stated that this provision requires the EPA to promulgate rules establishing “general applicable procedures and policies for Regional officers and employees . . . to follow” that are designed to “assure fairness and uniformity in the criteria, procedures, and policies” applied by the EPA Regional offices. The commenters contended that the EPA’s proposed rule codifies an impermissible exception to uniformity in the form of intercircuit nonacquiescence.

A few commenters pointed to the legislative history associated with the passage of CAA § 301(a)(2) and noted that Congress clearly intended there to be national consistency in implementing core CAA programs. One commenter noted that Congress’s directive in CAA § 301 was particularly critical in the prevention of significant deterioration (PSD) and new source review (NSR) permitting programs, as well as other national standards (e.g., New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants).

A few commenters also stated that even if CAA § 301 were ambiguous, the EPA's proposed amendments to the Regional Consistency regulations are unreasonable. The commenters noted that the D.C. Circuit vacated the EPA's *Summit* memorandum based on the language in the EPA regulations, which essentially is exactly the same as the statutory language and mandate requiring fairness and uniformity. Thus, the commenters concluded, the court has already found that the statutory language establishes a national uniformity mandate. One commenter additionally noted that the fact that court decisions are not expressly addressed by CAA § 301(a)(2) does not create ambiguity; the statute requires the EPA to maintain consistency.

Two commenters noted that the D.C. Circuit has recognized the call for uniformity as well in *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982). One commenter stated that the EPA's reliance on *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071 (6th Cir. 1984) in the proposal is misplaced because the case involved a different issue. The commenter maintained that the case does not support the EPA in ignoring the plain language of CAA § 301(a)(2) to promote "fairness and uniformity." The commenter noted that the court in *Air Pollution Control Dist.* expressed a "strong preference to achieve an interpretation of the Act which is consistent among the several circuits." *Id.* at 1094.

One commenter stated that the EPA's proposal is inconsistent with CAA § 301(a)(1), which provides that the Administrator may delegate authority when it is "necessary or expedient." The commenter stated that if the Administrator delegates her authority to Regional Administrators who make inconsistent decisions, the delegation would not be expedient and therefore would violate CAA § 301(a)(1). The commenter further maintained that the EPA incorrectly stated in the proposal notice that the current Regional Consistency regulations that

require regional officials to “seek concurrence” from Headquarters could result in inconsistent policies among Regional offices. Proposal at 50258. According to this commenter, this existing mechanism ensures consistency and does not condone variation between Regional offices.

Two commenters argued that the EPA’s proposal to incorporate intercircuit nonacquiescence into the Regional Consistency regulations creates “irrationality” in the rulemaking process. The commenters argue that by allowing her delegates (e.g., Regional Administrators) to act in an inconsistent manner is tantamount to the Administrator acting inconsistently, which is impermissible.

(2) EPA Response

The EPA disagrees with the commenters who state that the revision to the Regional Consistency regulations is inconsistent with CAA § 301(a)(2). On its face, CAA § 301(a)(2) does not impose a standalone requirement to attain uniformity. While CAA § 301(a)(2)(C) directs the EPA to create mechanisms for identifying and standardizing various criteria, there is nothing to suggest that such standardization requires exact duplication by all EPA Regions in all circumstances, including Regional office responses to court decisions.

As noted earlier, CAA § 301(a)(2) does not specifically discuss whether the fairness and uniformity objectives must be applied to all court decisions. Instead, the provision requires the EPA to establish *procedures* that apply to its Regional office officials and employees, but it does not address whether or how the EPA should address judicial decisions in those procedures. Congress also did not include language that would expressly prohibit the EPA from promulgating regulations that accommodate intercircuit nonacquiescence. To the extent that Congress prioritized judicially-created uniformity, this was expressed in CAA § 307(b)(1) – which allows for regional divergence among circuit courts – not in CAA § 301(a)(2)(A).

The EPA disagrees with commenters who claim that the amendments to the Regional Consistency regulations violate CAA § 301(a)(1). This provision provides authority to the Administrator to delegate her powers and duties to any EPA officer or employee as “[s]he may deem necessary or expedient.” This delegation is “expedient” if it is “suitable for achieving a particular end in a given circumstance” or “characterized by concern with what is opportune.” *Expedient, Merriam-Webster Dictionary* (2015). Given the immense quantity and breadth of tasks assigned to the Administrator through the CAA and other statutes the EPA is charged with administering, delegation of the Administrator’s authorities is both necessary and expedient in many circumstances to efficiently protect the environment and public health. Further, in amending the Regional Consistency regulations, the EPA is introducing only a narrow procedural exception to deal with federal court decisions adverse to EPA regarding locally or regionally applicable actions that may affect consistent application of national programs, policy, and guidance. The EPA does not agree that it is “irrational” for the agency to act differently in different regional actions when that difference is necessitated by an adverse local or regional court decision, whether the action is taken by the EPA Regional Administrators or by the Administrator herself.

As commenters admit, in *NEDACAP*, the D.C. Circuit explicitly did not address whether the CAA allows the EPA to adopt different standards in different circuits. *NEDACAP* at 1011. While the *NEDACAP* decision relied heavily on the general policy statements contained in 40 CFR 56.3 of the existing regulations – which broadly endorse the fair and uniform application of criteria, policy, and procedures by EPA Regional office employees – nothing in those general statements or any other provisions of the regulations mandates that the EPA adopt nationwide the interpretation of the court that first addresses a legal matter. The lack of such a mandate supports

the focused revisions in this rulemaking that are a natural extension of the agency's existing regulations.

As commenters noted, the D.C. Circuit cited to CAA § 301(a)(2) in *Kennecott*. 684 at 1014, fn. 18. However, this statutory provision was not central to the case, so the court's mention of the provision was *dicta*. The D.C. Circuit described the EPA's ability to prescribe in advance criteria that states must use in making a specific type of determination. The EPA's ability to require states to follow certain rules is not in question in this rulemaking. The court also stated that establishing criteria to implement a particular CAA program "on an ad hoc incremental basis" would not amount to "fairness and uniformity" described in CAA § 301(a)(2). The EPA is not attempting to create ad hoc rules on how to implement programs. Rather, in taking this final action, the EPA is creating a clear and uniform presumptive approach and standard agency process to follow in light of adverse local and regional court decisions. This is the opposite of an ad hoc approach.

As the EPA noted in the proposal notice, *Air Pollution Control Dist.* rejected the claim that CAA § 301(a)(2) establishes a substantive standard that requires similar or uniform emission limitations for all sources. 739 F.2d 1071, 1085 (6th Cir. 1984). Although that case addressed a different issue than the content of this rulemaking, specifically whether CAA § 301(a)(2) required the EPA to implement similar or uniform emission limitations for each source within a particular area, the decision does support the overall concept that CAA § 301(a)(2) does not impose a standalone requirement to attain uniformity.

Further, the EPA believes that the quote used by the petitioner in that case from page 1094 of the decision has been taken out of context. The court made a certain substantive ruling in *Air Pollution Control District* on an issue unrelated to this rulemaking. In making that decision,

Page 21 of 48

the court was seeking to keep its decision consistent with those of other circuit courts. A court's decision to make a holding consistent with other courts' prior decisions or to create a circuit split is outside the purview of this rulemaking and this agency. It may be a factor that weighs into how a court comes to a decision, but does not speak to how the agency should treat national policy in light of an adverse court decision with regional or local applicability, nor does it speak to the issue of whether it is appropriate for the EPA to create a narrow exception to the procedure established in the Regional Consistency regulations for adverse local and regional court decisions.

There is nothing in the limited legislative history of CAA § 301(a)(2) that counsels against the revision the EPA is making through this final action. The legislative history quoted by the commenter discusses one particular instance of regional inconsistency that, at least in part, motivated Congress to implement the regional consistency language of CAA § 301(a). This situation, which involved the use of different air quality models in different regions for the purpose of implementing the PSD permitting program, is far removed from the case of an adverse court decision of local or regional scope. Further, the legislative history surrounding passage of CAA § 307(b) indicates that Congress intended to advance the objective of even and consistent national application of certain EPA regulations that are national in scope. At the same time, Congress left the door open to intercircuit conflicts by granting jurisdiction over locally or regionally applicable "final actions" to the regionally-based courts of appeals. The EPA has found, and commenters have pointed to, nothing in the legislative history to suggest that at the same time, Congress intended for the Regional Consistency provisions to somehow upset this careful balance and require the EPA to apply a locally or regionally applicable decision in all EPA Regions in order to maintain consistency.

The revisions further the overall goal of consistency and clarity by specifically identifying the possibility of potential differing actions across the EPA Regions, especially where multiple courts have already addressed an issue in different ways, and standardizing a response that can be followed by all the EPA Regions, such that the EPA Regions only have to apply local and regional decisions issued by courts in those geographic areas over which the court has jurisdiction.

No commenter has explained in any detail why the NSR, NSPS or NESHAP programs are uniquely situated such that it would be inappropriate to finalize the narrow exception to the Regional Consistency regulations to deal with locally or regionally applicable federal court decisions. While some programs (such as NSR and NSPS) create national standards and others are administered through EPA-approved state implementation plans (SIPs), all portions of the CAA are federal law and apply nationwide. The explanation for the revisions provided in the proposal and final rule preambles apply equally to all criteria, procedures, and policies, and the commenter has failed to provide a reasoned explanation why certain programs should be considered differently. The EPA also notes that it is at times impossible to maintain complete consistency in the face of adverse court decisions. By revising the regulations, the EPA accommodates the possibility that a split in the circuits could preclude the EPA from complying with both court decisions at once, as illustrated by the following example outlined in the proposal notice. In a case involving a permit issued in New York, the Second Circuit upholds the EPA's longstanding position and, in doing so, confirms that the EPA's interpretation is compelled by the Act under Step One of *Chevron*. As a result, the EPA continues to apply its longstanding interpretation, consistent with the Second Circuit's decision, in a permit issued in Alabama, an Eleventh Circuit state. In an appeal of that permit, however, the Eleventh Circuit holds that not

only is the EPA's interpretation not compelled by the CAA, it is prohibited by the CAA. There are now two court decisions with conflicting *Chevron* Step One holdings – how could the EPA apply both of those decisions uniformly across the country? While the U.S. Supreme Court could review the issue, it might not. And even if the U.S. Supreme Court eventually resolved the conflict, there could be a multi-year period during which both decisions would remain applicable case law. *See, e.g.*, discussion of *Duke* in Section 4.b.(2) of this document. This revision acknowledges and addresses those instances in which the EPA may not be able to comply with two, conflicting decisions at the same time.

4. The Revisions Will Foster Overall Fairness and Predictability

a. *Summary of the EPA's Position*

Specifically accommodating intercircuit nonacquiescence in the Regional Consistency regulations also fosters fairness and predictability in the implementation of the CAA overall. As discussed earlier, the revisions ensure that national policy continues to apply unless there is an affirmative nationwide and deliberate change in the EPA's rules or policies, or an adverse court decision applies only in those states/areas within the jurisdiction of that court, with the exception of the D.C. Circuit court reviewing final agency actions of national applicability. Under the revised Regional Consistency regulations, a source subject to the CAA needs to know and follow only the law in the circuit where it is located, and the law of the D.C. Circuit Court and the U.S. Supreme Court. It would not be required to follow every CAA case in every court across the country to ensure compliance with the Act. While a source remains free to advocate for a change in the agency's national policy based on the results of a regional circuit court decision, unless and until the agency agrees to make such a change, the national policy will continue to apply except in the circuit where the adverse decision was issued.

b. Response to Comments

(1) Summary of Comments

A few commenters stated that the EPA's proposal, if finalized, would harm businesses due to different regulatory requirements applying to different facilities based on their location. For example, industry argues it will face uneven application and enforcement of CAA requirements, and incur increased compliance costs as they try to address regulatory ambiguity and confusion. One commenter stated that the proposed revisions would not ensure "fairness" as required in CAA § 301(a)(2). One commenter argued that the proposed revisions will have a chilling effect on new projects or improvements. One commenter noted that limiting the regulatory amendments to local or regional court decisions does not help because many of these decisions actually have nationwide impact.

One commenter cautioned that finalization of the proposed amendments to the Regional Consistency regulations will lead to increased litigation over venue, since decisions by the D.C. Circuit will apply nationwide, while decisions of district courts and other circuit courts would not be required to apply nationwide. Multiple commenters further noted that the rule change may also lead to additional litigation in multiple circuits to expand the impact of a single regional or local court decision. The commenters believe this will lead to greater burdens on litigants and strains on judicial resources.

One commenter stated that a lack of national uniformity would create confusion and implementation issues given that the geographic boundaries of the EPA's Regional offices do not match the boundaries of the federal circuit courts and that a single EPA Region may have to apply two different standards based on court decisions and their jurisdictions.

(2) EPA Response

The EPA believes in the overall importance of uniformity and fairness in the application of criteria, procedures, and policies across the various EPA regions in most instances. As the EPA explained when the Regional Consistency regulations were first finalized, the “intended effect” of these regulations was “to assure fair and consistent application of rules, regulations and policy throughout the country by assuring that the action of each individual EPA Regional office is consistent with one another and national policy” (45 FR 85400). These revisions merely identify a specific circumstance under which an EPA Regional office no longer needs to seek Headquarters concurrence to diverge from national policy, and confirms that national policy otherwise continues to apply.

CAA § 301(a)(2) focuses on promoting fairness and uniformity. The EPA believes that predictability is an important element of fairness and also a worthwhile objective to achieve in carrying out its mission. The changes made to the Regional Consistency regulations foster predictability by ensuring that, unless there is an affirmative nationwide and deliberate change in the EPA’s rules or policies, lower court decisions would apply only in those areas within the jurisdiction of the lower court, with the exception of the D.C. Circuit Court reviewing final agency actions of national applicability, consistent with CAA § 307(b)(1). The EPA may choose to initiate a change in national policy at any time, including in light of an adverse court decision, but the agency is bound to follow appropriate procedures in order to do so.

If the revisions to the Regional Consistency regulations had already been in place at the time of the *Summit* decision, a memorandum from EPA Headquarters like the one challenged in the *NEDACAP* decision would not have been necessary because EPA Regions, states, and other potentially affected entities would have had certainty and predictability regarding the application

of such a judicial decision – they would have known that this type of permit-specific, local and regional decision would only apply in the areas under the jurisdiction of the Sixth Circuit (unless and until the agency expressly decides to make a change to its national policy after consideration of the decision). Accordingly, it would have been clear to everyone that the EPA Regions would not be bound to apply the findings of the *Summit* decision in states outside the Sixth Circuit, and could continue to apply the longstanding practice that had not been successfully challenged in other federal circuit courts in their regions or decided nationally by the D.C. Circuit or U.S. Supreme Court.

The EPA acknowledges that under the revisions finalized, some facilities may be subject to different regulatory requirements based on their location. Some difference in governing rules is inherent in our federal judiciary system where district and circuit courts are limited to a definitive jurisdiction. The federal judicial system was designed to allow numerous, and sometimes conflicting, decisions until such time as the U.S. Supreme Court rules on an issue. The structure of the federal judicial system also sometimes results in increased litigation, as issues are considered by multiple courts. As noted previously, this rule simply changes the internal procedure followed by the agency in light of an adverse court decision; thus, these revisions, which are consistent with the federal judicial system, will not singlehandedly lead to increased litigation. One commenter noted that following this rulemaking, litigants may wish to challenge the venue of litigation more often to try to ensure cases are heard by the D.C. Circuit so that judicial outcomes apply nationwide. The EPA believes it is appropriate for venue to be challenged if the litigation is not brought in the appropriate court according to CAA § 307(b)(1). Under the CAA specifically, the drafting of CAA § 307(b) indicates that Congress intended to

leave the door open to intercircuit conflicts by granting jurisdiction over locally or regionally applicable “final actions” to the regionally-based courts of appeals.

Further, sometimes court decisions reviewing a regulation or statute are reversed on appeal. In other cases, a court decision may contain a ruling that arguably calls into question a national rule in the context of a source-specific action, which is inconsistent with CAA § 307(b)(1), as explained in the proposal notice. When either outcome occurs, intercircuit nonacquiescence allows the EPA to limit the impact of the court’s ruling while it undertakes other actions. For example, as outlined in the proposal notice, in *Duke*, 549 U.S. 561 (2007), the U.S. Supreme Court reversed the Fourth Circuit’s implicit invalidation of the EPA’s regulations in the context of an enforcement action. In that case, the U.S. Supreme Court found that the court of appeals had been too rigid in its insistence that the EPA interpret the term “modification” in its PSD regulations in the same way that the agency interpreted the term under the NSPS program. *Id.* at 572-577. While it is true that the U.S. Supreme Court eventually reversed the lower court, there was a 2-year period during which the Fourth Circuit’s decision remained in place. Under the commenter’s proposed approach, the EPA arguably would have been required to follow that later-reversed Fourth Circuit interpretation of its regulations nationwide during that 2-year period, even though the interpretation “read those PSD regulations in a way that seems to [the Supreme Court] too far a stretch for the language used.” *Id.* at 577.

The EPA disagrees that the amendments made to the Regional Consistency regulations are poor public policy. It is generally acceptable to apply a circuit court or District Court decision only within the jurisdiction of the court. A standard that specifically allows for intercircuit nonacquiescence for all CAA decisions other than those issued by the D.C. Circuit Court in response to challenges of nationwide actions would provide a uniform standard for the

EPA's application of court decisions that could be anticipated by those who implement the regulations and the regulated community.

The EPA acknowledges that the EPA Regional office boundaries do not align with the boundaries of circuit courts. However, the EPA Regional offices and Headquarters will endeavor to make clear the states, tribes, or local jurisdictions that are impacted by an adverse court decision. The EPA notes that, consistent with past practice, in certain instances the EPA Regions are already applying different policies across their states based on prior court decisions *See, e.g.*, discussion of follow on to *Sierra Club* decision in Section 5.b.(2) of this document.

5. The Revisions are a Reasonable Revision to the 40 CFR Part 56 Regulations and Maintain the EPA's Ability to Exercise Discretion

a. Summary of the EPA's Position

In the proposed rule, we noted that the Regional Consistency regulations already allowed for some variation between the EPA Regional offices. Specifically, the original version of 40 CFR 56.5(b) provided that regional officials should "seek concurrence" from the EPA Headquarters with respect to any interpretations of the Act, rule, regulation, or guidance that "may result in inconsistent application among the Regional offices." Thus, the Regional Consistency regulations have always contained a mechanism by which an EPA Regional office could diverge from national policy if doing so was required by an adverse court decision (i.e., by seeking Headquarters concurrence). The revisions simplify the process by establishing the presumption that national policy will continue to apply nationwide, but that an EPA Regional office impacted by an adverse court decision could diverge from that national policy without Headquarters concurrence to the extent required by the adverse court decision. In fact, the revisions further the overall goals of the existing Regional Consistency regulations by

specifically identifying the possibility of potential differing actions across the EPA regions, especially where multiple courts have already addressed an issue in different ways, and standardizing a response that can be followed by all the regions, such that EPA regions only have to apply local and regional decisions issued by courts in those areas over which the court has jurisdiction.

Nonetheless, as noted previously, the revisions do not hinder the EPA's ability to respond to an adverse court decision by revising a national policy or interpretation, following appropriate procedures, either on the agency's own initiative or in response to a request from a regulated entity or other interested party. The EPA recognizes that national policy can be influenced by insights and reasoning from judicial decisions and these revisions are not an indication that the agency will ignore persuasive judicial opinions issued in cases involving "locally or regionally applicable" actions. Such opinions may address issues of nationwide importance and could, in appropriate circumstances, lead the agency to adopt new national policy.

b. Response to Comments

(1) Summary of Comments

Some commenters stated that there would be no predictability under the EPA's proposal. One commenter expressed concern that the EPA Regional offices not covered by an adverse decision could choose to follow the adverse decision versus national policy. Another commenter also noted that the EPA's goal of promoting predictability is irrelevant because CAA § 301(a)(2) requires consistency, not predictability.

A couple of commenters stated that the EPA's proposed revision of the Regional Consistency regulations goes against 35 plus years of implementing the existing regulations. The

commenters also argued that it is inconsistent with the position the EPA has taken in various rulemakings and historic practice, citing statements by a former EPA General Counsel.

Numerous commenters stated that the proposed amendments to the Regional Consistency regulations would allow the EPA too much discretion in deciding whether certain court decisions will apply on a national scale. They stated that there would be no guarantee that further judicial review would resolve conflicting decisions, citing to currently conflicting decisions on application of the statute of limitations to construction permitting as an example. Commenters expressed concern that this could lead to the EPA applying arbitrary and unspecified factors to determine when judicial decisions will be applied nationally. Several commenters suggested that the EPA should establish criteria it would use to determine when it will not change its national policy and when it will in the face of an adverse court decision. Commenters recommended that the EPA withdraw the rule, or, if it proceeds, provide clear criteria to identify when intercourt nonacquiescence will be applied.

One commenter recommended that the Regional Consistency regulations only follow intercourt nonacquiescence (1) until three circuit courts have resolved the legal issue; (2) in circumstances of significant importance and impact on protection of human health and the environment; and (3) when documented in a written memorandum or directive signed by the Assistant Administrator for the Office of Air with concurrence of the General Counsel. Another commenter recommended that the EPA revise the Regional Consistency regulations to state that the agency will revisit a national policy whenever a court determines that it is arbitrary, capricious or otherwise unlawful. Further, the commenter offered that in such circumstances the EPA should consider whether to issue guidance clarifying what the EPA's policy will be going forward and undertake a rulemaking to effectuate that agency policy.

One commenter suggested that if the EPA does finalize the proposed amendments to the Regional Consistency regulations, the EPA should retain requirements “that (1) EPA Headquarters issue or revise mechanisms to address federal court decisions of local or regional applicability, *see* 40 C.F.R. § 56.4, and (2) the EPA Regional offices seek concurrence from the EPA Headquarters to act inconsistently with national EPA policy or interpretation if such action is required by a federal court decision of local or regional applicability. *See* C.F.R. § 56.5.” The commenter indicated these mechanisms promote certainty, predictability, and fairness for regulated entities. Another commenter suggested that the EPA Regional offices should still be required to seek the Office of General Counsel’s concurrence when they believe they are bound by an adverse court decision which requires them to deviate from national policy. A separate commenter expressed concern that the proposed revisions would allow a region to deviate from national policy without Headquarters concurrence that such deviation was required by a court decision.

A couple of commenters argued that the EPA should allow notice and comment on agency determinations that it would depart from these final Regional Consistency regulations and apply certain judicial decisions more broadly on a case-by-case basis. One commenter recommended that “regional consistency determination[s]” be published in the *Federal Register*. Another commenter stated that the EPA should define “fairness” and “uniformity” in the regulations.

(2) EPA Response

The EPA disagrees with the commenters’ characterization of this action. The final revisions authorize an EPA region to diverge from national policy only to the extent that the EPA Region must do so in order to act consistently with a decision issued by a federal court that has

direct jurisdiction over the EPA Region's action. The EPA regions outside of that court's jurisdiction would still be required to follow national policy or seek Headquarters concurrence to deviate from that policy. This is the same procedure established under the original Regional Consistency regulations.

The EPA further disagrees with commenters' statement that these final revisions go against the agency's past practice. Following the *Summit* decision, consistent with the Regional Consistency regulations, EPA Regions 4 and 5 could have sought Headquarters concurrence to deviate from national policy in order to follow the directive of the Sixth Circuit. In fact, EPA Region 4 did utilize this provision following the Sixth Circuit decision in *Sierra Club v. EPA*, 781 F.3d 299 (6th Cir. 2015), *cert. denied* 2016 U.S. LEXIS 2221 (March 28, 2016), which held that the EPA was not permitted to approve a redesignation request without first approving reasonably available control measures into the state SIPs. This decision went against the EPA's longstanding interpretation that where an area is attaining the NAAQS, these measures that are designed to bring areas into attainment are "inapplicable" under CAA § 107(d)(3)(E)(ii) for purposes of evaluating a redesignation. Following that decision, officials in EPA Region 4 sought and received concurrence from EPA Headquarters to follow the requirements of the *Sierra Club* decision, which are inconsistent with the EPA's national policy, in states falling within the jurisdiction of the Sixth Circuit. *See* 80 FR 56418 (September 18, 2015).⁶ If the EPA were to adopt the commenters' position, the agency would have to apply the decision of the Sixth Circuit nationwide.

⁶ Memorandum from Heather Toney, EPA Region 4 Administrator to Anna Marie Wood, Director, EPA/OAQPS/AQPD, *Regional Consistency Concurrence Request – Redesignation Actions in Kentucky and Tennessee*, July 20, 2015. Docket ID No. EPA-R04-OAR-2014-0031.

Thus, the Regional Consistency regulations have never required absolute uniformity between the EPA Regional offices. Rather, the Regional Consistency regulations have always acknowledged that certain EPA Regions may in some instances act differently from others, and these final revisions simply identify and authorize differences in a specific limited circumstance – when necessitated by a federal court decision reviewing an action of local or regional applicability. Accordingly, the EPA does not view finalization of this rule as a significant shift in the practical outcomes. Rather, the EPA is changing the internal procedure followed by the agency in light of an adverse court decision.

A couple commenters claimed that the revisions to the Regional Consistency regulations are inconsistent with statements made by a former EPA General Counsel. These comments of a former EPA General Counsel were made in the context of a discussion of the *intracircuit* nonacquiescence practices of other agencies, which is different from *intercircuit* nonacquiescence as explained in Section III.B.1 of this document. *See* S. Estreicher & R. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L. J. 679, 717 (February 1989) (surveying approaches of other federal agencies after describing the intracircuit nonacquiescence policies of the Social Security Administration and National Labor Relations Board).

The EPA considered the suggestions of several commenters to add regulatory text defining the parameters under which the agency would be required to re-evaluate its national policy following adverse court decisions. In response, we note that the EPA carefully reviews each adverse court decision. The types of factors advocated by the commenters (e.g., the reasoning for the adverse court decision, the number of adverse court decisions) generally are factors considered by the EPA as it develops its response to any given adverse court decision, including any reconsideration of the relevant national policy or interpretation. This case-by-case

approach is best because it allows the EPA to consider the individual merits of each decision and the appropriate course of action rather than apply a rigid formula. Nonetheless, it would be counterproductive to codify any specific parameters in regulatory text that must be applied in any and all circumstances.

We also are not requiring that a Regional office obtain Headquarters concurrence regarding whether an adverse court decision requires that Regional office to deviate from otherwise applicable national policy. A key purpose of the revisions is to establish the presumption that national policy remains national policy, and thus the Regional offices are already required to follow national policy to the extent allowed by an adverse court decision applicable to the Regional office's actions. Of course a Regional office is always free to discuss the scope of a court decision with Headquarters, but revisions do not require a Regional office seek concurrence before acting consistent with an adverse court decision applicable to the action being undertaken by the Regional office.

Contrary to the concerns of some commenters, the final revisions will not allow the EPA to act arbitrarily in determining how to respond to an adverse court decision. Nothing in the final revisions alters the requirement that the EPA act in a reasonable, non-arbitrary manner at all times. Moreover, the final revisions already provide clear criteria regarding when the EPA will apply intercircuit nonacquiescence by establishing the presumption that national policy will not change in response to any given adverse decision.⁷ In other words, national policy will remain unchanged until such time as the agency changes it through the appropriate method. That

⁷ Except, of course, decisions issued by the D.C. Circuit when reviewing rules of national applicability, or the U.S. Supreme Court.

presumption does not provide the EPA unlimited discretion, but does retain the discretion to determine national policy granted the EPA by Congress through the CAA.

The public is always free to petition the EPA to change regulations and national policy if it believes that the agency is inappropriately maintaining national policy in the face of numerous adverse court decisions. If a party believes that the EPA's position is no longer viable, it may petition the agency to change that position, and the party may then seek to challenge the EPA's final response to that petition if the party believes the EPA's final response is unreasonable, so long as the party meets all the usual statutory and jurisprudential requirements for such a challenge. For rules of national applicability, such challenges would be, appropriately, in the D.C. Circuit. *See, e.g., Oljato, infra*. Thus, the existing system already contains sufficient safeguards to ensure that the EPA continues to act in a reasonable manner, and additional regulatory text is not necessary.

Thus, as noted earlier, the EPA is not adding regulatory text establishing specific parameters or criteria that would govern how the agency would act in light of adverse court decisions. Nor is the EPA establishing new procedures that would apply if and when the EPA does reconsider national policy. As always, if the EPA does revisit national policy, it will follow the applicable procedures. For example, if the agency is changing regulatory text, it will undertake the appropriate notice and comment process. If, however, the EPA is merely issuing an interpretive rule without changing the regulations themselves, then consistent with the Administrative Procedure Act and U.S. Supreme Court case law, the EPA is not bound to follow a notice and comment process. 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

6. The Revisions are Otherwise Reasonable

The EPA received other miscellaneous comments that do not fall under the previous discussions, which are responded to in Sections 6.a and b.

a. *Response to Comments That the EPA was Under No Obligation to Promulgate Revisions to the Regional Consistency Regulations in Response to NEDACAP*

(1) Summary of Comments

Several commenters stated that the EPA should withdraw the proposal and leave the Regional Consistency regulations in place as currently written. A couple of commenters noted that the proposed amendments to the Regional Consistency regulations are not necessary because the EPA is under no obligation to undertake the rulemaking action. Commenters stated that while the EPA purported in the proposal notice to undertake the rulemaking in response to the *NEDACAP* decision, that court did not in any way require the EPA to undertake this rulemaking. In fact, the court applied the regulations when vacating the EPA's *Summit* memorandum.

Several commenters stated that the court's suggestion in *NEDACAP* that the EPA could amend the Regional Consistency regulations is not equivalent to that court's endorsement of such an approach under CAA § 301(a)(2). The commenters note that the D.C. Circuit expressly did not rule on "whether the [Clean Air Act] allows the EPA to adopt different standards in different circuits" in the *NEDACAP* opinion. 752 F.3d at 1011. Further, one commenter detailed that in *NEDACAP*, the D.C. Circuit held that the "fair and uniform" language of the existing Regional Consistency regulations, which is parallel to the language in CAA § 301(a)(2), establishes a national regulatory uniformity requirement.

One commenter noted that the EPA has other ways to respond to the court's decision in *NEDACAP*. In an example, the commenter cited the EPA's response to conflicting decisions

regarding the benzene NESHAP and “federal enforceability.” The commenters also stated that if the EPA stopped “continuously seeking to expand the reach of its regulations through such guidance” the agency could avoid adverse decisions like that in the Sixth Circuit regarding the Summit permitting decision.

(2) EPA Response

The EPA has not taken the position that it is required by the D.C. Circuit’s opinion in *NEDCAP* to undertake revisions to the Regional Consistency regulations. We agree that the EPA has discretion in deciding whether or not to undertake the revisions being finalized. The EPA also recognizes that the court’s suggestion that the EPA could revise the Regional Consistency regulations is not necessarily a judicial endorsement of the specific revisions being finalized, although it is unlikely that the court would make such a suggestion if any changes to the regulations to address intercircuit nonacquiescence would be in conflict with the statute.

Contrary to statements made by commenters, the EPA does not “continuously seek[] to expand the reach of its regulations through [] guidance.” Rather, the EPA issues guidance in an effort to better inform the regulated community and the public regarding the requirements of CAA regulations.

For the reasons set forth here and in the proposed rule, these revisions to the Regional Consistency regulations are an effective way to address the implications of adverse court decisions rendered by courts reviewing actions of local or regional applicability. While the EPA does have other options available to it, the EPA has determined that these revisions to the Regional Consistency regulations most effectively address the issue presented by an adverse

court decision involving an action or local or regional applicability.⁸ The revisions also accommodate the EPA’s proper and longstanding application of the doctrine of intercircuit nonacquiescence in future cases, while eliminating the need to undertake lengthy, narrowly focused rulemakings or seek review of all lower courts’ adverse decisions by the U.S. Supreme Court.

b. Response to Miscellaneous Comments

(1) Summary of Miscellaneous Comments

One commenter contended that the EPA failed to acknowledge the difference between an EPA action involving interpretation of a national regulation applied to a particular facility and an EPA action addressing a SIP provision. In the context of SIP provisions, the commenter stated that, “to the extent not prohibited by the CAA, the EPA should (and must) allow inconsistencies in particular SIP provisions as between states.”

Another commenter supported the EPA’s proposed addition to CAA § 56.5(b) insofar as it will ensure that the EPA Regional offices not subject to a court decision will continue to act consistently with existing national policy. However, the commenter believes that the proposed revision to CAA § 56.5(b) does not clearly accomplish this. The commenter contended that the

⁸ With respect to the comments referencing the EPA’s past practice with issuing guidance following conflicting court decisions, the examples cited are inapposite. The comment refers to the EPA’s response to court decisions regarding application of the benzene NESHAP, citing *U.S. v. Hoescht Celanese Corp.*, 128 F3d. 216, 224 (4th Cir. 1997). However this case does not discuss this topic; it merely involves one court’s opinion on whether a company had fair notice of the EPA’s interpretation of a regulation. In addition, the cited guidance regarding “federal enforceability” was not issued to reconcile inconsistent circuit court decisions regarding the same term. First, the guidance was originally issued before any adverse decisions from the D.C. Circuit. Second, the policy laid out in the guidance was extended in response to D.C. Circuit decisions consistently interpreting the term “federal enforceability”; first decision was cited as the basis for the second and third opinions. The only “inconsistency” in the decisions was whether the D.C. Circuit vacated the underlying rule pending remand or not.

existing and proposed regulatory text should be harmonized to make clear that, after an adverse court decision issued by a court reviewing a locally or regionally applicable action, continued application of national policy by the EPA Regional offices that are not subject to that court's jurisdiction does not require concurrence from EPA Headquarters, notwithstanding any inconsistency with the actions taken by the EPA Region(s) bound by the court's decision.

(2) EPA Response

The EPA agrees with the commenter that states are accorded great discretion under CAA § 110 in determining how to meet CAA requirements in SIPs. However, states are obligated to develop SIP provisions that meet fundamental CAA requirements. The EPA has the responsibility to review SIP provisions developed by states to ensure that they in fact meet fundamental CAA requirements. The Regional Consistency regulations generally establish certain mechanisms with the goal of “identifying, preventing, and resolving regional inconsistencies” (45 FR 85400). For the EPA Headquarters office employees, the regulations do this by targeting particular aspects of the Act that have the potential to present consistency problems – including any rule or regulation proposed or promulgated which sets forth requirements for the preparation, adoption, and submittal of state implementation plans.

We concur with the comment that the EPA Regional offices not covered by an adverse court decision should continue to follow existing national policy. We looked at the proposed revisions to 40 C.F.R. §56.5(b), as well as the revised language provided by the commenters. We agree that the revision to 40 C.F.R. §56.5(b) suggested by the commenter more clearly expresses that the exception to seeking Headquarters concurrence applies only to the EPA regions that must diverge from agency policy due to an adverse court decision with jurisdiction over the EPA region's actions. We have thus changed the regulatory text accordingly.

IV. Environmental Justice Considerations

This action finalizes a rule revision that provides procedural direction to the EPA Regions and Headquarters offices in implementing court decisions of a limited scope (i.e., those having local or regional applicability). The EPA did not conduct an environmental analysis for this rule because this rule will not directly affect the air emissions of particular sources. Because this rule will not directly affect the air emissions of particular sources, it does not affect the level of protection provided to human health or the environment. Therefore, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden. The final rule will not create any new requirements for regulated entities, but rather provides procedural direction to the EPA Regions and Headquarters offices in implementing national programs potentially affected by adverse court decisions of a limited scope (i.e., those having local or regional applicability).

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is

any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if a rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This final rule will not impose any requirements directly on small entities. The EPA and any state/local governments implementing delegated EPA programs are the only entities affected directly by this final rule. Other types of small entities are also not directly subject to the requirements of this rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This final rule revises regulations that apply to the EPA, and any delegated state/local governments, only, and would not, therefore, affect the relationship between the national government and the states or the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between

the federal government and Indian tribes, as specified in Executive Order 13175. This final rule only provides procedural direction to EPA Regions and Headquarters offices in implementing court decisions of a limited scope (i.e., those having local or regional applicability). Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not directly involve an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This action does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in Section IV of this document titled, “Environmental Justice Considerations.”

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under CAA § 307(b)(1), petitions for judicial review of any nationally applicable regulation, or any action the Administrator “finds and publishes” as based on a determination of nationwide scope or effect must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days of the date the promulgation, approval, or action appears in the *Federal Register*. This action is nationally applicable, as it revises the rules governing procedures regarding regional consistency in 40 CFR part 56. As a result, petitions for review of this final action must be filed in the United States Court of Appeals for the District of Columbia Circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of this action.

VI. Statutory Authority

The statutory authority for this action is provided by section 301 of the CAA as amended (42 U.S.C. 7601).

Page 45 of 47 – Amendments to Regional Consistency Regulations

List of Subjects in 40 CFR Part 56

Environmental protection, Air pollution control.

Dated:

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 56 of the Code of Federal Regulations is amended as follows:

PART 56—REGIONAL CONSISTENCY

1. The authority citation for part 56 continues to read as follows:

Authority: Sec. 301(a)(2) of the Clean Air Act as amended (42 U.S.C. 7401).

2. Section 56.3 is amended by adding paragraph (d) to read as follows:

§56.3 Policy.

* * * * *

(d) Recognize that only the decisions of the U.S. Supreme Court and decisions of the U.S. Court of Appeals for the D.C. Circuit Court that arise from challenges to “nationally applicable regulations...or final action,” as discussed in Clean Air Act section 307(b) (42 U.S.C. § 7607(b)), shall apply uniformly, and to provide for exceptions to the general policy stated in paragraphs (a) and (b) of this section with regard to decisions of the federal courts that arise from challenges to “locally or regionally applicable” actions, as provided in Clean Air Act section 307(b) (42 U.S.C. § 7607(b)).

* * * * *

3. Section 56.4 is amended by adding paragraph (c) to read as follows:

§56.4 Mechanisms for fairness and uniformity—Responsibilities of Headquarters employees.

* * * * *

(c) The Administrator shall not be required to issue new mechanisms or revise existing mechanisms developed under paragraphs (a) of this section to address the inconsistent application of any rule, regulation, or policy that may arise in response to the limited jurisdiction

of either a federal circuit court decision arising from challenges to “locally or regionally applicable” actions, as provided in Clean Air Act section 307(b) (42 U.S.C. § 7607(b)), or a federal district court decision.

* * * * *

4. Section 56.5 is amended by adding a sentence at the end of paragraph (b) and paragraphs (b)(1) and (2) to read as follows:

§56.5 Mechanisms for fairness and uniformity—Responsibilities of regional office employees.

* * * * *

(b) A responsible official in a Regional office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in application of the act or rule, regulation, or program directive that is inconsistent with Agency policy. However, the responsible official in a Regional office will not be required to seek such concurrence from the appropriate EPA Headquarters office for actions that may result in inconsistent application if such inconsistent application is required in order to act in accordance with a federal court decision:

(1) Issued by a Circuit Court in challenges to “locally or regionally applicable” actions, as provided in Clean Air Act section 307(b) (42 U.S.C. 7607(b)), if that circuit court has direct jurisdiction over the geographic areas that the Regional office official is addressing, or

(2) Issued by a district court in a specific case if the party the Regional office official is addressing was also a party in the case that resulted in the decision.

* * * * *