



Molly C. Dwyer
Clerk of Court

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

April 27, 2020

No.: 20-71196
EPA No.: EPA-R09-OAR-2018-0562
Short Title: Center for Biological Diversit, et al v. USEPA, et al

Dear Petitioners/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 27 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CENTER FOR BIOLOGICAL
DIVERSITY; CENTER FOR
ENVIRONMENTAL HEALTH,

Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY;
ANDREW WHEELER,
Administrator, United States
Environmental Protection Agency,

Respondents.

No. 20-71196

EPA No. EPA-R09-OAR-2018-0562
Environmental Protection Agency

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

Mon., May 4, 2020

Petitioners' Mediation Questionnaire due. If your registration for Appellate CM/ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.

Thu., July 16, 2020

Agency petitioner brief due

Mon., August 17, 2020

Respondents' answering brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

The optional petitioners' reply brief shall be filed and served within 21 days of service of the respondents' brief, pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Failure of the petitioners to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Janne Nicole Millare Rivera
Deputy Clerk
Ninth Circuit Rule 27-7



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Clerk of Court

**ATTENTION ALL PARTIES AND COUNSEL
PLEASE REVIEW PARTIES AND COUNSEL LISTING**

We have opened this appeal/petition based on the information provided to us by the appellant/petitioner and/or the lower court or agency. EVERY attorney and unrepresented litigant receiving this notice MUST immediately review the caption and service list for this case and notify the Court of any corrections.

Failure to ensure that all parties and counsel are accurately listed on our docket, and that counsel are registered and admitted, may result in your inability to participate in and/or receive notice of filings in this case, and may also result in the waiver of claims or defenses.

PARTY LISTING:

Notify the Clerk immediately if you (as an unrepresented litigant) or your client(s) are not properly and accurately listed or identified as a party to the appeal/petition. To report an inaccurate identification of a party (including company names, substitution of government officials appearing only in their official capacity, or spelling errors), or to request that a party who is listed only by their lower court role (such as plaintiff/defendant/movant) be listed as a party to the appeal/petition as an appellee or respondent so that the party can appear in this Court and submit filings, contact the Help Desk at <http://www.ca9.uscourts.gov/cmecf/feedback/> or send a letter to the Clerk. If you or your client were identified as a party to the appeal/petition in the notice of appeal/petition for review or representation statement and you believe this is in error, file a motion to dismiss as to those parties.

COUNSEL LISTING:

In addition to reviewing the caption with respect to your client(s) as discussed above, all counsel receiving this notice must also review the electronic notice of docket activity or the service list for the case to ensure that the correct counsel are

listed for your clients. If appellate counsel are not on the service list, they must file a notice of appearance or substitution immediately or contact the Clerk's office.

NOTE that in criminal and habeas corpus appeals, trial counsel WILL remain as counsel of record on appeal until or unless they are relieved or replaced by Court order. *See* Ninth Circuit Rule 4-1.

REGISTRATION AND ADMISSION TO PRACTICE:

Every counsel listed on the docket must be admitted to practice before the Ninth Circuit AND registered for electronic filing in the Ninth Circuit in order to remain or appear on the docket as counsel of record. *See* Ninth Circuit Rules 25-5(a) and 46-1.2. These are two separate and independent requirements and doing one does not satisfy the other. If you are not registered and/or admitted, you MUST, within 7 days from receipt of this notice, register for electronic filing AND apply for admission, or be replaced by substitute counsel or otherwise withdraw from the case.

If you are not registered for electronic filing, you will not receive further notices of filings from the Court in this case, including important scheduling orders and orders requiring a response. Failure to respond to a Court order or otherwise meet an established deadline can result in the dismissal of the appeal/petition for failure to prosecute by the Clerk pursuant to Ninth Circuit Rule 42-1, or other action adverse to your client.

If you will be replaced by substitute counsel, new counsel should file a notice of appearance/substitution (no form or other attachment is required) and should note that they are replacing existing counsel. To withdraw without replacement, you must electronically file a notice or motion to withdraw as counsel from this appeal/petition and include your client's contact information.

To register for electronic filing, and for more information about Ninth Circuit CM/ECF, visit our website at <http://www.ca9.uscourts.gov/cmecf/#section-registration>.

To apply for admission, see the instructions and form application available on our website at <https://www.ca9.uscourts.gov/attorneys/>.



**United States Court of Appeals
for the Ninth Circuit**

P.O. Box 31478
Billings, Montana 59107-1478

CHAMBERS OF
SIDNEY R. THOMAS
CHIEF JUDGE

TEL: (406) 373-3200
FAX: (406) 373-3250

Dear Counsel:

I write to introduce you to the court's mediation program. The court offers you and your clients professional mediation services, at no cost, to help resolve disputes quickly and efficiently and to explore the development of more satisfactory results than can be achieved from continued litigation. Each year the mediators facilitate the resolution of hundreds of cases, from the most basic contract and tort actions to the most complex cases involving multiple parties, numerous pieces of litigation and important issues of public policy.

The eight circuit mediators, all of whom work exclusively for the court, are highly experienced attorneys from a variety of practices; all have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure. Although the mediators are court employees, the court has adopted strict confidentiality rules and practices to ensure that what goes on in mediation stays in mediation. See Circuit Rule 33-1.

The first step in the mediation process is case selection. To assist the mediators in the case selection process, appellants/petitioners must file a completed Mediation Questionnaire within 7 days of the docketing of the case. See Circuit Rules 3-4, and 15-2. Appellees may also fill out and file a questionnaire. The questionnaire with filing instructions is available [here](#). Once the Mediation Questionnaire is submitted, the parties will receive via NDA a link to a separate form that will allow them to submit **confidential** information directly to the Circuit Mediators. Counsel may also submit confidential information at any time to ca09_mediation@ca9.uscourts.gov.

In most cases, the mediator will schedule a settlement assessment conference, with counsel only, to determine whether the case is suitable for mediation. Be assured that participation in the mediation program will not slow down disposition of your appeal. Mediation discussions are not limited to the issues on appeal. The discussions can involve other cases and may include individuals who are not parties to the litigation, if doing so enables the parties to reach a global settlement.

Further information about the mediation program may be found on the court's website: www.ca9.uscourts.gov/mediation/. Please address questions directly to the Mediation Program at 415-355-7900 or ca09mediation@ca9.uscourts.gov.

Sincerely,

A handwritten signature in black ink that reads "Sidney R. Thomas".

Sidney Thomas

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 7. Mediation Questionnaire

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form07instructions.pdf>

9th Cir. Case Number(s)

Case Name

**Counsel submitting
this form**

**Represented party/
parties**

Briefly describe the dispute that gave rise to this lawsuit.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Briefly describe the result below and the main issues on appeal.

Describe any proceedings remaining below or any related proceedings in other tribunals.

Signature

Date

(use “s/[typed name]” to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL)	
DIVERSITY and CENTER FOR)	
ENVIRONMENTAL HEALTH,)	
)	
<i>Petitioners,</i>)	
)	
v.)	No.
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and ANDREW)	
WHEELER, Administrator, United States)	
Environmental Protection Agency,)	
)	
<i>Respondents.</i>)	

PETITION FOR REVIEW

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1); Rule 15 of the Federal Rules of Appellate Procedure; and Circuit Rule 15-1, the Center for Biological Diversity and the Center for Environmental Health hereby petition the Court for review of the final action taken by Respondents United States Environmental Protection Agency (EPA) and Administrator Andrew Wheeler, entitled “Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, California.” EPA assigned this action Docket Number EPA–R09–OAR–2018–0562. Notice of this action was published in the Federal Register on February 27, 2020. *See* 84 Fed. Reg. 11,817 (Feb. 27, 2020), attached as Exhibit 1.

DATED: April 27, 2020 Respectfully submitted,

/s/ Steven M. Odendahl

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*Counsel for Center for Biological Diversity and
Center for Environmental Health*

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL)	
DIVERSITY and CENTER FOR)	
ENVIRONMENTAL HEALTH,)	
)	
<i>Petitioners,</i>)	
)	
v.)	No.
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and ANDREW)	
WHEELER, Administrator, United States)	
Environmental Protection Agency,)	
)	
<i>Respondents.</i>)	

RULE 26.1 DISCLOSURE STATEMENT

Center for Biological Diversity and Center for Environmental Health have no parent corporations. There are no publicly held corporations that have a 10 percent or greater ownership interest in Center for Biological Diversity or Center for Environmental Health.

DATED: April 27, 2020 Respectfully submitted,

/s/ Steven M. Odendahl

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*Counsel for Center for Biological Diversity and
Center for Environmental Health*

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Review on those listed below by sending a copy via First Class Mail to each of the following addresses on the 27th day of April, 2020.

Andrew Wheeler, Administrator
Office of the Administrator (MC 1101A)
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Jeffrey B. Clark, Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

United States Environmental Protection Agency
Office of General Counsel (MC 2310A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Gautam Srinivasan, Associate General Counsel
Air and Radiation Law Office
U.S. Environmental Protection Agency
Office of General Counsel (MC 2344A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Sylvia Quast, Regional Counsel
Office of Regional Counsel (MC ORC-1)
U.S. EPA Pacific Southwest, Region 9
75 Hawthorne Street
San Francisco, CA 94105

/s Steven M. Odendahl

EXHIBIT 1

or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 27, 2020. Filing a petition for reconsideration by the Administrator of this final rule 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 may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 29, 2020.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(514)(ii)(A)(4) and (c)(532) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

- (c) * * *
- (514) * * *
- (ii) * * *
- (A) * * *

(4) 2018 Updates to the California State Implementation Plan, adopted on October 25, 2018, chapter III ("SIP Elements for Ventura County"), excluding section III.C ("Contingency Measures"); and pages A-7 through A-10 of appendix A ("Nonattainment Area Inventories"), only.

* * * * *

(532) The following plan was submitted on April 11, 2017, by the Governor's designee.

- (i) [Reserved]
- (ii) *Additional materials.* (A) Ventura County Air Pollution Control District.

(1) Final 2016 Ventura County Air Quality Management Plan, adopted February 14, 2017, excluding chapter 7 ("Contingency Measures").

- (2) [Reserved]
- (B) [Reserved]

■ 3. Section 52.244 is amended by adding paragraph (a)(9) to read as follows:

§ 52.244 Motor vehicle emissions budgets.

(a) * * *

(9) Ventura County, approved March 30, 2020.

* * * * *

[FR Doc. 2020-03246 Filed 2-26-20; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2018-0562; FRL-10005-51-Region 9]

Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or "Act")

requirements for the 2008 ozone national ambient air quality standards (NAAQS) in the Imperial County nonattainment area, as follows. The EPA is approving the "Imperial County 2017 State Implementation Plan for the 2008 8-Hour Ozone Standard" ("Imperial Ozone Plan" or "Plan") and the portions of the "2018 Updates to the California State Implementation Plan" ("2018 SIP Update") that address the requirement for a reasonable further progress (RFP) demonstration for Imperial County for the 2008 ozone standards. In addition, the EPA is determining, based on the "Imperial County Clean Air Act Section 179B(b) Retrospective Analysis for the 75 ppb 8-hour Ozone Standard" ("Imperial Ozone Retrospective Demonstration"), that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the "Moderate" area attainment date of July 20, 2018, but for emissions emanating from Mexico, and therefore is not subject to the CAA requirements pertaining to reclassification upon failure to attain. As a result of these final actions, the Imperial County nonattainment area will remain classified as a Moderate nonattainment area for the 2008 ozone NAAQS.

DATES: This rule will be effective on March 30, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2018-0562. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. **FOR FURTHER INFORMATION CONTACT:** Ginger Vagenas, Air Planning Office (AIR-2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972-3964, or by email at vagenas.ginger@epa.gov. **SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us," and "our" refer to the EPA. The EPA is approving portions of the Imperial Ozone Plan that address the requirements for emissions statements, a base year emissions inventory, a reasonably available control measures

(RACM) demonstration, a demonstration of attainment of the standards by the applicable attainment date but for emissions emanating from Mexico, and motor vehicle emissions budgets. We are finalizing our proposed determination that Imperial County met its RFP requirements and therefore determining the requirement for contingency measures for failing to meet RFP is moot. We are also finalizing our proposed approval of the State's determination of attainment by the attainment date but for international emissions, and therefore determining that contingency measures for failing to attain the standard are not required. The EPA is also approving the portions of the 2018 SIP Update that address the requirement for a reasonable further progress demonstration for Imperial County for the 2008 ozone standards.

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- I. Summary of the Proposed Action
- II. Public Comment and EPA Responses
- III. Final Action
- IV. Statutory and Executive Order Reviews

I. Summary of the Proposed Action

On November 1, 2019 (84 FR 58641), the EPA proposed to approve, under CAA section 110(k)(3), two submittals from the California Air Resources Board (CARB or "State") and the Imperial County Air Pollution Control District ("District") as revisions to the California SIP for the Imperial County ozone nonattainment area.¹ The relevant SIP revisions include the Imperial Ozone Plan and the portions of the 2018 SIP Update that address the requirement for an RFP demonstration for Imperial County for the 2008 ozone standards. We also proposed to determine, based on a separate demonstration submitted by the State of California, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the "Moderate" area attainment date of July 20, 2018, but for emissions emanating from outside of the United States (specifically, from Mexico), and therefore is not subject to the CAA requirements pertaining to reclassification upon failure to attain. For more information on these submittals, please see our proposed rule.

In our proposed rule, we provided background information on the ozone

standards,² area designations and related SIP revision requirements under the CAA, and the EPA's implementing regulations for the 2008 ozone standards, referred to as the 2008 Ozone SIP Requirements Rule ("2008 Ozone SRR"), including information on the provisions of CAA section 179B, entitled "International Border Areas."³ To summarize, the Imperial County ozone nonattainment area is classified as Moderate for the 2008 ozone standards, and the Imperial Ozone Plan that is the subject of this final action was developed to address the requirements for this Moderate nonattainment area for the 2008 ozone NAAQS.

In our proposed rule, we also discussed a decision issued by the D.C. Circuit Court of Appeals in *South Coast Air Quality Management Dist. v. EPA* ("South Coast II")⁴ that vacated certain portions of the EPA's 2008 Ozone SRR. The only aspect of the *South Coast II* decision that affects this action is the vacatur of the provision in the 2008 Ozone SRR that allowed states to use an alternative baseline year for demonstrating RFP. To address this issue, CARB submitted an updated RFP demonstration in the 2018 SIP Update that relied on a 2011 baseline year, along with updated motor vehicle emissions budgets (MVEBs) associated with the new RFP milestone years.

For our proposed rule, we reviewed the various SIP elements contained in the Imperial Ozone Plan and the portions of the 2018 SIP Update that address the requirement for an RFP demonstration for Imperial County for the 2008 ozone standards, evaluated them for compliance with statutory and regulatory requirements, and concluded that they meet all applicable requirements. More specifically, in our

² Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_x) in the presence of sunlight. The 1-hour ozone NAAQS is 0.12 parts per million (ppm) (one-hour average), the 1997 ozone NAAQS is 0.08 ppm (eight-hour average), and the 2008 ozone standard is 0.075 ppm (eight-hour average). CARB refers to reactive organic gases (ROG) in some of its ozone-related submittals. The CAA and the EPA's regulations refer to VOC, rather than ROG, but both terms cover essentially the same set of gases. In this final rule, we use the federal term (VOC) to refer to this set of gases.

³ 80 FR 12264 (March 6, 2015).

⁴ *South Coast Air Quality Management Dist. v. EPA*, 882 F.3d 1138 (D.C. Cir. 2018). The term "South Coast II" is used in reference to the 2018 court decision to distinguish it from a decision published in 2006 also referred to as "South Coast." The earlier decision involved a challenge to the EPA's Phase 1 implementation rule for the 1997 ozone standard. *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006).

proposed rule, we proposed to approve the following:

- Emissions statement certification as meeting the requirements of CAA section 182(A)(3)(B);
- Base year emissions inventory as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 with respect to attainment planning;
- RACM demonstration as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c);
- RFP demonstration as meeting the requirements of CAA sections 182(b)(1), and 40 CFR 51.1110(a)(4)(i); and
- Motor vehicle emissions budgets for the 2017 RFP milestone year because they are consistent with the RFP demonstration and the demonstration of attainment but for international emissions that are approved herein and meet the other criteria of 40 CFR 93.118(e);⁵

We also proposed that finalization of this action regarding the 179B demonstration would render the RFP contingency measure requirement of CAA section 172(c)(9) moot and that attainment contingency measures would no longer be required.

We also note that since signature of our proposed action on the Imperial Ozone Plan, we have finalized a separate action approving in part and conditionally approving in part certain portions of the Imperial Ozone Plan (Chapter 7, "Reasonably Available Control Technology Assessment" and App. B, "Reasonably Available Control Technology Analysis for the 2017 Imperial County State Implementation Plan for the 2008 8-Hour Ozone Standard").⁶

Given our proposal that the Imperial Ozone Plan meets all requirements for the Imperial County Moderate ozone nonattainment area, other than the requirement to demonstrate attainment, and our evaluation of the State's lines of evidence that together support the conclusion that Imperial County's SIP submission demonstrated the area would have attained the 2008 ozone

⁵ In light of CARB's request to limit the duration of the approval of the budgets in the Imperial Ozone Plan and in anticipation of the EPA's approval, in the near term, of an updated version of CARB's EMFAC (short for EMISSION FACTOR) model for use in SIP development and transportation conformity in California to include updated vehicle mix and emissions data, we proposed to limit the duration of our approval of the budgets until replacement budgets have been found adequate. 84 FR 58641, 58658–58659.

⁶ The final action on the Imperial RACT SIP for the 2008 ozone standard has been signed but has not yet published in the **Federal Register**; therefore, we have included a copy of the signed final action in the docket for this action. See also, 84 FR 58647, note 54.

¹ The Imperial County ozone nonattainment area for the 2008 ozone standards includes the entire county. Both the Quechan Tribe of the Fort Yuma Indian Reservation and the Torres Martinez Desert Cahuilla Indians have lands within Imperial County. A precise description of the Imperial County ozone nonattainment area is contained in 40 CFR 81.305.

NAAQS by the July 20, 2018 attainment date but for emissions emanating from Mexico, under CAA section 179B(a), the EPA proposed to approve the Imperial Ozone Plan's section 179B attainment demonstration as meeting the requirements of CAA sections 172(c)(1), 182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.

Concurrently, we proposed to determine, consistent with our evaluation of the Imperial Ozone Plan, the 2018 Update, and the Imperial Ozone Retrospective Demonstration, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018, but for emissions emanating from Mexico, under CAA section 179B(b). We also stated that, if our proposed determination were finalized, the EPA's obligation under CAA section 181(b)(2)(A) to determine whether the area attained by its attainment date would not apply and the area would not be reclassified.

Please see our proposed rule for more information concerning the background for this action and for a more detailed discussion of the rationale for approval of the above-listed elements of the Imperial Ozone Plan and our determination that Imperial County would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018, but for emissions emanating from Mexico.

II. Public Comment and EPA Responses

The public comment period on the proposed rule opened on November 1, 2019, the date of its publication in the **Federal Register**, and closed on December 2, 2019. During this period, the EPA received one set of comments from the Center for Biological Diversity, Comite Civico del Valle, Inc., and Air Law for All, Ltd., and one anonymous comment.

The anonymous commenter describes ozone generators and safety sensors, issues that are outside the scope of this rulemaking. With respect to the other commenter, we provide summaries of the comments and our responses thereto in the following paragraphs. All the comments received are included in the docket for this action.

Comment 1: The commenter argues that any “but for” determination should be conditioned on California following through on its commitment to enhance and fund border pollution activities, including the creation and funding of a CARB assistant executive officer position for border pollution. The commenter asserts that CARB has acknowledged the need to create and

fund such a position with staff to focus on border pollution issues, referencing, among other things, statements made at a CARB public meeting on December 13, 2018 to consider a particulate matter plan for Imperial County. The commenter contends that the State's failure to fund and staff the assistant executive officer position for border pollution indicates that Imperial County does not have adequate personnel and funding to carry out the plan, as required by CAA section 110(a)(2)(E)(i).

Response: The commenter correctly asserts that CAA section 110(a)(2)(E)(i) requires the State and District to have adequate personnel and funding to meet their obligations under the SIP, and with respect to the specific obligations of the SIP submission at issue in this action. The EPA has previously determined that California met the CAA section 110(a)(2)(E)(i) requirements for the 2008 ozone standard.⁷ The commenter expresses concern that the State and District have not yet created, filled, or funded a specific position for an individual who will focus on international transport issues, as the State and District have previously had under consideration. The EPA agrees with the State, District, and commenters that the creation of an official position to focus on international transport issues might be a helpful approach to making progress on such problems. However, at this time neither the State nor the District included the creation of an assistant executive officer position for border pollution as an element or a commitment of the pre-existing SIP or in the submitted Imperial Ozone Plan at issue in this action.⁸ Thus, the creation, filling, or funding of such a position is not part of the SIP or the Imperial Ozone Plan, and thus is not relevant for purposes of section 110(a)(2)(E)(i), or an appropriate basis for the EPA to not finalize its proposed action to approve the Plan.

The commenters also suggest that the EPA should require the creation and funding of such a position as a part of the “but for” determination of CAA section 179B. Neither section 179B(a) nor the relevant statutory provisions applicable to nonattainment plan requirements impose a specific obligation on states to create, fill, or fund a position for personnel focusing on interstate transport. Similarly,

sections 179B(b)–(d) do not explicitly require states to meet a requirement that they have such personnel. Again, the EPA agrees that having such personnel could be useful, but does not agree that it is a requirement for purposes of section 179B. Because the creation and funding of the position is neither a requirement of the existing SIP or an element of the Imperial Ozone Plan, nor an explicit requirement of CAA section 179B, the EPA does not in this case consider it to be a relevant consideration for the “but for” analysis.

Comment 2: The commenter states that CAA sections 179B(a)(1) and (2) provide that the EPA shall approve a plan or plan revision if (1) it meets all requirements applicable to it under the Act, other than the requirement to demonstrate attainment and maintenance of the relevant air quality standard, and (2) the submitting state establishes to the EPA's satisfaction that the plan would be adequate to attain and maintain the standard by the relevant attainment date, but for emissions emanating from outside the United States. The commenter states that the EPA's proposed action did not discuss or explain the statutory terms “maintenance” and “maintain” in CAA section 179B(a) and argues that the EPA's failure to give any meaning to these terms constitutes a failure of notice and is contrary to law.

The commenter suggests that the term “maintenance” addresses a gap in the statutory structure of the Act. The commenter states that after an applicable attainment date, areas not affected by international emissions have additional planning obligations. Specifically, the commenter states that areas not affected by international emissions and that do not attain the applicable standard have additional attainment-related requirements, and areas not affected by international emissions that do attain the applicable standard have (at least in practice) maintenance plan requirements. The commenter states that, on the other hand, areas with attainment plans approved under CAA section 179B “may never have additional obligations [even] if the area never attains.” The commenter states that a state may never have the opportunity or obligation to submit a maintenance plan because the EPA can only redesignate an area based on its design value and the design value cannot be modified based on international border emissions. The commenter concludes, “In other words after EPA approves an attainment plan under section 179B(a) and exempts the area from reclassification, there is a gap in the statute: The state has no

⁷ 81 FR 18766 (April 1, 2016).

⁸ While several board members expressed support for staffing a position dedicated to the coordination of various border-related initiatives at its December 13, 2018 meeting, the Board did not state that it intended to establish an assistant executive officer for border pollution. California Air Resources Board meeting transcript, 258–265, December 13, 2018.

additional obligations to address maintenance of the NAAQS.”

The commenter states that the EPA must address the statutory terms “maintenance” and “maintain.” The commenter identifies a few arguments that it believes the EPA might make in response to this initial comment and puts forth counter arguments to those anticipated EPA arguments. The commenter contends that the EPA cannot show that Congress did not mean “maintenance” and “maintain” as a matter of historical fact (*i.e.*, legislative history) or as a matter of logic and statutory construction, and that the EPA cannot negate the “maintenance” requirement by arguing that it is not an applicable requirement.

Similarly, the commenter states that certain permitting programs (minor new source review, prevention of significant deterioration, and nonattainment new source review) are designed to maintain the NAAQS with respect to emissions from stationary sources and speculates that the EPA might assert that these programs are the portion of the implementation plan to which “maintenance” in CAA section 179B(a) applies. The commenter provides a counter argument that these permitting programs are insufficient to satisfy CAA section 179B(a)’s requirements regarding maintenance because they are not designed to maintain the NAAQS in section 179B areas and do not cover mobile sources, pesticides, fertilizers, and most non-point sources such as confined animal feeding operations.

The commenter suggests one possible way to interpret the meaning of “maintenance” and “maintain” in CAA section 179B would be to require the plan “to show that emissions within the state will not grow after the attainment date in such a way that the root cause of the failure to attain shifts from international border emissions to in-state emissions.”

Response: As noted by the commenter, CAA section 179B(a) provides that the EPA must approve a state implementation plan or plan revision if (1) the plan meets all applicable requirements, other than a requirement to demonstrate attainment and maintenance by the applicable attainment date, and (2) the state establishes to the satisfaction of the Administrator that a state plan would be adequate to attain and maintain by the applicable attainment date “but for emissions emanating from outside of the United States.” As further noted by the commenter, CAA section 179B(b) provides that a state that establishes that it would have attained the standard by the attainment date is not subject to

classification to a higher nonattainment classification pursuant to CAA section 181(b)(2)⁹ or (5), but does not condition this exemption from reclassification on any demonstration of maintenance of the NAAQS.

The statute provides little guidance regarding the meaning of the terms “maintenance” and “maintain” in CAA sections 179B(a)(1) and (2). For example, regarding the timing of the maintenance requirement, one possible interpretation of the statutory language is that the state’s demonstration must show that the plan revision is adequate to attain and “maintain” the NAAQS “by,” that is, up to, the attainment date. Another possible interpretation is that the statute requires the state to demonstrate that the plan revision is adequate to maintain the NAAQS beyond the attainment date. Under either of these readings, available emissions information from California indicates that its plan is adequate to maintain the NAAQS but for emissions emanating from Mexico, as the State’s emissions are projected to decline into the future. Therefore, we disagree that it is necessary to resolve this ambiguity in this action and we disagree with the commenter’s conclusion that the proposal was “contrary to law” based on a failure to provide notice of the EPA’s interpretation of those terms.

The commenter suggests that if the EPA were to interpret “maintain” in CAA section 179B(a)(1) and (2) as requiring a demonstration of maintenance beyond the attainment date, one way to do so would be to conduct an analysis of the area’s emissions some time into the future. We note that the EPA evaluates these types of prospective emissions projections in other maintenance analyses such as in the context of redesignations of nonattainment areas to attainment under CAA sections 107(d)(3)(E) and 175A, although such provisions are not applicable here.¹⁰

⁹ As we explained in our proposed action, CAA section 179B(b) erroneously refers to section CAA 181(a)(2); the correct cross-reference is section 181(b)(2). 84 FR 58660.

¹⁰ In the EPA’s guidance regarding redesignations, the EPA suggests that maintenance of the NAAQS for areas that have already attained the standard may be demonstrated by either showing that future emissions of a pollutant and its precursors will not exceed the level of the attainment inventory (*i.e.*, emissions at the time the area attained the relevant NAAQS) or by modeling to show that the mix of sources and emission rates will not cause a violation of the NAAQS. Memorandum dated September 4, 1992, from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, Subject: “Procedures for Processing Requests to Redesignate Areas to Attainment.”

Available emissions inventory information from the District and CARB regarding future domestic emissions of ozone precursors (NO_x and VOC) in Imperial County and regionally indicates that emissions will decline.¹¹ For example, in February 2019, the District and CARB submitted a redesignation request and maintenance plan for the 1987 PM₁₀ NAAQS. The District included NO_x and VOC emissions inventories for 2030 as part of the maintenance plan’s demonstration that Imperial County will maintain the 1987 PM₁₀ NAAQS. (NO_x and VOCs are subject to regulation as precursors for both PM₁₀ and ozone.) The NO_x and VOC inventories for 2030 in the PM₁₀ maintenance plan show declining emissions for both pollutants. Specifically, the District projects that annual average NO_x emissions will decline from 17.14 tons per day (tpd) in 2016 to 11.77 tpd in 2030 and that annual average VOC emissions will decline from 15.26 tpd in 2016 to 14.51 tpd in 2030.¹² In addition, CARB’s California Emissions Projections Analysis Model (CEPAM) emissions database shows that ozone precursors will decline in Imperial County over the same time-period.¹³ Specifically, the summer day emissions inventory¹⁴ for ozone precursors shows decreases that are consistent with those in the PM₁₀ maintenance plan.

Additionally, CARB’s CEPAM emissions database indicates that region-wide domestic emissions of ozone precursors in upwind areas that have potential contribution to ozone levels in Imperial County are also projected to decrease over the next decade.¹⁵ For example, NO_x emissions in the South Coast Air Basin are projected to decline from 306.5 tpd in

¹¹ Memorandum dated February 3, 2020, from Carol Bohnenkamp (EPA) to Rulemaking Docket EPA-R09-OAR-2018-0562, Subject: “Ozone Precursor Emission Inventory Trends for Imperial County, California.”

¹² “Imperial County 2018 Redesignation Request and Maintenance Plan for Particulate Matter Less Than 10 Microns in Diameter (PM₁₀),” submitted by CARB to EPA on February 13, 2019 as a revision to the Imperial County portion of the California SIP, accessible at <https://ww3.arb.ca.gov/planning/sip/planarea/imperial/sip.pdf>.

¹³ CARB’s CEPAM 2016 Standard Emission Tool is accessible at <https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php>.

¹⁴ Because warm weather facilitates the formation of ground-level ozone, attainment demonstrations in ozone plans are based on emissions inventories for summer days. There is not a strong seasonal correlation for PM₁₀ levels in Imperial County, so the PM₁₀ inventories are based on annual average days.

¹⁵ CARB’s CEPAM 2016 Standard Emission Tool. Emissions of ozone precursors in the South Coast Basin, as well as other areas in southern California, including San Diego, and Ventura, are projected to decline from 2020 to 2031.

2020 to 204.9 tpd in 2031, and VOC emissions are projected to decline from 388.6 tpd in 2020 to 358.3 tpd in 2031.¹⁶

In response to the commenter’s concern that there is a “gap” in the statute, we note that if domestic emissions were to increase such that the nonattainment problem were to be exacerbated, the EPA has the authority under CAA section 110(k)(5) to call for plan revisions to address substantially inadequate implementation plans.

III. Final Action

For the reasons discussed in detail in the proposed rule and summarized herein, under CAA section 110(k)(3), the

EPA is taking final action to approve as a revision to the California SIP the following portions of the Imperial Ozone Plan and the 2018 SIP Update submitted by CARB on November 14, 2017 and December 11, 2018, respectively:

- Emissions statement element, as meeting the requirements of CAA section 182(a)(3)(B) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- Base year emissions inventory element in the Imperial ozone plan as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 for the 2008 ozone NAAQS;

- RACM demonstration element as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c) for the 2008 ozone NAAQS;
- RFP demonstration as meeting the requirements of CAA section 182(b)(1) and 40 CFR 51.1110(a)(2)(i) for the 2008 ozone NAAQS; and
- Motor vehicle emissions budgets for the RFP milestone year of 2017, as shown in Table 1 below, because they are consistent with the RFP demonstration and demonstration of attainment but for international emissions for the 2008 ozone NAAQS finalized for approval herein and meet the other criteria in 40 CFR 93.118(e).

TABLE 1—2017 MOTOR VEHICLE EMISSIONS BUDGETS FOR IMPERIAL COUNTY FOR THE 2008 OZONE NAAQS

	2017	
	NO _x (tpd)	VOC (tpd)
On-road Mobile Sources	6.53	3.13
Safety Margin	0.4	0.8
Motor Vehicle Emissions Budget (rounded to nearest whole number)	7	4

Source: 2018 SIP Update, Table II-2, and CARB’s *Technical Clarification Letter*, Attachment A.

With respect to the MVEBs, we are taking final action to limit the duration of the approval of the MVEBs to last only until the effective date of the EPA’s adequacy finding for any subsequently submitted budgets. We are doing so at CARB’s request and in light of the benefits of using EMFAC2017-derived budgets¹⁷ prior to our taking final action on the future SIP revision that includes the updated budgets.

In finalizing this action, we are also rendering the RFP contingency measure requirement of CAA section 172(c)(9) moot and determining that attainment contingency measures are no longer required as discussed in section II.J of the proposed rule.

Given our final determination that the Imperial Ozone Plan meets all requirements for the Imperial County Moderate ozone nonattainment area, other than the requirement to demonstrate attainment, and our evaluation of the State’s lines of evidence that together support the conclusion that Imperial County would attain the 2008 ozone NAAQS by the July 20, 2018 attainment date but for emissions emanating from Mexico, the EPA is approving the Imperial Ozone Plan’s section 179B attainment demonstration as meeting the requirements of CAA sections 172(c)(1),

182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.

Concurrently, we are determining, consistent with our evaluation of the Imperial Ozone Plan, the 2018 SIP Update, and the Imperial Ozone Retrospective Demonstration, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018 but for emissions emanating from Mexico, under CAA section 179B(b). Therefore, the EPA’s obligation under section 181(b)(2)(A) to determine whether the area attained by its attainment date no longer applies and the area will not be reclassified.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state plans as meeting Federal requirements and does not impose additional requirements beyond those

imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because it is not a significant regulatory action under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or

¹⁶ These projections are included in Table IX–2 of CARB’s “2018 Updates to the California State Implementation Plan,” which the EPA approved on October 31, 2019 (84 FR 52005).

¹⁷ On August 15, 2019, the EPA approved and announced the availability of EMFAC2017, the latest update to the EMFAC model for use by State

and local governments to meet CAA requirements. 84 FR 41717.

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

However, with respect to our determination that Imperial County attained the 2008 ozone NAAQS by July 20, 2018, but for emissions from Mexico, this action has tribal implications. Nonetheless, it neither imposes substantial direct compliance costs on federally recognized tribal governments, nor preempts tribal law. Two tribes have areas of Indian country within or directly adjacent to the Imperial County ozone nonattainment area: The Quechan Tribe of the Fort Yuma Indian Reservation and the Torres Martinez Desert Cahuilla Indians. The EPA contacted both tribes with offers to consult on our proposed action; however, neither tribe requested consultation.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the

agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 27, 2020]. Filing a petition for reconsideration by the Administrator of this final rule 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 may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 4, 2020.

Deborah Jordan,
Acting Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(514)(ii)(A)(5) and (c)(530)(ii)(A)(3) to read as follows:

§ 52.220 Identification of plan—in part.

- * * * * *
- (c) * * *
- (514) * * *
- (ii) * * *
- (A) * * *

(5) 2018 Updates to the California State Implementation Plan, adopted on October 25, 2018, Chapter II (“SIP Elements for Imperial County”) and pages A–3 through A–6 of Appendix A (“Nonattainment Area Inventories”), only.

- * * * * *
- (530) * * *
- (ii) * * *
- (A) * * *

(3) Imperial County 2017 State Implementation Plan for the 2008 8-Hour Ozone Standard, adopted September 12, 2017, except Chapter 7 (“Reasonably Available Control Technology Assessment”) and Appendix B (Reasonably Available Control Technology Analysis for the 2017 Imperial County State Implementation Plan for the 2008 8-Hour Ozone Standard”).

* * * * *

■ 3. Section 52.244 is amended by adding paragraph (a)(10) to read as follows:

§ 52.244 Motor vehicle emissions budgets.

- (a) * * *
- (10) Imperial, approved March 30, 2020.

* * * * *

[FR Doc. 2020–03152 Filed 2–26–20; 8:45 am]

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Office of the Clerk

After Opening an Agency Case: An Introduction for Attorneys

You have received this guide because you filed a petition for review of a federal agency decision in the U.S. Court of Appeals for the Ninth Circuit. It provides information you need to know to represent a petitioner before the court.

This guide is not for immigration cases. If you opened an immigration case, please request our immigration packet.

Read this guide carefully. If you don't follow instructions, the court may dismiss your case.

This Guide Is Not Legal Advice

Court employees are legally required to remain neutral; that means they can't give you advice about how to win your case. However, if you have a question about procedure—for example, which forms to send to the court or when a form is due—this packet should provide the answer. If it doesn't, you may contact the clerk's office for more information.

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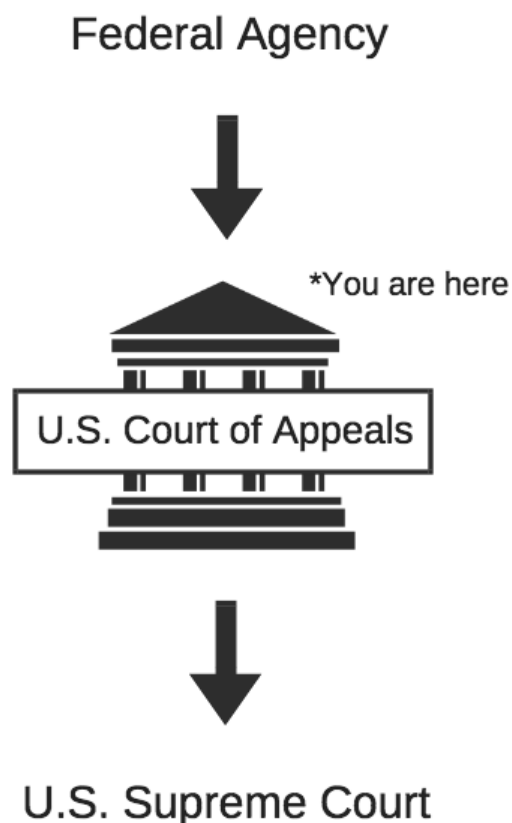
HOW AN AGENCY PETITION WORKS

The chart below shows the path of an agency petition from the agency to the highest court. Review these steps to make sure you understand where you are in the process.

Federal Agency. Cases come to the U.S. Court of Appeals from several different federal agencies. For example, a petition may arise from a final decision at the Federal Aviation Administration, National Labor Relations Board, Federal Trade Commission, or another agency. The important thing to understand is that you must have exhausted all of your options for appeal within the agency itself before filing a petition for review with the court of appeals. Many agency decisions must first be challenged in a U.S. District Court before you can come to the court of appeals.

U.S. Court of Appeals. When reviewing the federal agency decision in your case, the court of appeals (usually a panel of three judges) will carefully consider everything that has happened so far. The court will also read all the papers that you and opposing counsel file during your case. The court will look to see whether any agency, officer, or lower court has made a legal or factual mistake. You are not allowed to present new evidence or testimony on appeal.

U.S. Supreme Court. If you do not agree with the decision of the court of appeals, you can ask the United States Supreme Court to review your case. The Supreme Court chooses which cases it wants to hear. It reviews only a small number of cases each year.



Your case may not go through all of the stages shown above. For example, if the U.S. Court of Appeals resolves your case the way that you want, you won't need to file a petition in the U.S. Supreme Court.

PRACTICE RULES AND RESOURCES

This guide highlights rules that you **absolutely must follow** after filing a case. You are also responsible for reviewing and following the Federal Rules of Appellate Procedure (Fed. R. App. P.), the Ninth Circuit Rules (9th Cir. R.), and the general orders. The Federal Rules and the Ninth Circuit Rules are available at www.ca9.uscourts.gov/rules.

Practice Guides

In addition to the rules above, the following guides can support your practice before this court. You can find these and other resources on the court's website under *Legal Guides*:

- **Appellate Practice Guide.** A thorough manual of appellate practice prepared by the Appellate Lawyer Representatives.
- **Perfecting Your Appeal.** You can view this video for free at www.ca9.uscourts.gov or purchase it from the clerk's office for \$15.00.

Appellate Mentoring Program

The appellate mentoring program provides guidance to attorneys who are new to federal appellate practice or who would benefit from mentoring at the appellate level. Mentors are volunteers who have experience in immigration, habeas corpus, or appellate practice in general. If you are interested, a program coordinator will match you with a mentor, taking into account your needs and the mentor's particular strengths.

To learn more, email the court at mentoring@ca.9.uscourts.gov or go to www.ca9.uscourts.gov. On the website, select the "Attorneys" tab, look for "Appellate Mentoring Program," then choose "Information."

IMPORTANT RULES FOR ALL CASES

The rules in this section apply to all attorneys who file an agency petition in the court of appeals. You must understand and follow each one.

Ninth Circuit Bar Admission

To practice before the court of appeals, you must be admitted to the Bar of the Ninth Circuit. For instructions on how to apply, go to www.ca9.uscourts.gov. Select the "Attorneys" tab, look for "Attorney Admissions," then choose "Instructions."

Register for Electronic Filing

Unless the court gives you an exemption, you must use the Ninth Circuit's electronic filing system, called CM/ECF (Case Management/Electronic Case Files). To learn more and to register, go to www.ca9.uscourts.gov then click "Filing a Document – CM/ECF."

For additional guidance on filing documents and making payments electronically, read the Ninth Circuit Rules, especially Rule 25-5. For a complete list of the available types of filing events, see the [CM/ECF User Guide](#). To find the guide, go to "Filing a Document" as described just above, look for "Documentation & Training," then select "CM/ECF User Guide."

Complete a Mediation Questionnaire

After you file a petition for review of an agency decision, you must complete a mediation questionnaire. (9th Cir. R. 15-2.) The court uses the questionnaire to assess settlement potential.

You must file the questionnaire no later than **seven days** after the clerk's office docketed your petition. To find the form, go to www.ca9.uscourts.gov/forms.

If you want to request a conference with a mediator, call the Mediation Unit at (415) 355-7900, email ca09_mediation@ca9.uscourts.gov, or make a written request to the Chief Circuit Mediator. You may request conferences confidentially. For more information about the court's mediation program, go to www.ca9.uscourts.gov/mediation.

Meet Your Deadlines

Read all documents you get from the court. They will contain important instructions and deadlines for filing your court papers. **If you miss a deadline or fail to respond to the court as directed, the court may dismiss your case.**

Complete Your Forms Properly

Everything you send to the court must be clear and easy to read. If we can't read your papers, we may send them back to you. To make the clerk's job easier, please:

- ✓ Include your case number on all papers you send to the court or to opposing counsel.
- ✓ Number your pages and put them in order.
- ✓ If you are not filing electronically, use only one paper clip or a single staple to keep your documents organized. The clerk's office must scan your documents and extra binding makes that job difficult.

Deliver Papers the Right Way

When you deliver papers to the court or to opposing counsel, you must take certain steps to show you sent them to the right place on time.

- ✓ **Use the correct address.** Before you put anything in the mail, make sure the address is current and correct.
 - To find current addresses for the court, see “How to Contact the Court,” at the end of this guide. You may deliver a document to the court in person, but you must hand it to someone designated to receive documents in the clerk’s office.
 - To find the correct address for opposing counsel, see opposing counsel’s notice of appearance. Opposing counsel should have sent a copy of this notice to you after you filed your petition for review. The notice states opposing counsel’s name and address.
- ✓ **Attach a certificate of service.** You must attach a signed certificate of service to each document you send to the court or to opposing counsel unless all parties will be served via CM/ECF. *See* 9th Cir. R. 25-5(f).
- ✓ **Send a copy of all documents to opposing counsel.** When you file a document with the court, you must also send a copy (including any attachments) to opposing counsel unless they will be served via CM/ECF.

Keep Copies of Your Documents

Make copies of all documents you send to the court or to opposing counsel and keep all papers sent to you.

Pay the Filing Fee or Request a Waiver

The filing fee for your case is \$500.00. The fee is due when you file a petition for review. If you don’t pay the fee, you will receive a notice informing you that you have **21 days** to either pay the fee or request a waiver because the petitioner can’t afford to pay.

- **If the petitioner can afford the fee.** Submit your payment through the electronic filing system, or send a check or money order to the court. Make the check out to “Clerk, U.S. Courts.” Don’t forget to include the case number. Please note that after you pay the fee, we cannot refund it, no matter how the case turns out.

- **If the petitioner can't afford to pay.** You may ask the court to waive the fee by filing a motion to proceed in forma pauperis. See “Stage One: Opening Your Case,” below.

If you do not pay the fee or submit a waiver request by the deadline, the court will dismiss your case. (9th Cir. R. 42-1).

If You Move, Tell the Court

If your mailing address changes, you must immediately notify the court in writing. (9th Cir. R. 46-3.)

- **CM/ECF.** If you are registered for CM/ECF, update your information online at <https://pacer.psc.uscourts.gov/pscf/login.jsf>.
- **Paper filing.** If you are exempt from CM/ECF, file a change of address form with the court. You can find the form on the court's website at www.ca9.uscourts.gov/forms.

If you don't promptly change your address, including your email address, you could miss important court notices and deadlines. As noted above, missing a deadline may cause the court to dismiss your case.

HANDLING AN AGENCY CASE: THREE STAGES

This section will help you understand and manage the different parts of your case. We describe the basic documents you must file with the court and the timing of each step.

To begin, review the chart below. It introduces the three stages of a case.

1 Opening

- You file a petition for review.
- The court sends you a case schedule.
- You pay filing fees or get a waiver.
- You start compiling excerpts of record.
- You and opposing counsel may file motions.
- You respond to any court orders or motions from opposing counsel.

2 Briefing

- You submit an opening brief and excerpts of record.
- Opposing counsel submits an answering brief.
- You may submit a reply to opposing counsel's brief.

3 Decision

- The court decides your case.
- If you don't like the result, you decide whether to take further action.

Stage One: Opening a Case

By the time you receive this guide, you have already opened a case by filing a petition for review. In response, the clerk's office created the case record and gave you a case number and a briefing schedule.

If you haven't already paid the filing fee, you must do so now. See "Pay the Filing Fee or Request a Waiver," above.



The court may dismiss your case at any time. Even if you pay the fees and get a briefing schedule, the court may decide not to keep your case for a variety of legal reasons. If the court dismisses your case and you think the court was wrong, see "If You Don't Agree with a Court Decision," below.

Now is also the time to start compiling excerpts of record and to file any opening motions with the court. This section discusses each step in turn.

Preparing Excerpts of Record

The Ninth Circuit Court of Appeals does not require an appendix of record. Instead, you must file excerpts of record with your opening brief. (*See* 9th Cir. R. 17-1.) Your excerpts of record should be clear and well-organized. They should include all the documents that the court will need to understand and decide the issues in your petition.

Start putting together your excerpts of record now, before you write your opening brief. Then, as you write the brief, you can mark each record page that you reference so you can easily add the marked pages to your excerpts.

To learn the rules that govern what your excerpts should and should not include, and how to format them, read 9th Cir. R. 17-1 and 30-1. We also recommend that you read Chapter X of Appellate Practice Guide; see "Practice Guides," above.

Filing Opening Motions

Here are two common motions that you might make at the beginning of your case.

Motion to Proceed in Forma Pauperis

File this motion to ask the court to waive the petitioner's filing fee. To file your motion, you must complete and include [Form 4: Motion and Affidavit for Permission to Appeal in Forma Pauperis](#). The form is available on the court's website at www.ca9.uscourts.gov/forms. In addition, please follow the instructions in "How to Write and File Motions," below.

Motion for Injunction Pending Appeal

You can also file a motion for injunction pending appeal, sometimes called a motion for injunctive relief. This type of motion asks the court to order someone to do something or to stop doing something while your case is in progress. Be specific about what type of relief you are asking for, why the court should grant the relief, and the date by which you want the court to respond. In addition, be sure to follow the instructions in “How to Write and File Motions,” below.

Stage Two: Preparing and Filing Briefs

During the second stage of your case, you and opposing counsel will prepare and file written briefs. The required components of a brief are set out in Fed. R. App. P. 28 and 32, and 9th Cir. R. 28-2, 32-1, and 32-2. You should familiarize yourself with those rules and follow them carefully. In this section, we cover some key points of briefing practice.

Opening Brief

You will write and file the first brief in your case. In the opening brief, you must:

- state the facts of the case
- describe the relief you are seeking for the petitioner
- provide legal arguments to support your petition, and
- include citations to the excerpts of record.

Deadline for filing. You must file your opening brief and excerpts of record by the deadline stated in the briefing schedule.

If you do not file your brief on time or request an extension, the court will dismiss your case.

Tips for Writing Your Briefs

Keep these points in mind to write a better brief:

Avoid unnecessary words. Don't use 20 words to say something you can say in ten.

Think things through. Make logical arguments and back them up with legal rules.

Be respectful. You can disagree without being disagreeable. Focus on the strengths of your case, not the character of others.

Tell the truth. Don't misstate or exaggerate the facts or the law.

Proofread. Before you file, carefully check for misspellings, grammatical mistakes, and other errors.

Answering Brief

In response to your opening brief, opposing counsel may file an answering brief. If opposing counsel files an answer, they must send a copy to you.

The time scheduling order sets the deadline for the answering brief. Please note that the opening and answering brief due dates are not subject to the rules for additional time described in Fed. R. App. P. 26(c). In particular, if you file your opening brief early, it does not advance the due date for your opponent's answering brief. (*See* 9th Cir. R. 31-2.1.)

Reply Brief

You are invited to reply to opposing counsel's answering brief, but you are not required to do so. If you write a reply brief, do not simply restate the arguments in your opening brief. Use the reply brief to directly address the arguments in opposing counsel's answering brief.

You must file your reply brief within **21 days** of the date the government serves you with its answering brief.

How to File a Brief

Rules for filing briefs depend on whether or not you are required to file electronically.

CM/ECF. After we review your electronic submission, we will request paper copies of the brief that are identical to the electronic version. Do not submit paper copies until we direct you to do so. (*See* 9th Cir. R. 31-1.) You must also send **two copies** of the brief to any exempt or unregistered opposing counsel.

Exempt Filers Only. Please follow these steps:

- ✓ Send the original document and **six copies** of your brief to the court.
- ✓ Send **two copies** to opposing counsel.
- ✓ Attach a signed certificate of service to the original and to each copy for opposing counsel.
- ✓ Keep a copy for your records.

How to File Excerpts of Record

Submit your excerpts in PDF format using CM/ECF on the same day that you submit your brief. You must serve a paper copy of your excerpts on any unregistered party.

If the excerpts contain sealed materials, you must submit the sealed documents separately, along with a motion to file under seal. (9th Cir. R. 27-13(e).) You must serve sealed filings on all parties by mail or by email if they are registered for electronic filing, or if mutually agreed, rather than through CM/ECF.

After approving your electronic submission, the clerk will direct you to file individually bound paper copies of the excerpts of record with white covers.

To review the rules for filing excerpts, see 9th Cir. R. 30-1.

If You Need More Time to File

Usually, you may ask for one streamlined extension of up to 30 days from the brief's existing due date. (*See* 9th Cir. R. 31-2.2(a) for conditions.)

- **CM/ECF.** Electronic filers do not need to use a written motion; you may submit your request using the "File Streamlined Request to Extend Time to File Brief" event on CM/ECF on or before your brief's existing due date.
- **Paper filing.** Make your request by filing Form 13 on or before your brief's existing due date. You can find Form 13 on the court's website at www.ca9.uscourts.gov/forms.

If you need more than 30 days, or if the court has already given you a streamlined extension, you

must submit a written motion asking for more time. Your motion must show both diligence and substantial need. You must file your request at least **seven days** before your brief is due. The motion must meet the requirements of 9th Cir. R. 31-2.2(b). You may use Form 14 or write your own motion.

Usually, in response to an initial motion for more time, the court will adjust the schedule. (*See* Circuit Advisory Committee Note to Ninth Circuit Rule 31-2.2.) If you followed the correct procedures to ask for more time but the court doesn't respond by the date your brief is due, act as though the court has granted your request and take the time you asked for.

What Happens After You File

After you and opposing counsel have filed your briefs, a panel of three judges will evaluate the case. Sometimes the court decides a case before briefing is complete (9th Cir. R. 3-6); if that happens, we will let you know.

Judges conduct oral hearings in all cases unless all members of the panel agree that oral argument would not significantly aid the decision-making process. (Fed. R. App. P. 34(a)(2).)

Notification of oral hearings. We will notify you of the potential dates and location of an oral hearing approximately 14 weeks in advance. After you receive notice, you have **three calendar days** to inform the court of any conflicts. We distribute calendars about ten weeks before the hearing date.

Changes to oral hearing dates or location. The court will change the date or location of an oral hearing only if you show good cause for the change. If you wish to submit a request to continue a hearing, you must do so within 14 days of the hearing. Note, however, that the court grants such requests only if you can show exceptional circumstances. (9th Cir. R. 34-2.)

Oral arguments are live streamed to YouTube. Viewers can access them through the court's website. Go to www.ca9.uscourts.gov and choose "Live Video Streaming of Oral Arguments and Events."

Stage Three: The Court's Final Decision

After the judges decide your case, you will receive a memorandum disposition, opinion, or court order stating the result. If you are happy with the outcome, congratulations.

If you or opposing counsel didn't get the final results you want, either of you may take the case further. We explain your options in the section "After Your Case," below.

HOW TO WRITE AND FILE MOTIONS

This section provides general guidelines for writing and filing motions, including motions discussed elsewhere in this guide. The motion you want to make may have special rules—for example, a different page limit or deadline—so be sure that you also read its description, as noted below.

How to Write a Motion

If you want to file a motion with the court, follow these guidelines:

- ✓ Clearly state **what** you want the court to do.
- ✓ Give the legal reasons **why** the court should do what you are asking.
- ✓ Tell the court **when** you would like it done.
- ✓ Tell the court what the opposing party's position is. (Circuit Advisory Committee Note to Ninth Circuit Rule 27-1(5); 9th Cir. R. 31-2.2(b)(6).)
- ✓ If you are filing a response requesting affirmative relief, include your request in the caption. (Fed. R. App. P. 27(a)(3)(B)) and use the correct filing type.
- ✓ Don't write a motion that is more than 20 pages long unless you get permission from the court.

If you like, you may support your motion with an affidavit or declaration. (28 U.S.C. § 1746.)

Cases Scheduled for Argument or Submitted to a Panel

If your case has been (1) scheduled for oral argument, (2) argued, or (3) submitted to or decided by a panel, then the first page or cover of your motion must include the date of argument, submission, or decision and, if known, the names of the judges on the panel. (9th Cir. R. 25-4.)

How to File a Motion

To file your motion, you must follow the rules described in “Deliver Papers the Right Way,” at the beginning of this guide. Keep the following points in mind.

- **CM/ECF.** For electronic filing, follow instructions on CM/ECF. If there are any non-registered parties, you must send a hard copy to that party.
- **Paper filing.** Send the original document to the court and send a copy to opposing counsel. Remember to attach a signed certificate of service to the original and to any copies. Always keep a copy for your own records.

Note that you should not include a notice of motion or a proposed order with your motion. (Fed. R. App. P. 27(a)(2)(C)(ii) and (iii).)

What Happens After You File

The path of a motion depends on the details of your case. Certain motions—for example, a motion to dismiss the case—may automatically stay the briefing schedule. (*See* 9th Cir. R. 27-11.) The following steps are common after filing a motion.

Opposing counsel may respond. After you file a motion, opposing counsel has ten days to file a response. (*See* Fed. R. App. P. 27(a)(3)(A); Fed. R. App. P. 26(c).) In the response, opposing counsel will tell the court why it disagrees with the arguments in your motion.

You may reply to opposing counsel’s response. If opposing counsel responds, you may tell the court why you think opposing counsel’s view is incorrect. If you file a reply, don’t just repeat the arguments in your original motion. Instead, directly address the arguments in opposing counsel’s response. You usually have **seven days** to file a reply with the court, starting on the day you are served with their response. (*See* Fed. R. App. P. 27(a)(3)(B).) Normally, a reply may not be longer than ten pages.

The court decides your motion. After you and opposing counsel file all papers related to the motion, a panel of two or three judges will decide the issue.

How to Respond to a Motion from Opposing Counsel

Your opponent may also submit motions to the court. For example, opposing counsel may file a motion to dismiss the case or to ask the court to review the case more quickly than usual. If opposing counsel files a motion, you are allowed to respond with your arguments against it. Your response may not be longer than 20 pages.

Usually, you must file your response with the court no more than **ten days** from the day opposing counsel serves its motion on you.

Read More About These Motions

If you are making one of the following motions, read the section noted here:

Motion to proceed in forma pauperis in “Filing Opening Motions,” above.

Motion for injunctive relief pending appeal in “Filing Opening Motions,” above.

Motion for extension of time to file a brief in “If You Need More Time to File,” above.

Motion for reconsideration in “If You Don’t Agree With a Court Decision,” below.



Emergency Motions

An emergency motion asks the court to act within 21 days to avoid irreparable harm. Your emergency motion must meet the requirements of 9th Cir. R. 27-3.

If you need emergency relief, you must notify the Emergency Motions department in San Francisco before you file the motion. Call them at 415-355-8020 or e-mail emergency@ca9.uscourts.gov. Please note that a request for more time to file a document with the court or any other type of procedural relief does *not* qualify as an emergency motion. (See Circuit Court Advisory Committee Note to 27-3(3).)

Finally, if you absolutely must notify the court of an emergency outside of standard office hours, call 415-355-8000. This line is for true emergencies that cannot wait until the next business day—for example, imminent removal from the United States.

IF YOU DON'T AGREE WITH A COURT DECISION

If you think the court of appeals made an incorrect decision about important issues in your case, you can ask the court to take a second look. You may do this during your case—for example, if you disagree with the court's ruling on a motion. Or you may ask the court to review its final decision at the end of your case.

During Your Case: Motion for Reconsideration

If you disagree with a court order or ruling during your case, you may file a motion for reconsideration stating the reasons why you think the court's ruling was wrong. Your motion may not be longer than 15 pages.

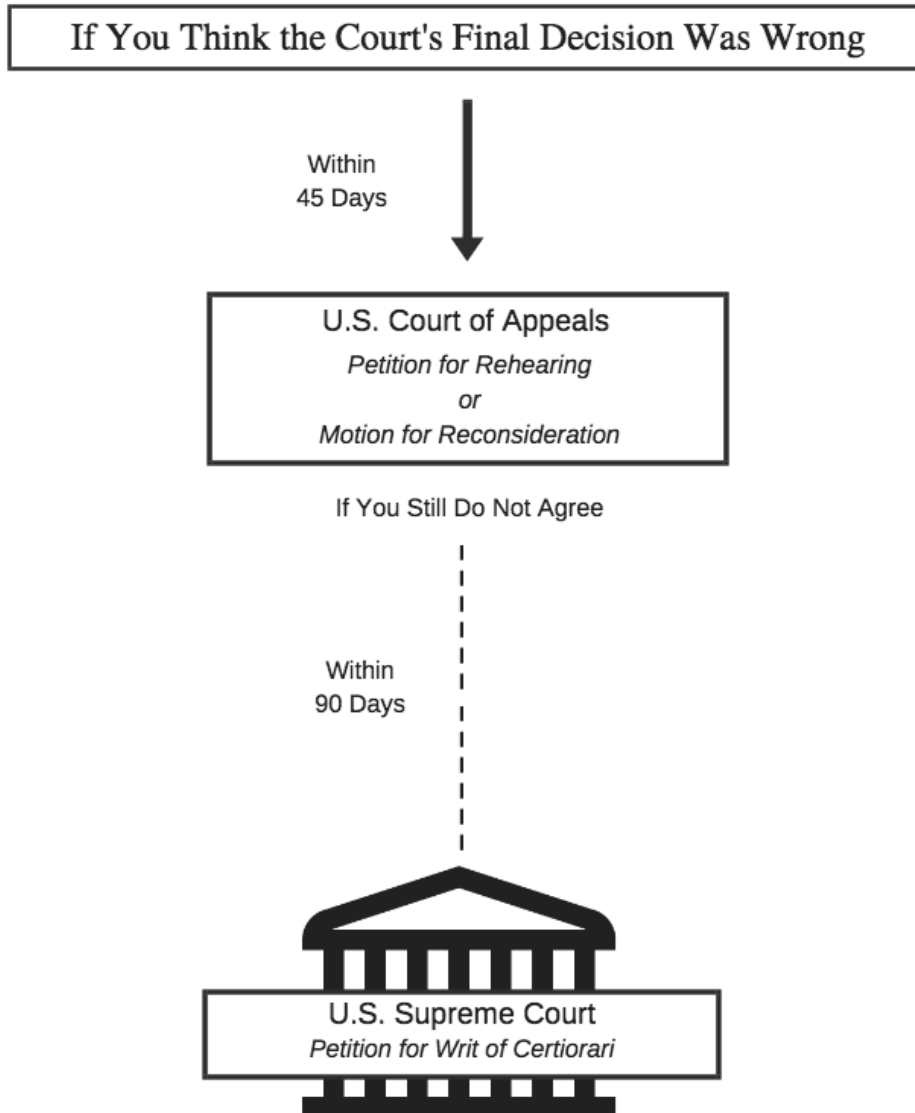
A motion for reconsideration of an order that does not end the case—that is, a non-dispositive order—is due **within 14 days** of the date stamped on the court order. (9th Cir. R. 27-10(a).) In addition to these rules, please follow the general guidelines in “How to Write and File Motions,” above.

After Your Case: Motions and Petitions

If you think the court's final decision in your case was wrong and you want to take further action, you have two options:

- File a motion for reconsideration or petition for rehearing in this court.
 - If the court decided your case in an order, then you would file a motion for reconsideration, as discussed just above. You have **45 days** (instead of 14 days) to file a motion for reconsideration of a court order that ends your case. (9th Cir. R. 27-10(a).)
 - If the court decided your case in a memorandum disposition or opinion, then you would file a petition for rehearing, discussed below.
- File a petition for writ of certiorari with the U.S. Supreme Court.

It is most common to do these things one after the other—that is, to file a petition for rehearing or motion for reconsideration in this court and then, if that doesn't succeed, petition the Supreme Court. It is technically possible to file both petitions at the same time but that is not the typical approach. Our discussion focuses on the common path.



Court of Appeals: Petition for Rehearing

To ask the court of appeals to review its final decision in your case, you must file a petition for rehearing. Before starting a petition, remember that you must have a legal reason for believing that this court's decision was incorrect; it is not enough to simply dislike the outcome. You will not be allowed to present any new facts or legal arguments in your petition for rehearing. Your document should focus on how you think the court overlooked existing arguments or misunderstood the facts of your case.

A petition for rehearing may not be longer than 15 pages. Your petition is due **within 45 days** of the date stamped on the court's opinion or memorandum disposition. To learn more about petitions for rehearing, see Fed. R. App. P. 40 and 40-1.

Most petitions for rehearing go to the same three judges who heard your original petition. It is also possible to file a petition for rehearing en banc. This type of petition asks 11 judges to review your case instead of three. The court grants petitions for rehearing en banc only in rare, exceptional cases. To learn more about petitions for rehearing en banc, see Fed. R. App. P. 35.

U.S. Supreme Court: Petition for Writ of Certiorari

If the court of appeals denies your petition for rehearing—or if it rehears your case and issues a new judgment you don't agree with—you have 90 days from the denial order or the new decision to petition the U.S. Supreme Court to hear your case. You do this by asking the Supreme Court to grant a writ of certiorari. You must file the petition with the Supreme Court directly. A writ of certiorari directs the appellate court to send the record of your case to the Supreme Court for review.

The Supreme Court is under no obligation to hear your case. It usually reviews only cases that have clear legal or national significance—a tiny fraction of the cases people ask it to hear each year. Learn the [Supreme Court's Rules](#) before starting a petition for writ of certiorari. (You can find the rules and more information about the Supreme Court at www.supremecourt.gov.)

HOW TO CONTACT THE COURT

Court Addresses: San Francisco Headquarters

<i>Mailing Address for U.S. Postal Service</i>	<i>Mailing Address for Overnight Delivery (FedEx, UPS, etc.)</i>	<i>Street Address</i>
Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103-1526	95 Seventh Street San Francisco, CA 94103

Court Addresses: Divisional Courthouses

<i>Pasadena</i>	<i>Portland</i>	<i>Seattle</i>
Richard H. Chambers Courthouse 125 South Grand Avenue Pasadena, CA 91105	The Pioneer Courthouse 700 SW 6th Ave, Ste 110 Portland, OR 97204	William K. Nakamura Courthouse 1010 Fifth Avenue Seattle, WA 98104

Court Website

www.ca9.uscourts.gov

The court's website contains the court's rules, forms, and general orders, public phone directory, information about electronic filing, answers to frequently asked questions, directions to the courthouses, bar admission forms, opinions and memoranda, live streaming of oral arguments, links to practice manuals, an invitation to join our pro bono program, and more.