No. 11-1403

In the Supreme Court of the United States

MONTANA SULPHUR AND CHEMICAL COMPANY,
PETITIONER

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In the administrative decisions under review in this case, the United States Environmental Protection Agency (EPA) (1) directed the State of Montana to revise aspects of its State Implementation Plan (SIP) governing sulfur dioxide emissions by four emitters in the Billings/Laurel area, (2) partially disapproved the State's responsive revisions to that Plan, and (3) issued a Federal Implementation Plan to fill gaps in the State's SIP. The question presented is whether EPA acted arbitrarily and capriciously or contrary to law, or abused its discretion under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, in issuing those decisions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 666 F.3d 1174.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2012. On April 6, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 18, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Clean Air Act (CAA), 41 U.S.C. 7401 *et seq.*, the United States Environmental Protection Agency (EPA) has developed a list of pollutants that

cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7408(a)(1)(A). For each such pollutant, EPA promulgates "national ambient air quality standards" (NAAQS) sufficient to protect public health and welfare. 42 U.S.C. 7409(b). EPA sets "primary" standards to protect "public health" and "secondary" standards to protect "public welfare." 42 U.S.C. 7409(b)(1) and (2). All areas in the country are designated as "attainment" or "nonattainment" with respect to each NAAQS (except when for some reason a particular area must be designated "unclassifiable"). 42 U.S.C. 7407. Attainment areas are subject to requirements designed to prevent deterioration of air quality, see 42 U.S.C. 7470-7479, while nonattainment areas are subject to requirements designed to bring them into attainment of the relevant NAAQS, see 42 U.S.C. 7501-7515.

Under the CAA, States develop State Implementation Plans (SIPs)—sets of enforceable emission limitations that "assure" attainment and maintenance of the NAAQS. 42 U.S.C. 7407(a), 7410(a)(2)(A), 7410(a)(2)(C). Such limitations are developed, and their efficacy is evaluated, primarily through computer modeling. See 40 C.F.R. 51.112(a)(1) ("The adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).").[1]

EPA reviews all SIPs and SIP revisions to determine whether they meet the statute's requirements. 42

[1] In the court of appeals, petitioner acknowledged that EPA's regulations "allow EPA to determine attainment through computer models rather than actual measurements." Pet. C.A. Mot. for Stay Pending Appeal 6 (July 30, 2008).

U.S.C. 7410(a)(1), (k) and (*l*). The EPA Administrator may not approve a SIP revision that would "interfere" with any applicable requirement concerning attainment of the NAAQS, or with any other CAA requirement. 42 U.S.C. 7410(*l*). Each State commits, in each SIP, to revise the plan "whenever the Administrator finds on the basis of information available to [her] that the [SIP] is substantially inadequate to attain the [NAAQS] which it implements." 42 U.S.C. 7410(a)(2)(H). Accordingly, whenever EPA finds a SIP "substantially inadequate," EPA must "notify the State of the inadequacies" and require the State to revise its SIP "as necessary to correct such inadequacies." 42 U.S.C. 7410(k). If a State fails to respond with a satisfactory SIP, EPA must promulgate a Federal Implementation Plan (FIP). 42 U.S.C. 7410(c). A FIP corrects "all or a portion of" the inadequacy of a SIP by, for example, "fill[ing] * * * a gap" that the State plan has left open. 42 U.S.C. 7602(y).

2. This case involves enforcement of a NAAQS in one region of Montana known for these purposes as the Billings/Laurel Area. That area has long been adversely affected by air pollution, including emissions of sulfur dioxide (SO_2), the pollutant at issue here. Petitioner emits SO_2 from a sulfur recovery plant located in the Billings/Laurel Area.

Sulfur dioxide is both highly reactive and highly dangerous. Although it is "best known for causing 'acid rain,'" Pet. App. 5a (citation omitted), SO_2 also "directly impairs human health." *E.g.*, *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). In 1978, EPA designated the Laurel Area "nonattainment" with respect to SO_2, based on measured and modeled violations of the primary SO_2 standards, and potential violations

were also identified in the Billings Area. 43 Fed. Reg. 9010 (Mar. 3, 1978); Pet. App. 6a. In 1980, EPA approved Montana's SIP for regulating SO_2 in the Billings/Laurel Area. Pet. App. 6a.

a. In 1992 and 1993, EPA, Montana's Department of Health and Environmental Services (MDHES) and the City of Billings learned of potential violations of the SO_2 standard in the Billings/Laurel Area. Pet. App. 6a-7a. After reviewing a report prepared for the City by a contractor, MDHES acknowledged that the State's existing SIP "did not regulate SO_2 emissions from industrial process units" (including sulfur recovery plants), and that SO_2 was "allowed to be emitted at levels significantly higher than actual emissions in recent years." C.A. Supp. E.R. 144-145. MDHES explained that those deficiencies prevented Montana from demonstrating the SIP's adequacy to protect the NAAQS for SO_2, and added that "recent dispersion modeling studies conducted in the area show numerous predicted violations of the NAAQS." *Id.* at 145.

After describing modeling as "the accepted and required tool for evaluating and developing SIPs," MDHES stated:

> It is the combination of the lenient emission control plan and the modeling results that is leading EPA to declare the SIP inadequate. EPA is well aware that actual SO_2 monitoring data from sites in the area has not shown a violation of SO_2 NAAQS; however, current monitoring sites are not at the highest predicted locations, nor could we locate enough monitors to provide the spatial coverage represented in the model.

C.A. Supp. E.R. 145. MDHES advised that the status quo was problematic because it effectively "grandfathered" existing industry while discouraging new industry seeking a permit in that area. *Id.* at 146. MDHES concluded: "With a revised SO_2 SIP which specifies emission limits on all area industries and which demonstrates compliance with the ambient standards based on dispersion modeling, permitting of new industries will be eased significantly." *Id.* at 147.

b. Shortly thereafter, EPA issued its SIP Call. EPA found the Billings/Laurel SO_2 SIP substantially inadequate to attain and maintain the SO_2 NAAQS, and the agency requested that Montana submit revisions to its plan. See 58 Fed. Reg. 41,430 (Aug. 4, 1993) (Pet. App. 42a-45a). The SIP Call did not purport to establish national policy regarding SIP Calls, and did not extend to areas other than Billings/Laurel.

Over the next several years, Montana submitted to EPA various proposed revisions to its SIP. See Pet. App. 7a. In 2002 and 2003, following notice and comment, EPA approved many of Montana's SIP revisions but disapproved certain others. See *id.* at 7a-8a; 67 Fed. Reg. 22,168-22,169 (May 2, 2002) (Pet. App. 48a-49a); 68 Fed. Reg. 27,908-27,909 (May 27, 2003); see also 73 Fed. Reg. 21,419 (Apr. 21, 2008) (Pet. App. 138a). EPA subsequently promulgated FIP measures to replace the disapproved SIP provisions, two of which are at issue in petitioner's current challenge.

i. *Flaring.*—One basis for EPA's disapproval of the State's attainment demonstration was the lack of an enforceable limitation on "flaring," *i.e.*, the practice of releasing gases to a device for immediate incineration, Pet. App. 22a. See 67 Fed. Reg. at 22,180 (Pet. App. 78a). In seeking to demonstrate to EPA that its proposal would

attain the SO_2 NAAQS, the State used a model that assumed (*inter alia*) that emissions from flaring would not exceed 150 pounds of SO_2 per three-hour period. But the State did not include any corresponding limits on flaring that would make that assumption enforceable. EPA concluded that enforceable limits on flaring were required. See *ibid.*

ii. *Auxiliary Vent Stacks.*—A further reason for disapproving the State's submission was its problematic treatment of petitioner's auxiliary vent stacks. Emissions from those stacks were not continuously monitored; rather, they were estimated based on the time period that those stacks were in use. For those estimates to be valid, EPA concluded, limitations must be placed on the sulfur content of the fuel burned in the boilers that use those stacks, and a method for measuring that sulfur content must be available. The State's plan contained no such limitation or method. See 64 Fed. Reg. 40,800-40,801 (July 28, 1999); 67 Fed. Reg. at 22,202-22,203 (Pet. App. 131a-135a).

c. Although the State did not contest either the SIP Call or the partial disapproval of its submission in response to the call, petitioner filed a petition for review of those actions in the court of appeals. At petitioner's urging, the court of appeals held that case (No. 02-71657) in abeyance pending EPA's anticipated promulgation of a FIP to remedy the SIP's disapproved portions. Pet. App. 8a.

3. Following notice and extensive opportunity for comment, including a public hearing, EPA promulgated a FIP to take the place of the inadequate aspects of Montana's Billings/Laurel SO_2 SIP. 40 C.F.R. 52.1392. The FIP established certain emissions limits and compliance methods for four sources located in the Bill-

ings/Laurel Area: petitioner's facility and three petroleum refineries. 73 Fed. Reg. at 21,419-21,420 (Pet. App. 142a). EPA reaffirmed that "[t]he State, of course, remains free to submit a SIP revision that reflects a different mix of controls." *Id.* at 21,424 (Pet. App. 161a-162a).

a. The FIP included two provisions that petitioner challenges in this Court. Both of those provisions corresponded to aspects of the SIP that EPA had previously disapproved. Neither required petitioner to install any new controls. See 71 Fed. Reg. 39,268-39,269 (July 12, 2006); 73 Fed. Reg. at 21,447.

i. *Flaring.*—EPA adopted a FIP provision imposing a 150 lb/3 hr limit on SO_2 emissions from flaring at all four sources. See 40 C.F.R. 52.1392(g)(2)(i) (provision applicable to petitioner); 73 Fed. Reg. at 21,420 (Pet. App. 143a). EPA rejected the request of a conservation group that it impose a stricter limit of 500 lb/day. The agency deemed this "more stringent limit [to be] unnecessary to ensure attainment of the NAAQS." *Id.* at 21,433 (Pet. App. 173a-174a).

The FIP also specified how emissions from flaring would be monitored and computed. 40 C.F.R. 52.1392(g)(2)(ii) and (h); 73 Fed. Reg. at 21,420 (Pet. App. 143a). The FIP further provided emitting facilities with an affirmative defense against enforcement action for civil penalties if they violated the flare limits during startup, shutdown, or malfunction episodes at emitting facilities. 40 C.F.R. 52.1392(i); 73 Fed. Reg. at 21,435-21,437 (Pet. App. 181a-190a).

ii. *Auxiliary Vent Stacks.*—EPA adopted a FIP provision to impose enforceable limitations on emissions of SO_2 from petitioner's auxiliary vent stacks. See 40 C.F.R. 52.1392(g)(4). The provision specified 3-hour,

daily, and annual limitations for SO_2 emissions from those stacks, and it specified the maximum concentration of hydrogen sulfide (H_2S) for fuel being burned in units exhausting to the auxiliary vent stacks. The limitations on H_2S content were set at levels that would "protect the 3-hour SO_2 NAAQS" and also ensure that sustained use at the 3-hour maximum would not prevent attainment of the 24-hour NAAQS. 73 Fed. Reg. at 21,446-21,447. EPA noted that, because the Montana SIP already required the use of "low sulfur gas," the new H_2S requirements should not be burdensome. *Id.* at 21,447.

b. EPA selected these emission limitations to ensure that the SO_2 NAAQS were attained and maintained going forward, consistent with applicable CAA and regulatory requirements. With these limits (and the SIP limits that EPA had previously approved in 2002), EPA's attainment modeling showed that SO_2 would reach a high 24-hour value of 354 $\mu g/m^3$ (micrograms per cubic meter). That level—accounting for background concentrations of 11 $\mu g/m^3$—would exactly meet the 24-hour SO_2 NAAQS of 365 $\mu g/m^3$. 73 Fed. Reg. at 21,439. Based on the SIP and FIP 3-hour emission limits, EPA modeled a high 3-hour value of 1291.5 $\mu g/m^3$, which is "just below" the 3-hour NAAQS of 1300 $\mu g/m^3$. *Id.* at 21,424 n.5 (Pet. App. 161a n.5).

Accordingly, EPA stated that the requirements of the FIP would not meaningfully exceed what was necessary to attain the levels specified in the NAAQS. 73 Fed. Reg. at 21,424 n.5 (Pet. App. 161a n.5). EPA noted in the alternative that, "if [it] had felt a larger margin of safety was justified to ensure attainment and maintenance," the agency would have been authorized to im-

pose such measures as part of a FIP, just as a State may do as part of a SIP. *Ibid.*

c. Petitioner sought review of the FIP in the court of appeals. Neither the State of Montana nor any of the three other affected SO_2-emitting sources filed a petition for review or sought to intervene. Pet. App. 8a.

4. A unanimous panel of the court of appeals denied both petitions for review. Pet. App. 1a-41a.

a. Petitioner contended that EPA lacked authority to make the 1993 SIP Call because there were no monitored violations of NAAQS in the area, only predicted violations based on computer dispersion modeling. See Pet. App. 12a. The court of appeals held that EPA had not exceeded its authority in issuing the SIP Call. *Id.* at 12a-15a.

The court of appeals recognized that "EPA lacks authority to issue a SIP Call unless the SIP is 'substantially inadequate'" to attain or maintain the NAAQS. Pet. App. 12a (quoting 42 U.S.C. 7410(a)(2)(H) and (k)(5)). The court held, however, that EPA could properly rely on modeling data in assessing the adequacy of the SIP. *Id.* at 12a-15a. The court observed that EPA "did not ignore actual SO_2 monitoring data when it issued the SIP Call," but instead "expressly addressed these results and explained their shortcomings." *Id.* at 12a. The court stated that "EPA had plausible reasons for concern in 1993 about attainment given the proximity between Laurel (a nonattainment area) and Billings, the limitations of the existing monitoring methods, the indications from the modeling studies available, and the gravity of the health issues that [SO_2] NAAQS seek to prevent." *Id.* at 15a. It concluded that "EPA therefore did not act arbitrarily or capriciously by relying on predictive modeling to make the SIP Call in 1993." *Ibid.*

The court of appeals also explained that the CAA "expressly recognizes modeling as an appropriate regulatory tool." Pet. App. 14a (citing 42 U.S.C. 7610(a)(2)(K)(i)). Petitioner contended that CAA amendments enacted in 1990, by deleting a prior reference to modeling from a definitional provision, "indicate a Congressional intent to eliminate the use of modeling." *Ibid.* The court of appeals rejected that argument, explaining that Congress had simultaneously deleted a reference to monitoring from the same provision and had replaced both references with a cross-reference to another section of the CAA. *Ibid.* The court further explained that the 1990 legislative history recognized EPA's authority to rely on any valid data, including modeling. *Id.* at 14a-15a.

b. The court of appeals also upheld EPA's promulgation of a FIP. As relevant here, the court sustained EPA's decision to impose limits on flaring and on emissions from petitioner's auxiliary stacks. Pet. App. 27a-31a, 34a-37a.

The court of appeals rejected petitioner's contention that, by selecting a 150 lb/3 hour limitation on SO_2 emissions from flaring, EPA had "go[ne] beyond what is necessary to satisfy the NAAQS." Pet. App. 30a. The court credited EPA's calculation that the emission limits imposed by the FIP "would just meet the NAAQS." *Ibid.* (quoting 73 Fed. Reg. at 21,439 (Pet. App. 200a)). The court accordingly did not address the question whether, when EPA is required to promulgate a FIP, EPA may include measures that are more stringent than necessary to attain a NAAQS. See *ibid.*

The court of appeals also rejected petitioner's challenge to the requirements applicable to auxiliary stacks. Pet. App. 34a-37a. Those requirements, the court con-

cluded, "were not arbitrary or unreasonable." *Id.* at 37a.

ARGUMENT

The court of appeals correctly held that EPA acted within its statutory authority in issuing the SIP Call and in promulgating the FIP. That decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner first challenges the SIP Call. Petitioner contends (Pet. 14-16) that the court of appeals applied the incorrect test to uphold the SIP Call, and (Pet. 17-21) that under a correct standard, the SIP Call would have been set aside. Petitioner incorrectly characterizes the court of appeals' decision, which correctly applied the standard of review set out in the CAA and sustained EPA's decision under that standard.

a. Petitioner contends (Pet. 13, 14-16) that the court of appeals inappropriately utilized a "plausible concern test" to evaluate whether EPA had lawfully issued the SIP Call. That assertion reflects a misunderstanding of the court's opinion. The court correctly explained that "EPA lacks authority to issue a SIP Call unless the SIP is 'substantially inadequate.'" Pet. App. 12a (citing 42 U.S.C. 7410(a)(2)(H) and (k)(5)). The court also recognized that, if EPA concludes that a substantial inadequacy exists, the court's task is to determine whether that agency judgment is arbitrary or capricious. *Id.* at 8a (citing 42 U.S.C. 7607(d)(9)(A)).

In applying that standard to EPA's decision to issue the SIP Call, the court of appeals explained why EPA's concerns about the inadequacies in Montana's existing SIP—concerns shared by the State of Montana—were fully plausible under the circumstances, as reflected in

the administrative record. Pet. App. 15a n.3. The court cited the close proximity between Laurel (a nonattainment area) and Billings, the limitations of the existing SO_2 monitoring network, the results from several modeling studies, and the significant public-health consequences of allowing SO_2 levels to exceed the NAAQS. *Id.* at 15a. The court concluded that this evidence gave EPA "plausible reasons for concern," and that the agency's judgment was not arbitrary or capricious. *Ibid.*

Thus, contrary to petitioner's contention (Pet. 15), the court of appeals' analysis is fully consistent with this Court's early CAA decisions in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), and *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). Both of those cases involved EPA's review of SIP revisions initiated by a State. Nothing in either case conflicts with the court of appeals' approach to reviewing the Billings/Laurel SIP Call here. For instance, in *Union Electric*—in which the State initiated and EPA approved the SIP revision in question—the Court had no occasion to address how EPA might conclude that provisions of a SIP provisions had become substantially inadequate and issue a SIP Call. The Court merely noted that the States may make regulatory choices under the CAA only "so long as the national standards [are] met." 427 U.S. at 269. When the States' regulatory choices become "substantially inadequate" to meet those standards, the SIP Call mechanism gives the States the first opportunity to propose revisions to cure the inadequacy.

b. In this case EPA properly concluded that the relevant portion of the SIP was substantially inadequate to attain the national standard, and petitioner's largely fact-bound challenge to that determination is without merit.

Petitioner contends (Pet. 15) that the CAA prohibits EPA from relying on modeling to document a substantial inadequacy. The statutory provision on which petitioner relies, however, imposes no such restriction. The CAA authorizes a SIP Call when the existing SIP "is substantially inadequate to attain or maintain the relevant [NAAQS]." 42 U.S.C. 7410(k)(5). The statute does not limit EPA to a snapshot measurement of whether the NAAQS is being violated at the present moment. Cf. *Train*, 421 U.S. at 93. The present-tense verb "is" does not signify otherwise; a safeguard *is* inadequate today if it will fail tomorrow.[2]

The court of appeals decisions that petitioner cites (Pet. 16) do not hold to the contrary. The D.C. Circuit in *Virginia* v. *EPA*, 108 F.3d 1397, modified on reh'g, 116 F.3d 499 (1997), held that a SIP Call must be premised on a finding of substantial inadequacy, not simply on EPA's preference for an alternative control measure that the State declined to impose. See *id.* at 1409-1410. Here, EPA did not dictate any measures through its SIP Call. Instead, it properly called for the State to adopt measures to address the existing SIP's substantial inadequacy. The D.C. Circuit in *Virginia* v. *EPA* did not speak to whether a finding of substantial inadequacy could be based wholly or partially on modeling data.

Florida Power & Light Co. v. *Costle*, 650 F.2d 579 (5th Cir. Unit B 1981), is even farther afield. In that case, which did not involve a SIP Call, Florida proposed to amend its SIP. EPA substantially approved the revi-

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[2] Petitioner cites (Pet. 15) the CAA provision that governs designation of particular areas as "attainment" or "nonattainment" after a NAAQS is promulgated or revised, 42 U.S.C. 7407(d)(1)(A)(i), but petitioner gives no textual, structural, or other reason why that distinct provision should inform the interpretation of the SIP Call provision.

sion as consistent with national standards, disapproved certain aspects, but then added to the SIP revision a provision (a two-year time limit) that the State had not included in its proposal. The Fifth Circuit held that EPA lacked authority to "insist[] upon incorporating into Florida's SIP revision" a provision that the State did not propose and that EPA conceded "d[id] not affect Florida's substantive compliance with the Clean Air Act." *Id.* at 587. In this case, by contrast, EPA properly concluded that the deficiencies in Montana's SIP *did* affect its compliance with national standards.

c. In disputing EPA's finding of substantial inadequacy, petitioner raises various fact-bound objections to particulars of the record on which EPA relied. None of those case-specific contentions warrants further review.

Contrary to petitioner's contentions (Pet. 20), EPA did not "ignor[e]" SO_2 monitoring data when it issued the SIP Call. Rather, as the court of appeals explained, Pet. App. 12a-13a, EPA discussed the "shortcomings" of that information and explained that it was "not practical, given the number and complexity of sulfur dioxide sources, to install a sufficient number of monitors to provide the spatial coverage provided by air quality dispersion models." *Ibid.* (quoting EPA's Technical Support Document). Indeed, EPA noted that monitors in the Billings area were not even located in the areas of maximum SO_2 concentration. C.A. E.R. 137; see Pet. App. 13a. Monitoring has its advantages, as the court of appeals and EPA recognized, but it is not "more accurate" for all purposes than computer modeling, which "can analyze all possible conditions to predict concentrations that may not have occurred yet but could occur in

the future." Pet. App. 13a (quoting 67 Fed. Reg. at 22,185).[3]

Petitioner's argument therefore reduces to a contention that the modeling EPA used in reviewing the adequacy of the Billings/Laurel SO_2 SIP was "unrealistic." Pet. 19-21.[4] Petitioner argues that EPA's guidelines and modeling practices should have led it to use a different

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[3] In the court of appeals, petitioner argued that Congress had implicitly disapproved modeling by amending one provision of the CAA. In this Court, petitioner reframes that argument as a contention (Pet. 18) that Congress's "decision to remove a statutory provision allowing EPA to choose between modeling and monitoring in this context" is a reason to give greater weight to monitoring data. As the court of appeals explained, Pet. App. 14a-15a, petitioner's reliance on that statutory amendment is misplaced. The provision in question formerly defined a "nonattainment area" as "an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any [NAAQS]." 42 U.S.C. 7501(2) (1988). Congress deleted both the references to monitored data and to air-quality modeling, replacing them with a cross-reference to air-quality designations under Section 7407(d). As the court of appeals stated, Congress did not delete the reference to modeling but leave the reference to monitored data intact; it deleted both, refuting any inference that it intended to express a preference between the two. The Senate Report on the 1990 amendment explained that "EPA may rely on any 'sound data' that is available," including, "'where appropriate and necessary, * * * on modeling or on statistical extrapolation.'" Pet. App. 14a-15a (quoting S. Rep. No. 228, 101st Cong., 1st Sess. 15 (1989)).

[4] Petitioner contends (Pet. 19) that EPA should have evaluated the adequacy of the SIP by reference to emission limitations that are not in the SIP. The case petitioner cites involved a different CAA provision that turned on a source's "potential to emit [pollutants,] *considering controls*"—not necessarily federally enforceable controls. *National Mining Ass'n* v. *United States EPA*, 59 F.3d 1351, 1361-1365 (D.C. Cir. 1995) (quoting 42 U.S.C. 7412(a)(1)). Here, by contrast, the adequacy of the SIP is measured by the terms of the SIP.

model, but that those guidelines were misapplied in this case. That contention does not warrant further review. EPA consistently applied its modeling practices, see, *e.g.*, 67 Fed. Reg. at 22,186 (explaining assumptions "based on facts" that inform modeling). But even if it had not, petitioner identifies no legal issue of any significance. The court of appeals did not broadly opine on the substance of modeling data or make new law on the subject. Moreover, the SIP Call in question was finalized a decade ago, and the resulting SIP revisions affected only seven SO_2 emitters in a single region of south-central Montana. Plenary review of this question is not warranted.

Contrary to petitioner's assertion (Pet. 21-22), nothing in the court's decision to uphold the SIP Call has "breath-taking" implications for federalism. As noted, the State of Montana supported the SIP Call when it was made, and the State has never challenged it since. Indeed, the State worked constructively over several years to develop a revised SIP intended to respond to the SIP Call. When EPA approved in part and disapproved in part that revision, the State did not challenge that action. Nor did the State challenge the FIP that EPA subsequently promulgated to fill gaps in the SIP. Petitioner's view of Montana's prerogatives thus is not shared by Montana itself. Cf. *Harbison* v. *Bell*, 556 U.S. 180, 192 n.9 (2009) (rejecting federalism concerns not shared by the affected State).

2. Petitioner also challenges the FIP, asserting that two of its provisions exceed EPA's authority because they go beyond what is minimally necessary to achieve compliance with the NAAQS. The court of appeals did not endorse petitioner's premise or consider its conclusion. This case therefore does not present the question

petitioner raises. In any event, petitioner's contentions lack merit.

a. Petitioner attributes to the court of appeals the view that "EPA can act as a State and go beyond the NAAQS when issuing a FIP." Pet. 29. The Ninth Circuit has previously endorsed that proposition in a different case. See *Central Ariz. Water Conservation Dist.* v. *EPA*, 990 F.2d 1531, 1541 (stating that when EPA issues a FIP, it "'stands in the shoes of the defaulting State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA'") (citation omitted), cert. denied, 510 U.S. 828 (1993). In this case, however, the court of appeals upheld the FIP without relying on, or even mentioning, that reasoning or that precedent. Rather, the court addressed petitioner's challenges to the FIP issue-by-issue, and concluded with respect to each that EPA had acted reasonably to ensure that the SO_2 NAAQS is attained and maintained.

Similarly, in promulgating the FIP, EPA expressly declined to rely on the principle that it could act prophylactically to impose greater emissions controls than necessary to attain or maintain the NAAQS. Although it reserved that authority in the footnote that petitioner partially quotes (Pet. 27), EPA also pointed out that its models showed that the relevant provisions of the FIP would meet the NAAQS almost exactly. See pp. 8-9, *supra*.

For instance, the FIP provision imposing limits on emissions from flaring was not an attempt to achieve greater-than-required emissions reductions. Rather, as the court of appeals pointed out, the FIP adopted the very same 150 lb/3 hour standard that Montana had adopted (though not in its SIP) and on which Montana's attainment model was based. EPA reiterated that, with

this limitation, projected emissions "would exactly meet" the NAAQS. Pet. App. 30a (quoting 73 Fed. Reg. at 21,439).[5]

Thus, neither the FIP itself nor the court of appeals' affirmance of it depends upon the proposition petitioner challenges.

b. In any event, petitioner points to no circuit conflict on the question, and it identifies nothing in the CAA or this Court's decisions that supports its proposed limitation on EPA's authority. In this case, EPA identified an inadequacy in the Montana SIP, and the court of appeals sustained that conclusion. Montana proposed SIP amendments; in a few respects relevant here, EPA disapproved those proposals as inadequate to meet the NAAQS; and the court of appeals sustained that conclusion as well.

EPA then promulgated the FIP to fill the gap and meet the NAAQS, as the CAA required it to do. 42 U.S.C. 7410(c). Indeed, in one respect (*i.e.*, with respect to flaring), EPA adopted the same limitation (150 lb/3 hours) that the State itself had chosen to impose (albeit not as part of its SIP) in order to provide for attainment of the NAAQS. See Pet. App. 23a. Because the FIP "correct[s] all or a portion of an inadequacy in a [SIP], * * * includes enforceable emission limitations * * * , and provides for attainment of the relevant [NAAQS]," it is within EPA's authority. 42 U.S.C. 7602(y). Nothing in the statute supports petitioner's contention (Pet. 25, 27-28) that EPA was required to ensure that it was adopting the *least restrictive* FIP provisions that would

[5] Petitioner's assertion that the restrictions on its auxiliary vent stacks were not necessary to achieve attainment is likewise incorrect. In particular, petitioner's quotation (Pet. 28) is from the SIP disapproval, not from the FIP.

meet the NAAQS. Nor does petitioner identify any appellate decision endorsing that proposition.

As EPA noted, moreover, the FIP will remain in place only until the State promulgates new SIP provisions and obtains the necessary approval. 73 Fed. Reg. at 21,424 (Pet. App. 161a). Even on petitioner's view, the State is free to adopt exactly the same measures as part of its SIP. The effect on petitioner's operations would be precisely the same. And, as explained above, the State has not sought to challenge the FIP as an infringement on its prerogatives under the CAA. Thus, even if EPA had avowedly chosen to adopt FIP provisions going beyond what was necessary to achieve compliance with the NAAQS, further review would not be warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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