ORAL ARGUMENT HELD APRIL 13, 2012
DECISION ISSUED AUGUST 21, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1302 and consolidated cases (Complex)

EME HOMER CITY GENERATION, L.P., et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON PETITIONS FOR REVIEW OF A FINAL RULE PROMULGATED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR REHEARING EN BANC

IGNACIA S. MORENO
Assistant Attorney General
NORMAN L. RAVE, JR.
JESSICA O'DONNELL
JON M. LIPSHULTZ
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-2219

OF COUNSEL

SONJA RODMAN
KAYTRUE TING
RAGAN TATE
STEPHANIE HOGAN
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

DATED: October 5, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EME HOMER CITY GENERATION, L.P., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 11-1302 (and consolidated cases)

RESPONDENTS' CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 27(a)(4), counsel for Respondents United States Environmental Protection Agency and Lisa Jackson, Administrator (collectively "EPA") submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to These Cases

Petitioners

Industry and Labor Petitioners

AEP Texas North Co.
Alabama Power Co.
American Coal Co.
American Energy Corp.
Appalachian Power Co.
ARIPPA
Big Brown Lignite Company LLC
Big Brown Power Company LLC
Columbus Southern Power Co.
Consolidated Edison Company of New York, Inc.
CPI USA North Carolina LLC
Dairyland Power Cooperative
DTE Stoneman, LLC
East Kentucky Power Cooperative, Inc.
EME Homer City Generation, LP.
Entergy Corp.
Environmental Committee of the Florida Electric Power Coordinating Group, Inc.
Environmental Energy Alliance of New York, LLC
GenOn Energy, Inc.
Georgia Power Co.
Gulf Power Co.
Indiana Michigan Power Co.
International Brotherhood of Electrical Workers, AFL-CIO
Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas
Kansas Gas and Electric Co.
Kenamerican Resources, Inc.
Kentucky Power Co.
Lafayette Utilities System

Louisiana Chemical Association
Luminant Big Brown Mining Company LLC
Luminant Energy Company LLC
Luminant Generation Company LLC
Luminant Holding Company LLC
Luminant Mining Company LLC
Midwest Food Processors Association
Midwest Ozone Group
Mississippi Power Co.
Municipal Electric Authority of Georgia
Murray Energy Corp.
National Mining Association
National Rural Electric Cooperative Association
Northern States Power Co. (a Minnesota corporation)
Oak Grove Management Company LLC
Ohio Power Co.
Ohio Valley Coal Co.
Ohio American Energy, Inc.
Peabody Energy Corp.
Public Service Company of Oklahoma
Sandow Power Company LLC
South Mississippi Electric Power Ass'n
Southern Company Services, Inc.
Southern Power Co.
Southwestern Electric Power Co.
Southwestern Public Service Co.
Sunbury Generation LP
Sunflower Electric Power Corp.
Utility Air Regulatory Group
United Mine Workers of America
Utah American Energy, Inc.
Westar Energy, Inc.
Western Farmers Electric Cooperative
Wisconsin Cast Metals Association
Wisconsin Electric Power Co.
Wisconsin Paper Council, Inc.
Wisconsin Manufacturers and
Commerce
Wisconsin Public Service Corp.

State and Municipal Petitioners

City of Ames, Iowa
City of Springfield, Illinois, Office of Public Utilities, doing business as City Water, Light & Power
Louisiana Department of Environmental Quality
Louisiana Public Service Commission
Mississippi Public Service Commission
Public Utility Commission of Texas
Railroad Commission of Texas
State of Alabama
State of Florida
State of Georgia
State of Indiana
State of Kansas
State of Louisiana
State of Michigan
State of Nebraska
State of Ohio
State of Oklahoma
State of South Carolina
State of Texas
State of Virginia
State of Wisconsin
Texas Commission on Environmental Quality
Texas General Land Office

Intervenors in Support of Petitioners

San Miguel Electric Cooperative
City of New York (Nos. 11-1388 and 11-1395 only)
State of New York (Nos. 11-1388 and 11-1395 only)

Respondents

United States Environmental Protection Agency
Lisa P. Jackson, Administrator

Intervenors in Support of Respondents

American Lung Association
Calpine Corporation
Clean Air Council
Environmental Defense Fund
Exelon Corporation
Natural Resources Defense Council
Public Service Enterprise Group, Inc.
Sierra Club
City of Bridgeport, Connecticut
City of Chicago
City of New York (all but Nos. 11-1388 and 11-1395)
City of Philadelphia
Mayor and City Council of Baltimore
State of Connecticut
State of Delaware
District of Columbia
State of Illinois
State of Maryland
Commonwealth of Massachusetts
State of New York (all but Nos. 11-1388 and 1395)
State of North Carolina
State of Rhode Island
State of Vermont

Amici

Putnam County, Georgia
Industrial Energy Consumers of America
Southern Legal Foundation, Inc.

(B) Rulings Under Review

The Agency action under review is "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 Fed. Reg. 48,208 (Aug. 8, 2011).

(C) Related Cases

The case on review has not been previously before this Court or any other Court. Review of three EPA regulations that supplement or modify the rule under review are pending in this Court in Public Service Co. v. EPA, No. 12-1023 and consolidated cases; Wisconsin Public Service Corp. v. EPA, No. 12-1163 and consolidated cases; and Utility Air Regulatory Group v. EPA, No. 12-1346 and consolidated cases.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

DATED: October 5, 2012

/s/ Norman L. Rave, Jr.
NORMAN L. RAVE, JR.
JESSICA O'DONNELL
JON M. LIPSHULTZ
Environmental Defense Section
Environment and Natural Resources Div.
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 616-7568

OF COUNSEL

SONJA RODMAN
KAYTRUE TING
RAGAN TATE
STEPHANIE HOGAN
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Authorities principally relied on are marked with an asterisk.

STATUTES

Clean Air Act:

RULES

FEDERAL REGISTER

Respondent United States Environmental Protection Agency ("EPA") hereby seeks *en banc* rehearing of the Court's August 21, 2012, decision vacating EPA's Cross-State Air Pollution Rule (the "Transport Rule"). Rehearing *en banc* is required to preserve the uniformity of this Court's decisions. See Fed. R. App. P. 35(b)(1)(A); Dissent at 1. The panel's analysis of Clean Air Act ("CAA") state implementation plan ("SIP") requirements and the Act's "contribute significantly" criterion conflicts, *inter alia*, with Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000), and North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008), modified, 550 F.3d 1176 (D.C. Cir. 2008), as well as numerous other decisions that protect the integrity of the administrative and judicial process by strictly construing the Act's jurisdictional and exhaustion requirements. The panel's decision upends the appropriate relationship of the judicial, legislative, and executive branches of government by rewriting clear legislation, ignoring explicit statutory jurisdictional limits, and stepping into the realm of matters reserved by Congress and the courts to the technical expertise of administrative agencies. Especially in light of the enormous public health and regulatory significance of the Transport Rule, these clearly are issues of "exceptional importance." Fed. R. App. P. 35(b)(1)(B).

BACKGROUND

Congress did not itself seek to untangle the web of interstate pollution problems, which involve complex associations between numerous pollutants emitted from sources in multiple "upwind" states and the affected "downwind" states. It instead directed states to submit SIPs that, among other things, prohibit emissions

that "contribute significantly" to the inability of other states to attain or maintain the national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7410(a)(2)(D).

EPA first developed a practical and comprehensive regulatory approach to interstate air pollution issues in the 1998 "NOx SIP Call." EPA used air quality modeling to identify "upwind" states that made more than a threshold contribution to NAAQS nonattainment problems in at least one "downwind" area, and then deemed "significant" (and hence subject to control) only that portion of each identified upwind state's emissions that could be eliminated using "highly cost-effective" controls. This Court upheld this two-step approach in Michigan. 213 F.3d at 677-80. The 2005 Clean Air Interstate Rule, or "CAIR," used a similar approach to address both ozone and fine particulate matter ("$PM_{2.5}$") nonattainment problems. No party challenged the two-step approach in CAIR, and the Court in North Carolina expressly left that aspect of the rule "undisturbed," 531 F.3d at 916-17, when it remanded CAIR on other grounds.

EPA promulgated the Transport Rule in 2011 as the replacement for CAIR, again utilizing the two-step approach (refined to *increase* the emphasis on air quality). The rule included federal implementation plans ("FIPs") where EPA had previously found that the state failed to submit, or EPA had disapproved, a transport SIP. In the instant case, the Court vacated the Transport Rule in an opinion by Judge Kavanaugh (joined by Judge Griffith), holding that the two-step approach did not assure a close enough correlation between each state's degree of contribution and its required

emissions controls, and outlining, essentially *de novo*, its own "proportional" control regime. Op. at 22-40. The majority also held that EPA erred in promulgating FIPs because states are not required to submit SIPs addressing transported pollution until after EPA first quantifies their obligation. Op. at 40-58. Judge Rogers dissented, arguing that the SIP/FIP issue was not properly presented in this case at all, and that even if it was, the majority's reasoning was flatly inconsistent with the statute. Dissent at 5-27. The dissent further argued that Petitioners' challenge to EPA's traditional two-step regulatory approach was waived by failure to comment and foreclosed by Michigan and North Carolina. Dissent at 27-40.

ARGUMENT

I. THE PANEL'S DECISION ON EPA'S AUTHORITY TO ISSUE FIPS IS INCONSISTENT WITH CIRCUIT PRECEDENT.

In holding that EPA lacked authority to promulgate the Transport Rule FIPs, the panel acted contrary to decisions of this Court by (1) reaching out to invalidate EPA actions that were not before the Court and for which the statutory review period had previously run, and (2) exceeding the Court's proper role in statutory interpretation by rewriting the plain language of the Act.

The Act assigns specific roles to EPA and the States and creates an orderly process for them, a process that the panel's decision completely upends. First, the Act requires states, within three years of promulgation of a new or revised NAAQS, to submit a SIP to EPA containing specific provisions, including provisions to

prohibit sources in the state from significantly contributing to nonattainment or interfering with maintenance of a NAAQS in other states. 42 U.S.C. § 7410(a). If states fail to submit a SIP or submit an inadequate one, EPA must make a finding of failure to submit or disapprove the submission. Id. § 7410(k). EPA has an unambiguous mandatory duty to promulgate a FIP within two years of making such a finding or disapproval unless the state has addressed the problem. Id. § 7410(c). For every state for which it promulgated a Transport Rule FIP, EPA had made a formal finding of failure to submit and/or disapproved a SIP, e.g., 75 Fed. Reg. 32,673 (June 9, 2010), and thus had a mandatory duty to promulgate a FIP.

A. The Panel Lacked Jurisdiction To Determine That States Were Not Required To Submit Transport SIPs.

In holding that EPA lacked authority to promulgate FIPs, the panel disregarded the statutory process, the Act's jurisdictional provision that provides that judicial review of EPA action is waived if not brought within 60 days of Federal Register publication of that action, 42 U.S.C. § 7607(b), and decisions of this Court that such provisions must be strictly construed. Specifically, in holding that states are not obligated to submit a transport SIP unless EPA first defines their level of significant contribution, Op. at 45, the panel was overturning, not the Transport Rule that was before it, but rather EPA's earlier findings of failure to submit and SIP disapprovals, which directly relied on EPA's determination that transport SIPs are required regardless of whether EPA had previously quantified a state's significant

contribution to nonattainment in other States. See Dissent at 5-16. EPA's findings of failure to submit and all but three of the SIP disapprovals were not challenged. (These three SIP challenges were not consolidated with this case.) Thus, any challenges to the validity of these actions and to EPA's conclusion that the relevant States had defaulted on their obligation to submit approvable transport SIPs were either waived or not before the panel.

This Court has consistently demanded strict adherence to such jurisdictional limits because they are essential to bringing finality to agency actions. E.g., Med. Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011); Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 682 (D.C. Cir. 2001); see Dissent at 5-6. The panel's attempt to distinguish this precedent, Op. at 58 n.34, illustrates the fundamental flaws in its decision. The panel misstated the statute when it said, "EPA must issue a FIP within two years after a State fails to make a 'required submission' or submits a deficient SIP." The actual trigger for EPA's FIP obligation is when EPA "finds" that the state failed to make a required submission or when it disapproves a SIP. 42 U.S.C. § 7410(c). Only by ignoring the fact that prior EPA action is necessary to trigger the FIP obligation can the panel justify reaching the issue of whether transport SIPs are "required" submissions. EPA made findings of failure to submit or disapproved SIPs for all states subject to Transport Rule FIPs. These findings and disapprovals were final agency actions, were published in the Federal Register, and were subject to the judicial review provisions of the Act. It was in

taking *those* actions that EPA determined that these states were required to submit transport SIPs. The Act and this Court's precedents permit this determination to be reviewed *only* in the context of a petition for review of those actions brought within the statutory time period. See Dissent at 9-16.

B. The Panel Exceeded Its Proper Role In Statutory Interpretation.

The panel's decision violates the fundamental rule that: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (internal citation omitted); see Dissent at 16-17. The language of the Clean Air Act is unambiguous. It says that "[e]ach State *shall* . . . adopt and submit to the Administrator" a SIP within three years of promulgation or revision of a NAAQS. 42 U.S.C. § 7410(a)(1) (emphasis added). It further says that:

> Each such [SIP] shall . . . contain adequate provisions (i) prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will -- (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such [NAAQS].

Id. § 7410(a)(2)(D). Thus, the Act unambiguously requires that transport provisions be submitted within the three-year time frame for section 7410(a) SIP submissions.

Notwithstanding this unambiguous language, the panel rewrote this provision to exempt states from this Congressionally-mandated requirement until EPA determines the extent of that state's significant contribution to nonattainment in other

states. See Dissent at 5-16. Nothing in the statute requires EPA to make such a determination or imposes a deadline for EPA to do so. Thus, under the panel's revision of the statute, states may *never* be obligated to promulgate transport SIPs despite the clear Congressional intent that upwind states address the attainment problems their sources cause in other States by a date certain. Given Congress' recognition of the importance of controlling interstate pollution, it is inconceivable that it would have conditioned this requirement on action by EPA and then given EPA no deadline to take that action. By rewriting the statute to frustrate Congress' intent, the panel exceeded its proper constitutional role. The panel even asserts that EPA's reading of the statute is contrary to the "text and context" of the statute pursuant to step 1 of Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), Op. at 53 n.32. However, both the text and the context of the statute state just the opposite. See Dissent at 21 & n.11.

Moreover, the panel's assertion that developing a SIP for in-state emissions is less complex than developing a transport SIP, Op. at 48, is pure speculation. Many SIPs addressing in-state emissions are based on complex modeling to predict how emissions of numerous pollutants will interact with atmospheric conditions to create, in areas often far from the sources, concentrations of ozone and $PM_{2.5}$. Such modeling must take into account the level of pollutants transported into the State from sources in other States. The Act recognizes the resulting need for coordination, and thus requires that SIPs address not only in-state emissions but also emissions that

impact other states. The panel disrupts that necessary coordination by exempting States from timely submitting their transport SIPs.

The panel also underestimated the ability of states to model interstate transport. Dissent at 21-27. States have considerable expertise in performing air quality modeling and the necessary emissions information from all states is publicly available. See id. at 22-23. Furthermore, numerous states not included in CAIR or the Transport Rule have, on their own, complied with the requirement to submit transport SIPs. E.g., 77 Fed. Reg. 1027 (Jan. 9, 2012).

Finally, the panel's decision is inconsistent with Circuit precedent. In Michigan, the Court rejected claims that the NOx SIP Call violated the cooperative federalism requirements of the Act by prospectively specifying the amount of reductions each State must achieve, holding that section 110 is silent on this issue and that EPA reasonably interpreted its statutory authority to ensure that submitted SIPs adequately prohibit significantly contributing emissions. 213 F.3d at 687; see Dissent at 20-21. Similarly, in Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001), the Court rejected the assertion that principles of cooperative federalism required EPA to allow States to revise their own SIPs before imposing remedies under 42 U.S.C. § 7426, holding that the plain language of the statute could not be ignored for policy concerns. 249 F.3d at 1046-47. That issue is indistinguishable from the one the panel addressed in the exact opposite fashion.

II. THE PANEL'S DECISION ON "SIGNIFICANT CONTRIBUTION" ISSUES VIOLATES APPLICABLE WAIVER, EXHAUSTION, AND LAW-OF-THE-CIRCUIT DOCTRINES

The panel's "significant contribution" analysis misapplies the Act's waiver and exhaustion requirements and ignores settled Circuit precedent in finding an unwritten proportionality requirement in the statute.

A. Petitioners Waived Their Statutory Claims on These Issues.

The CAA specifies that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). This Court has heretofore strictly and consistently applied this provision to enforce repose in rulemaking proceedings and to ensure that agencies have the first opportunity to address alleged flaws.[1] The panel's failure to do so resulted in a decision largely premised on conjecture and speculation rather than record-based facts.

Petitioners challenged EPA's two-step analytical approach primarily on the ground that the emission reductions required as the result of the Agency's cost-effectiveness analysis (the second step of EPA's approach) might, theoretically,

---

[1] See Dissent at 27-29, 38 (citing, inter alia, Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1238 (D.C. Cir. 2004); Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 860 (D.C. Cir. 2001)). Similarly, outside the CAA, this Court and the Supreme Court have long required parties to "forcefully present[ ]" their arguments to the agency at the "appropriate" time in the underlying administrative proceedings before seeking judicial review. Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 655-56 (D.C. Cir. 2011) (citations omitted).

require a state to reduce its emissions below the "first step" screening threshold (i.e., one percent of the applicable NAAQS for at least one upwind-to-downwind linkage), a result Petitioners argued would exceed EPA's statutory authority to regulate only "significant" contributions. See Op. at 31-34 (summarizing these arguments).[2] Petitioners' briefs cited only two rulemaking comments allegedly raising this statutory issue (one from Wisconsin and one from Tennessee).[3] Not only did neither of these comments make Petitioners' statutory argument, but Wisconsin in fact argued that EPA should have adopted *more stringent* controls based on air quality impacts (the opposite of Petitioners' point), see Dissent at 30-31, and Tennessee suggested that emission reductions below the screening threshold could be acceptable policy if they were low in cost. See Dissent at 29.[4]

The panel therefore turned to a comment submitted to EPA many years earlier in the *CAIR* rulemaking (and not in the record for the Transport Rule). Op. at 31-34 & n.18. The panel reasoned that since a CAIR commenter had urged EPA to use the

---

[2] Petitioners did not demonstrate and the panel did not conclude that any state's budget actually pushes emissions below this threshold, and as EPA explained in its brief, data in the record suggest that the rule does *not* have this alleged impact. EPA Br. at 33-34, n.20. See Dissent at 27, n.15.

[3] See State Pet. Reply Br. at 16; Ind. Pet. Reply Br. at 6, n.1 (citing JA 556 (Tennessee comments) and JA 1293 (Wisconsin comments)).

[4] Tennessee simply stated that EPA "should consider" whether less-expensive control strategies could be chosen that would still allow States to reduce their emission down to (or *below*) the level of the screening threshold, a suggestion that, as EPA explained, was entirely *consistent* with the cost-effectiveness approach used in the rule. See JA 1823 (EPA's response to Tennessee's comment).

"step one" screening threshold as a regulatory "floor" for each state's emission budgets, and since the Court had remanded CAIR to EPA for further rulemaking, EPA should be deemed to have "had notice of this issue and could, or should have, taken it into account." Op. at 33, n.18 (citation omitted).

Petitioners clearly waived any arguments based on the CAIR comment.[5] Even if this were not the case, however, the panel wrongly equated Petitioners' present argument (that the statute *requires* EPA to use the step-one screening thresholds as a step-two "significant contribution" floor), with the separate issue of whether, as a matter of policy discretion, it would be reasonable for EPA to choose that or another alternative approach. See Cement Kiln, 255 F.3d at 860-61 (policy comments do not preserve related statutory argument). EPA correctly viewed the *statutory* issue as settled for the Transport Rule, since the position advocated in the cited comment was rejected in CAIR for legal and policy reasons,[6] that determination was not challenged,

---

[5] Petitioners actually waived this argument in two ways -- first, by not presenting it to EPA "during the period for public comment" on the Transport Rule, 42 U.S.C. § 7607(d)(7)(B), and second, by not presenting it to the Court until rebuttal oral argument. See Dissent at 34-35. Indeed, to date Petitioners have never filed or even attempted to file the actual CAIR comment referred to in the docket in this action, and the majority relied entirely on EPA's discussion of this comment in the CAIR preamble. See Oral Arg. Tr. at 89-90.

[6] As the passage from the CAIR preamble cited by the majority makes clear, EPA rejected the comment because, among other things, it believed it to be inconsistent with the Court's analysis in Michigan, which "rejected similar arguments to those raised by commenters." 70 Fed. Reg. 25,162, 25,177 (May 12, 2005). Moreover, as the dissent found, the cited CAIR comment itself was phrased primarily in policy rather than statutory terms. See Dissent at 35-36.

and the Court in North Carolina therefore *expressly* declined to disturb that aspect of the Agency's approach. See Dissent at 32-37 (citing North Carolina, 531 F.3d at 916-17).

EPA's discussion of alternative regulatory approaches in the Transport Rule proposal (see Op. at 33, n.18) *reinforces* rather than undercuts the Agency's position here. The proposal reiterated EPA's view that the two-step approach was legally appropriate and that no compelling policy reasons supported the choice of an alternative.[7] If Petitioners felt that EPA had misconstrued this aspect of Michigan and North Carolina, and that the statute *required* EPA to adopt an alternative regulatory approach, it was their obligation under § 7607(d)(7)(B) to advocate this position "with reasonable specificity" in comments; none did.[8]

The panel's casual approach to waiver and exhaustion issues places the nearly impossible burden on agencies to intuit unstated objections to proposed rules based on the record in a universe of prior proceedings, and it tasks courts with adjudicating very complex regulatory challenges without the benefit of focused rulemaking comments and responses thereto. Moreover, it also tramples on the deferential

---

[7] 75 Fed. Reg. 45,210, 45,298-99 (Aug. 2, 2010); see also JA at 2306-20 (supporting technical document for proposal on these issues, discussing examined alternatives in detail).

[8] The panel's reliance on a comment by Delaware advocating an approach placing more emphasis on air quality than cost also is unavailing. See Op. at 34, n.18. Delaware's comment was never cited by Petitioners, but even if it had been, it at most expressed a policy rather than a statutory objection, and was in any event inconsistent with Michigan. See Dissent at 31, n.16.

standard of review normally due agency rules, especially on issues of statutory construction. See Dissent at 38.

B. The Panel Erred in Choosing its Own Construction of an Ambiguous Statutory Term Over an Agency Construction Previously Upheld by this Court.

The panel also erred in adopting its *own* construction of an ambiguous statutory term (thereby effectively dictating its own policy approach), Op. at 38, rather than following prior decisions of the Court upholding EPA's construction.

SIPs must prohibit emissions that "contribute significantly" to NAAQS nonattainment and maintenance problems in other states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Michigan held that "significant" is ambiguous in this context, and that EPA can permissibly determine the amount of a state's "significant" contribution with reference to the amount of emissions reductions achievable through application of "highly cost-effective" controls. 213 F.3d at 677-79. The Court further held that it was permissible for EPA to apply a *uniform* cost-effectiveness standard (i.e., reductions available for $2,000 per ton) to *all* states subject to the rule notwithstanding the potential lack of proportionality inherent in such an approach.[9] North Carolina

[9] 213 F.3d at 679-80 (recognizing that the EPA approach the Court upheld required that "all of the covered jurisdictions, *regardless of amount of contribution*, reduce their NOx by an amount achievable with 'highly cost-effective controls'" and that "where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures.") (emphasis added).

expressly re-affirmed this aspect of Michigan.[10] The panel's "proportional" approach to significant contribution simply cannot be reconciled with this precedent.[11] EPA, not the Court, is charged with interpreting ambiguous statutory provisions in the first instance, and only the full Court, not a panel, may revisit the central holdings of Michigan and North Carolina.[12]

The panel's proportional regulatory framework, which was never advocated in any rulemaking comments, also raises serious feasibility concerns and practical implications that appear to conflict with the panel's larger holdings.[13] These are

---

[10] North Carolina, 531 F.3d at 917 (noting Michigan's rejection of claims that EPA's approach "was irrational because both smaller and larger contributors had to make reductions achievable by the same highly cost-effective controls.").

[11] The majority also wrongly relied on out-of-context quotes from North Carolina that were, as explained in the Dissent at 33-34, directed at specific features of CAIR that were corrected in the Transport Rule and unchallenged here. As explained above, North Carolina re-affirmed Michigan in respects relevant here, but even if this were not the case, Michigan would still be controlling. See Sierra Club v. Jackson, 648 F.3d 848, 854 (D.C. Cir. 2011) ("when a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail.") (citation omitted).

[12] See Dissent at 41; see also, e.g., LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court.").

[13] See Dissent at 40-41; see also JA 2306-20 (EPA's analysis of prohibitive costs and other concerns regarding such alternative control regimes). For example, there is an inherent conflict between the "proportional" methodology created by the panel and the holding that EPA must seek to minimize collective "over-control," given facts where partially overlapping sets of upwind states contribute to multiple downwind locations with different degrees of severity of nonattainment. Specifically, it is impossible to simultaneously: (1) resolve the collective upwind contribution to nonattainment at the worst affected downwind locations, (2) avoid collective "over-control" at less severely affected downwind locations, and (3) maintain

(footnote continued)

precisely the sorts of problems that Congress sought to avoid by imposing the Act's stringent exhaustion requirements. Certainly, Congress never intended courts to develop regulatory policy out of whole cloth in an area of this significance, but that is precisely the effect of the panel's decision here.

CONCLUSION

For all the foregoing reasons, EPA respectfully requests that the Court grant this petition for rehearing *en banc*.[14]

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/S/ Norman L. Rave, Jr.
NORMAN L. RAVE, JR.
JON M. LIPSHULTZ
JESSICA O'DONNELL
Environmental Defense Section
Environment & Natural Resources Division

"proportionality" of required reductions among the upwind states that contribute to each affected downwind location, because upwind states contributing to multiple downwind locations would face a different "proportional" reduction obligation for each downwind location to which they contribute. The panel's methodology also attributes a much larger amount of a downwind state's problem to the upwind states than did EPA's methodology, see Op. at 25 (assigning to upwind states the *entire amount* by which the downwind State exceeds the NAAQS if the downwind state would attain but for upwind contributions), an approach that cannot be squared with the portions of the opinion suggesting that EPA assigned too much responsibility to upwind states.

[14] Should the full Court decide to grant rehearing, EPA requests the opportunity to submit supplemental briefing given the importance of these statutory and regulatory issues.

United States Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-2219

OF COUNSEL

SONJA RODMAN
KAYTRUE TING
RAGAN TATE
STEPHANIE HOGAN
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

DATED: October 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were today served, this 5th day of October, 2012, through the Court's CM/ECF system on all registered counsel.

/s/ Norman L. Rave, Jr.
NORMAN L. RAVE, JR.
Counsel for Respondent EPA