ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2015

No. 11-1302 and consolidated cases (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
*Petitioners*,
v.
Environmental Protection Agency, *et al.*,
*Respondents*.

On Petitions for Review of a Final Order of the
United States Environmental Protection Agency

# STATE AND LOCAL PETITIONERS' OPENING BRIEF ON REMAND

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

11-1302 (lead), 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, and 11-1395

### (A) Parties, Intervenors, and Amici

**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
**City of Ames, Iowa**
City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light and Power
Columbus Southern Power Co.
Consolidated Edison Company of New York
CPI USA North Carolina LLC
Dairyland Power Cooperative
DTE Stoneman, LLC
East Kentucky Power Cooperative, Inc.
EME Homer City Generation, LP
Entergy Corp.

* The petitioners that join this brief appear in bold.

Environmental Committee of the Florida Electric Power Coordinating Group
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
Kansas Gas and Electric Co.
Kenamerica Resources, Inc.
Kentucky Power Co.
Lafayette Utilities System
Louisiana Chemical Association
**Louisiana Department of Environmental Quality**
**Louisiana Public Service Commission**
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.
**Mississippi Public Service Commission**
Municipal Electric Authority of Georgia
Murray Energy Corp.
National Mining Association
National Rural Electric Cooperative Association
Northern States Power Co.
Oak Grove Management Company, LLC
Ohio Power Co.
Ohio Valley Coal Co.
OhioAmerica Energy, Inc.
Peabody Energy Corp.
Public Service Company of Oklahoma
**Public Utility Commission of Texas**
**Railroad Commission of Texas**

Sandow Power Company, LLC
South Mississippi Electric Power Association
Southern Company Services, Inc.
Southern Power Co.
Southwestern Electric Power Co.
Southwestern Public Service Co.
**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 Wisconsin**
Sunbury Generation LP
Sunflower Electric Power Corp.
**Texas Commission on Environmental Quality**
**Texas General Land Office**
United Mine Workers of America
UtahAmerica Energy, Inc.
Utility Air Regulatory Group
Westar Energy, Inc.
Western Farmers Electric Cooperative
Wisconsin Cast Metals Association
Wisconsin Manufacturers and Commerce
Wisconsin Paper Council, Inc.
Wisconsin Public Service Corp.

**Intervenors for 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)

**Amici for Petitioners**

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

**Respondents**

United States Environmental Protection Agency ("EPA")
EPA Administrator Gina McCarthy (substituted for former EPA Administrator Lisa Perez Jackson)

**Intervenors for Respondents**

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

**(B) Rulings Under Review**

All petitions for review challenge EPA's final rule entitled "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 FR 48,208 (Aug. 8, 2011) ("the Transport Rule"), which appears at pages 277 to 552 of the joint appendix ("JA").

**(C) Related Cases**

All of the petitions for review consolidated under Case No. 11-1302 are related. They have previously been reviewed by both this Court and the Supreme Court. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The Rule 28(a)(1) statement in the Industry and Labor Petitioners' opening brief on remand identifies and describes all other related cases.

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## TABLE OF AUTHORITIES

### Cases



* Authorities upon which we chiefly rely are marked with asterisks.

**Statutes and Rules**

**Federal Regulatory Material**

**Other Authorities**

## GLOSSARY

| | |
|---|---|
| EPA | United States Environmental Protection Agency |
| CAA | Clean Air Act |
| CAIR | Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the $NO_x$ SIP Call, 70 FR 25,162 (May 12, 2005) |
| FIP | Federal Implementation Plan |
| JA | Joint Appendix |
| NAAQS | National Ambient Air Quality Standard(s) |
| SIP | State Implementation Plan |
| Transport Rule | Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals 76 FR 48,208 (Aug. 8, 2011) |

## JURISDICTION

EPA promulgated the Transport Rule on August 8, 2011 under 42 U.S.C. 7601(a). Petitions for review were timely filed on or before October 7, 2011, invoking the Court's jurisdiction under 42 U.S.C. 7607(b)(1).

## ISSUES

1. Whether EPA lacked statutory authority to impose federal implementation plans ("FIPs") with respect to the 1997 national ambient air quality standards ("NAAQS") on States whose state implementation plans ("SIPs") addressing those standards had been fully approved by EPA.

2. Whether EPA's implementation of the good-neighbor provision's "interfere with maintenance" prong, 42 U.S.C. 7410(a)(2)(D)(i)(I), was unlawful.

3. Whether the Transport Rule is invalid as applied to several States.

## STATUTES AND REGULATIONS

The petitioners' joint addendum pursuant to D.C. Circuit Rule 28(a)(5) reproduces the statutes and regulatory material cited in this brief.

## STATEMENT

The facts and procedural history of these consolidated challenges to EPA's Transport Rule are set forth in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11–19 (D.C. Cir. 2012). Although the Supreme Court reversed this Court's judgment vacating the rule, it agreed with significant portions of this Court's

analysis and identified challenges to be resolved on remand. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1599 n.12, 1608–09 (2014).

The first of these challenges concerns EPA's imposition of FIPs with respect to the two 1997 standards on several upwind States even though EPA had fully approved those States' good-neighbor SIP revisions for the 1997 standards. *See id.* at 1599 n.12; 76 FR 48,208, 48,219–22 (Aug. 8, 2011); *see also EME Homer*, 696 F.3d at 31 n.29 (noting this challenge). The second concerns EPA's implementation of the good-neighbor provision's "interfere with maintenance" prong. *See EME Homer*, 134 S. Ct. at 1604 n.18; 76 FR at 48,233–36, 48,246–64; *see also EME Homer*, 696 F.3d at 27 n.25 (noting the limits of EPA's authority under this prong). The third concerns whether the Transport Rule is invalid as applied to several States. *See EME Homer*, 134 S. Ct. at 1608–09; *infra* Part III (citing the portions of the record that support the as-applied challenges presented in this brief).

## SUMMARY

1. EPA's approval of 22 States' Clean Air Interstate Rule ("CAIR") SIP revisions extinguished the agency's authority under 42 U.S.C. 7410(c)(1) to impose Transport Rule FIPs on those States. EPA should have issued a SIP call under section 7410(k)(5), and its invocation of section 7410(k)(6) was unlawful for two

reasons. First, section 7410(k)(6) authorizes EPA to correct errors that were errors at the time they were made, not to retroactively rescind, based on later developments, earlier statements that had unavoidable legal consequences. Second, EPA made its "corrections" without using notice-and-comment rulemaking, but section 7410(k)(6) requires EPA to make any corrections "in the same manner as the approval." EPA's assertion that the SIPs it approved did not correct the deficiency that should have required disapproval is untenable, and because EPA's errors infect a large number of the Transport Rule's nonseverable FIPs, the proper relief is vacatur of the entire rule.

2. In concluding that CAIR was invalid, this Court explained that EPA was required to give independent effect to the good-neighbor provision's "contribute significantly to nonattainment" and "interfere with maintenance" prongs. EPA, however, failed to do so in the Transport Rule. It instead adopted a single methodology for regulating emissions under both prongs, failing to consider whether the Transport Rule's "maintenance" requirements were necessary to prevent upwind emissions from reaching specific downwind maintenance areas and threatening continued NAAQS attainment in those areas. That approach led EPA to require Transport Rule "maintenance" reductions that exceed what the Clean Air Act ("CAA") and circuit precedent permit.

3. The Supreme Court agreed with this Court that EPA may not regulate upwind States under the good-neighbor provision in a manner that is unnecessary to achieve NAAQS attainment in every downwind State to which an upwind State is linked. EPA violated this prohibition with respect to Texas and several other States that were linked to areas already attaining the standards addressed in the Transport Rule.

EPA's promulgation of the Transport Rule also violated notice-and-comment requirements. This challenge, which was raised but not resolved in the initial phase of proceedings before this Court, likewise requires vacatur.

Finally, Kansas and Indiana argue that certain Transport Rule FIPs addressing the 2006 fine-particulate standard are unlawful because EPA's Administrator signed the Transport Rule before the relevant SIP disapprovals were published in the *Federal Register*.

## STANDING

The Courts' opinions in these cases demonstrate the petitioners' standing. Petitioners are the objects of the action at issue, *see Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002), and the Transport Rule injures States by overriding their statutory right to control emissions through SIPs. *See, e.g.*, 76 FR at 48,219–

22. Vacating the rule would provide redress and prompt EPA to reconsider its action. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

## STANDARD OF REVIEW

The Court should vacate the Transport Rule upon concluding that it is arbitrary or capricious, is in excess of EPA's statutory authority, or was promulgated without observance of required procedures. 42 U.S.C. 7607(d)(9).

## ARGUMENT

### I. EPA LACKED STATUTORY AUTHORITY TO IMPOSE FIPS FOR THE 1997 NAAQS ON A MAJORITY OF THE TRANSPORT RULE STATES.

#### A. EPA's Approval Of CAIR SIPs Deprived The Agency Of FIP Authority For 22 Of The 27 Transport Rule States.

1. 42 U.S.C. 7410(c)(1) is the exclusive source of EPA's FIP authority. EPA must promulgate a FIP whenever "a State has failed to make a required [SIP] submission" or EPA "disapproves a [SIP] submission in whole or in part." 42 U.S.C. 7410(c)(1)(A), (B). Section 7410(c)(1)'s final sentence, however, deprives EPA of FIP authority if "the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision, before [EPA] promulgates such [FIP]." "[T]he deficiency" is what allows EPA to make a finding of failure to submit a SIP under section 7410(c)(1)(A) or to disapprove a SIP submission under section 7410(c)(1)(B). *See EME Homer*, 134 S. Ct. at 1594 (explaining that EPA's FIP authority derives from a

determination "that a State has failed to submit an adequate SIP"). A State "corrects th[at] deficiency" by submitting an adequate SIP. 42 U.S.C. 7410(c)(1).

Under 42 U.S.C. 7410(k)(3), EPA has a nondiscretionary duty to approve a State's "[SIP] submittal as a whole if it meets all of the applicable requirements of [the CAA]." And as EPA has explained, "[o]nce a SIP is fully approved, EPA no longer has authority for the FIP[]" that previously governed the State's obligations, and the FIP must therefore be withdrawn. 72 FR 55,659, 55,660 (Oct. 1, 2007) (describing a scenario in which EPA approves SIPs to replace FIPs).

2. In April 2005, EPA issued a blanket finding that "States ha[d] failed" to submit SIPs to satisfy their good-neighbor obligations with respect to the 1997 ozone and fine-particulate NAAQS. 70 FR 21,147, 21,148 (Apr. 25, 2005); *see* JA3167–78. The next month, EPA promulgated CAIR, which defined the 1997-NAAQS good-neighbor SIP requirements for 28 States, giving those States a year and a half to submit SIPs addressing their obligations under CAIR and thus prevent application of CAIR FIPs. 70 FR 25,162, 25,162, 25,167 (May 12, 2005); 71 FR 25,328, 25,328, 25,330, 25,340 (Apr. 28, 2006). Consistent with 42 U.S.C. 7410(c)(1) and (k)(3), EPA explained that approval of CAIR SIPs would extinguish its FIP authority for the 1997 NAAQS and lead to withdrawal of any CAIR FIPs that had already issued. 71 FR at 25,333.

3. In *North Carolina v. EPA,* this Court sustained a number of challenges to CAIR but remanded the rule without vacatur. 531 F.3d 896, 930 (D.C. Cir. 2008), *modified on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). Accordingly, both before and after *North Carolina,* CAIR was effective and binding on EPA and the States. *See* 74 FR 62,496, 62,496 (Nov. 30, 2009).

When presented with CAIR-compliant SIP revisions, EPA thus had a nondiscretionary duty to approve them "as a whole." 42 U.S.C. 7410(k)(3); *see* 74 FR 38,536, 38,537 (Aug. 4, 2009) (confirming that "EPA's role is to approve State choices, provided that they meet the criteria of the [CAA]"). If EPA had concluded that any of those submissions failed to satisfy any portion of a State's 1997 NAAQS good-neighbor obligations as defined in CAIR, EPA's duty would have been to approve the submissions "in part and disapprove [them] in part," 42 U.S.C. 7410(k)(3), preserving EPA's FIP authority (and obligation) to cure the remaining deficiencies.

All told, EPA approved fifteen CAIR SIP revisions before *North Carolina* and seven thereafter. *See* 76 FR at 48,220–21 (citing approvals for Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia). None

of those submissions was disapproved, and none was approved in part and disapproved in part; rather, each of the 22 CAIR SIPs was approved in full. *See id.* In approving these 22 CAIR SIPs, EPA terminated, for each State, its FIP authority arising from the 2005 finding of failure. *See supra* Parts I.A.1–2.

### B. EPA's Efforts To Revive Its 1997 NAAQS FIP Authority With Respect To These 22 States Were Unlawful.

When EPA promulgated the Transport Rule, it recognized the threat to its 1997-NAAQS FIP authority that approval of the 22 States' CAIR SIPs presented. 76 FR at 48,219 (acknowledging comments on this point). But because EPA wanted to maintain a single, accelerated timeline for all of the Transport Rule States, it attempted to "unring the bell" with respect to its CAIR SIP approvals and reclaim FIP authority arising from the 2005 finding of failure to submit SIPs—authority that EPA's CAIR SIP approvals had extinguished. *See id.*; *see also* 76 FR at 48,213 (Table III–1), 48,219 n.12 (reflecting imposition of 1997-NAAQS FIPs on 19 of the 22 States whose CAIR SIPs had been fully approved).

EPA deployed two maneuvers in its effort to accomplish that feat. First, it attempted to invoke 42 U.S.C. 7410(k)(6), *see id.* at 48,217, to alter the past to service its present need by "rescind[ing] any statements [in its CAIR SIP approvals] suggesting that the [CAIR] SIP submissions satisfied or relieved states of the obligation to submit SIPs to satisfy the requirements of [the good-neighbor

provision] or that EPA was relieved of its obligation and authority to promulgate FIPs under [that provision]." *Id.* at 48,219. Second, EPA contended that the CAIR SIPs it had initially approved failed to "correct[] the deficiency," 42 U.S.C. 7410(c)(1)(A), that had prompted it to issue the 2005 finding of failure. 76 FR at 48,219.

As explained below, neither maneuver was lawful. And because the Transport Rule's FIPs are nonseverable, the Court should vacate the entire rule.

**1. Section 7410(k)(6) cannot authorize retroactive—and immediate—nullification of EPA's CAIR SIP approvals.**

a. This is not the first time in recent years that EPA has attempted to stretch the boundaries of its section-7410(k)(6) "[c]orrections" power. In connection with its regulation of greenhouse gases, EPA attempted to wield that power to retroactively change an earlier SIP "full approval" into a "partial approval, partial disapproval." *Texas v. EPA*, 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). Although the *Texas* majority did not address the merits of that effort, *see id.* at 199 (concluding that the petitioners lacked standing), the dissent observed that EPA's invocation of section 7410(k)(6) was improper because, at the time of the full approval, the applicable authorities did not require partial disapproval. *See id.* at 204 (Kavanaugh, J., dissenting).

In *Texas*, EPA thus attempted to use section 7410(k)(6) to retroactively create SIP requirements where none existed before. *See id.* Here, EPA attempted to use section 7410(k)(6) to retroactively alter SIP requirements that *did* exist, had been satisfied, and led to EPA's full approval of 22 SIPs. *See supra* Part I.A. Both invocations of section 7410(k)(6) were unlawful. Because the petitioners here have standing, the Court should hold that EPA lacked statutory authority to impose FIPs on the States subjected to EPA's section-7410(k)(6) treatment in the Transport Rule and, in so doing, prevent further abuse of this provision.

b. Entitled "Corrections," section 7410(k)(6) was intended merely to "enable EPA to deal promptly with clerical errors or technical errors. It [wa]s not intended to offer a route for EPA to reevaluate its policy judgements," Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 ENVTL. L. 1843, 1924–25 (1991), or to give EPA the extraordinary power to undo the legal consequences of its past actions. As the Court has already suggested, the Transport Rule's invocation of section 7410(k)(6) was unlawful for two independent reasons. *See EME Homer City*, 696 F.3d at 31 n.29.

i. Section 7410(k)(6) authorizes corrections only when a past EPA action "was in error," meaning that the action was erroneous under the law in existence

at the time. *See Texas*, 726 F.3d at 204 (Kavanaugh, J., dissenting). The provision cannot be used to rescind key statements in a SIP approval based on subsequent developments in judicial doctrine or agency rulemaking. That is the office of the preceding section, which requires EPA to issue a "SIP call" whenever it finds that a SIP is "substantially inadequate to attain or maintain the relevant [NAAQS] … or to otherwise comply with any requirement of [the CAA]." 42 U.S.C. 7410(k)(5).

Yet EPA relied on section 7410(k)(6), not section 7410(k)(5), reasoning that *North Carolina*'s invalidation of CAIR "meant that the CAIR SIPs were not adequate to satisfy [the good neighbor provision's] mandate." 76 FR at 48,217, 48,219. It bears emphasis, however, that EPA did not stop approving CAIR SIPs when *North Carolina* was decided. As already noted, seven of the subsequently "corrected" approvals post-date *North Carolina*. *See id.* at 48,221. In any event, EPA's reasoning is flawed.

To begin, condoning EPA's use of section 7410(k)(6) would impermissibly allow the Transport Rule to apply retroactively, "altering the past legal consequences of past actions." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis omitted). The Transport Rule altered the past consequences of EPA's CAIR SIP approvals, purporting to make them prolong, rather than terminate, EPA's authority to issue FIPs. *See* 42 U.S.C.

7410(c)(1) (requiring a FIP to issue "within 2 years after" a finding of failure to submit a SIP or a SIP disapproval); 76 FR at 48,219 (referencing the 2005 finding of failure on which EPA premised its 2011 Transport Rule FIP authority for the States subjected to EPA's section-7410(k)(6) treatment, *see* JA3167–78). That contradicts *Bowen*, which forbids retroactive rulemaking absent clear and unambiguous statutory authorization, 488 U.S. at 208, and the Administrative Procedure Act, which defines "rule" as "an agency statement of . . . future effect." 5 U.S.C. 551(4). Furthermore, it exceeds the admitted limits of EPA's authority under section 7410(c)(1). *See* 76 FR at 48,219 & n.15, 48,220 (conceding that EPA lacks statutory authority to restart the "within 2 years" "FIP clock").

EPA's construction of "error" in section 7410(k)(6) also cannot be reconciled with section 7410(k)(5)'s SIP-call provision. Under section 7410(k)(5), EPA "shall" issue a SIP call whenever it finds a SIP "substantially inadequate" to maintain a NAAQS or comply with any CAA requirement. The provision requires EPA to "notify the State of the inadequacies" and provide an opportunity for the State to submit a revised SIP. 42 U.S.C. 7410(k)(5). A FIP cannot issue until *after* EPA finds that the State failed to submit the necessary SIP revisions. 42 U.S.C. 7410(c)(1).

EPA's understanding of the word "error" extends section 7410(k)(6)'s correction power to every circumstance described in section 7410(k)(5). Whenever an EPA-approved SIP is found inadequate to comply with EPA's current understanding of the CAA, EPA can simply declare its earlier approval an "error" and immediately impose a FIP without complying with section 7410(k)(5). That interpretation renders section 7410(k)(5)'s language meaningless and is therefore invalid. *See Davis Cnty. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1404 (D.C. Cir. 1996).

In short, EPA's SIP approvals were not in error when made. They were mandated under section 7410(k)(3), which directs EPA to "approve [a SIP] … if it meets all of the applicable requirements of [the CAA]." Accordingly, EPA could not use section 7410(k)(6) to "correct" its CAIR SIP approvals.

ii. EPA's use of section 7410(k)(6) is unlawful for another, independent reason. Any revisions of past agency action must be made "in the same manner as" the putative erroneous action. 42 U.S.C. 7410(k)(6). Although EPA issued its SIP approvals through notice-and-comment rulemaking, *see, e.g.*, 72 FR at 55,659, its "corrections" did not go through that process. 76 FR at 48,221.

EPA's attempt to invoke the "good cause" exception of 5 U.S.C. 553(b)(B), 76 FR at 48,221–22, fails. Two independent sources of law obligated EPA to use

notice and comment: 5 U.S.C. 553(b), which is subject to a "good cause" exception, and 42 U.S.C. 7410(k)(6), which is not. Agencies do not have a good-cause license to violate their organic statutes.

**2. EPA's "correct[] the deficiency" argument fails.**

As already noted, section 7410(c)(1)'s final sentence revokes EPA's FIP authority when "the State corrects the deficiency" and EPA "approves the [SIP] or [SIP] revision." In the Transport Rule, EPA admitted it had approved the 22 States' CAIR SIPs but nevertheless claimed that, in light of *North Carolina*, those SIPs failed to "correct[] the deficiency," 42 U.S.C. 7410(c)(1), and therefore did not terminate EPA's FIP authority. 76 FR at 48,219. That position is untenable.

Again, "the deficiency" in section 7410(c)(1) is the deficiency that caused EPA to (A) find that a State failed to submit a SIP or (B) disapprove a SIP that was submitted. *See supra* Part I.A.1. It cannot mean a deficiency that arises only upon later developments. A State "corrects the deficiency" by submitting a new SIP that responds to the concerns that prompted EPA to act under section 7410(c)(1)(A) or (B) and that complies with every reasonably knowable legal obligation at the time of EPA's disapproval or finding of failure. Each of the 22 States' SIPs that EPA approved did so. *See supra* Part I.A.2–3.

EPA's construction of section 7410(c)(1) rewrites the statute to require a State to correct all deficiencies that are currently known and that *may become* known. That interpretation departs from the natural reading of the text and would render the final sentence of section 7410(c)(1) useless in constraining EPA's power, allowing the agency to circumvent section 7410(k)(5)'s procedural protections merely by declaring a previously approved SIP deficient. No principle of deference allows an agency to interpret its organic statute in such an atexutal and self-aggrandizing manner.

**3. This error requires vacatur of the entire rule.**

As EPA explained in the Supreme Court, each State's good-neighbor obligations are intertwined with other States' good-neighbor obligations under the 1997 and 2006 NAAQS. *See* Br. for Fed. Pet'rs 45–53, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182); *see also EME Homer*, 134 S. Ct. at 1604 (noting that "the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States"); 76 FR at 48,252–53 (Table VI.B–3 & n.a) (reflecting EPA's conclusion that Transport Rule FIPs requiring more stringent emissions reductions in some States than others will cause emissions shifting, resulting in greater emissions in States whose Transport Rule FIPs are more lenient); *cf. North Carolina*, 531 F.3d at 929 (noting that CAIR's components

"must stand or fall together"). The Transport Rule FIPs, in other words, are nonseverable.

And as already noted, EPA's violation of section 7410(c)(1) affects a substantial portion of the rule. Thirty-one of its fifty-nine FIPs implement good-neighbor obligations under the 1997 NAAQS for States whose CAIR SIPs EPA had previously approved, 76 FR at 48,213 (Table III–1), 48,219 n.12, 48,220–21, and the Transport Rule's regional trading programs for the 1997 standards could not function with a majority of the covered States excluded. Accordingly, the entire rule should be vacated.

## II. EPA'S IMPLEMENTATION OF THE GOOD-NEIGHBOR PROVISION'S "INTERFERE WITH MAINTENANCE" PRONG IS UNLAWFUL.

### A. EPA Was Required To Give The Statute's "Maintenance" Prong Independent Effect.

1. Once EPA promulgates a NAAQS, States must develop "attainment" SIPs that provide for "implementation, maintenance, and enforcement" of the NAAQS. 42 U.S.C. 7410(a)(1). In formulating an attainment plan, a State must impose on its sources "emission limitations and other control measures, means, or techniques … as may be necessary or appropriate to meet the applicable requirements of [the CAA]." 42 U.S.C. 7410(a)(2)(A). Because the NAAQS-pollutant concentrations in each location in a State will reflect contributions from

both in-state emissions and upwind-state emissions, and because States must demonstrate attainment and maintenance of the NAAQS based on existing NAAQS-pollutant concentrations, any State's demonstration will necessarily account for present emissions from existing sources—both within and outside of the State.

When a State is unable to achieve attainment, its SIP must satisfy additional requirements for areas designated "nonattainment." 42 U.S.C. 7410(a)(2)(I), 7502(c). If air quality sufficiently improves, the area may be redesignated from nonattainment to attainment, *see* 42 U.S.C. 7407(d)(3)(E), provided the State submits a "[m]aintenance plan[]" that assures "maintenance of the [NAAQS] … for at least 10 years after the redesignation." 42 U.S.C. 7505a(a); *see* 42 U.S.C. 7407(d)(3)(E)(iv). Maintenance plans must contain "contingency provisions" to ensure that the State will "promptly correct any violation of the [NAAQS]." 42 U.S.C. 7505a(d). Because both attainment plans and maintenance plans contain emissions limitations necessary to maintain NAAQS compliance, and because those NAAQS-compliant levels include emissions contributions from upwind States, only emissions that were *not* considered in the SIP attainment/maintenance demonstration (or in developing any contingency provisions), such as increased

upwind-state emissions, could trigger a requirement for SIP revision. 42 U.S.C. 7410(a)(2)(H)(ii), 7505a(d).

2. The distinction between regulating emissions causing nonattainment and regulating increased emissions that could threaten continued attainment is reflected in the text of the good-neighbor provision, which contains two distinct prongs for addressing emissions from one State that affect air quality in another. The first prong focuses on downwind nonattainment areas, prohibiting all upwind-state emissions that "contribute significantly to nonattainment in … any other State." 42 U.S.C. 7410(a)(2)(D)(i)(I). The second prong focuses on downwind attainment areas and addresses only those upwind-state emissions that will "interfere with maintenance [of NAAQS attainment] by … any other State." *Id.* Because SIPs must assure maintenance of NAAQS-compliant concentrations that include contributions from upwind States, the potential candidates for regulation under the good-neighbor provision's "maintenance" prong are upwind-state emissions greater than those assumed in the upwind-state SIP's attainment/maintenance demonstration.

3. These fundamental differences led the Court to hold in *North Carolina* that the two prongs of the good-neighbor provision must be given separate,

independent meanings. 531 F.3d at 909–10. And as the Court explained earlier in this litigation,

> [t]o require a State to reduce "amounts" of emissions pursuant to the "interfere with maintenance" prong, EPA must show … that those "amounts" from an upwind State … will reach a specific maintenance area in a downwind State and push that maintenance area back over the NAAQS in the near future. Put simply, the "interfere with maintenance" prong of the statute is not an open-ended invitation for EPA to impose reductions on upwind States. Rather, it is a carefully calibrated and commonsense supplement to the "contribute significantly" requirement.

*EME Homer,* 696 F.3d at 27 n.25. To give the "maintenance" prong independent effect, EPA must therefore focus not on upwind-state emissions that were already accounted for in developing attainment SIPs, but instead on any additional upwind-state emissions that would increase downwind concentrations not considered in the attainment/maintenance demonstration. Reductions are required only where increased upwind-state emissions "will … interfere" with continued NAAQS attainment "by … any [downwind] State." 42 U.S.C. 7410(a)(2)(D)(i)(I); *see, e.g.*, JA3210–22 (EPA memo describing maintenance-plan requirements for areas redesignated attainment).

### B. EPA's Implementation Of The "Maintenance" Prong Is Contrary To The Text Of The Statute And This Court's Precedent.

Rather than recognizing the distinct focus of the "maintenance" prong, EPA simply adopted the same methodology used to implement the statute's "contribute significantly" prong, with the exception that EPA used more stringent ambient thresholds to establish "maintenance" linkages. 76 FR at 48,233–36. Like EPA's significant-contribution methodology, EPA's maintenance methodology evaluates total emissions from an upwind State (*i.e.*, all mobile, residential, industrial, and utility-sectors emissions). *Id.* at 48,224–25. When those upwind-state emissions are projected to contribute concentrations that exceed "one percent" of the rule's ambient threshold, EPA's "maintenance" methodology mandates "cost-effective" reductions in total utility-sector upwind-state emissions but no reductions in upwind emissions from any other sector. *Id.* at 48,246–64. This "contribute significantly" approach to "interfere with maintenance" violates *North Carolina* and runs afoul of the CAA in several respects.

1. To begin, EPA's approach violates the text of the good-neighbor provision by failing to identify and analyze only those upwind emissions that might actually threaten continued attainment. Upwind-state emissions that contribute to concentrations that are below the NAAQS in a downwind State, and that have already been accounted for in that State's attainment demonstration, cannot, by

definition, "interfere with maintenance." Moreover, EPA's methodology ignores the fundamental difference between areas that are meeting NAAQS and areas that are not. In nonattainment areas, because the air-quality status quo is unacceptable, all emissions contributing to nonattainment are targeted for reduction. 42 U.S.C. 7502(c)(1), (c)(6). In areas that have attained standards, by contrast, the air-quality status quo is the regulatory end sought by Congress, and only increased emissions that threaten that status quo "interfere with maintenance" of the NAAQS and thus are targets for additional regulation. *See* 42 U.S.C. 7407(d)(3)(E)(iv), 7505a.

Yet EPA's "maintenance" methodology requires substantial reductions in upwind-state utility emissions without regard to whether concentrations resulting from those emissions were accounted for in the attainment-plan or maintenance-plan demonstration for the downwind attainment area. Nothing in EPA's methodology is directed at identifying increased upwind-state emissions that threaten to "push … [a downwind-state attainment] area back over the NAAQS in the near future." *EME Homer*, 696 F.3d at 27 n.25. And a methodology that focuses exclusively on the utility sector for emissions reductions, when emissions from other sectors (e.g., mobile sources) may dominate contributions to downwind-state attainment areas, is not capable of targeting those emissions reductions that the

"maintenance" analysis required by the language of the Act would select for regulation.

2. The example of Allegan County, Michigan, illustrates how far EPA departed from the statute. In 2010, EPA redesignated Allegan County from nonattainment to attainment of the 1997 ozone standard. 75 FR 58,312, 58,312–13 (Sept. 24, 2010). In so doing, EPA approved Michigan's maintenance plan for the area, based on a demonstration that ozone concentrations caused by local and upwind-state emissions would register attainment through 2021 by a wide margin. *Id.*; *see* 75 FR 42,018, 42,026–28 (July 20, 2010) (proposed rule). To assure attainment beyond 2021, a contingency plan targeted local volatile-organic-compound emissions for possible future reductions. *See* 75 FR at 42,028–29. According to the maintenance plan, further nitrogen-oxides reductions would have no impact on attainment of the ozone NAAQS in Allegan County. *See id.* at 42,027.

Without regard to this EPA-approved Allegan County maintenance plan, the Transport Rule's "interfere with maintenance" methodology imposes substantial upwind reductions in utility-sector nitrogen-oxides emissions, ignoring the volatile-organic-compound reductions called for in the Allegan County contingency plan and making no attempt to evaluate the importance of upwind utility-sector nitrogen-oxides emissions relative to other upwind emissions that were linked to

Allegan County. *See* 76 FR at 48,233–36. As a result, the Transport Rule's methodology mandates significant reductions in upwind utility-sector nitrogen-oxides emissions that are not necessary to prevent a violation of the ozone NAAQS in Allegan County. 75 FR at 42,027.

More specifically, the Transport Rule targeted nine upwind States (Arkansas, Illinois, Indiana, Iowa, Kansas, Missouri, Oklahoma, Texas, and Wisconsin) for the same nitrogen-oxides emissions reductions that would be required if Allegan County were subject to a nonattainment plan. *See* 76 FR at 48,246 (Table V.D–9). Yet EPA made no showing that these utility-sector emissions threaten to create downwind-state nonattainment "in the near future" (or, for that matter, at any more distant time). *EME Homer*, 696 F.3d at 27 n.25. This is not how the CAA works. Indeed, as EPA has recognized, "applying controls on upwind sources in these circumstances not only could be environmentally unnecessary, but could even create a perverse incentive for downwind states to increase local emissions." 71 FR at 25,337.

In short, EPA unlawfully failed to adopt a methodology for the good-neighbor provision's "maintenance" prong that gives that prong independent meaning and comports with the statute as a whole. That deficiency requires vacatur of the Transport Rule.

## III. AT THE VERY LEAST, THE TRANSPORT RULE IS INVALID AS APPLIED TO SEVERAL PETITIONERS.

### A. The Transport Rule Violates This Court's And The Supreme Court's Express Prohibitions.

After agreeing with this Court that "EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set," *EME Homer*, 134 S. Ct. at 1608; *accord EME Homer*, 696 F.3d at 20–26, 27–28, the Supreme Court recognized the potential for valid as-applied challenges based on these core principles. 134 S. Ct. at 1609. As explained below, several such challenges are valid.

#### 1. The Transport Rule is invalid as applied to Texas.

Texas is an exception to the Supreme Court's general observation that "individual upwind States often 'contribute significantly' to nonattainment in multiple downwind locations." *Id.* at 1608. In the Transport Rule, EPA determined that Texas contributed significantly to nonattainment of the 1997 fine-particulate standard at the Madison, Illinois monitor alone. 76 FR at 48,241 (Table V.D–2). Similarly, EPA identified East Baton Rouge, Louisiana, as Texas's single ozone nonattainment linkage. *Id.* at 48,246 (Table V.D–8); *see also id.* at 48,246 (Table V.D–9) (linking Texas to Allegan, Michigan for ozone maintenance, rather than

nonattainment); *supra* Part II.B.2 (explaining why Allegan was not a proper maintenance linkage).

As explained in Part I.A of the Industry and Labor Petitioners' opening brief on remand, EPA over-controlled Texas for both fine particulate matter and ozone. And in light of Texas's single nonattainment linkages for the two 1997 NAAQS, the Supreme Court's discussion of permissible over-control is inapplicable to Texas. *See EME Homer*, 134 S. Ct. at 1608–09 & n.22 (reflecting that over-control with respect to one downwind location is permissible only as a byproduct of EPA's efforts to ameliorate air pollution at one or more downwind linkages with more substantial problems).

In short, the Transport Rule FIPs for Texas are based on unlawful linkages and impermissibly over-control Texas emissions. In Texas's view (unlike that of the Industry and Labor Petitioners), this error requires vacatur, at a minimum, of the Transport Rule FIPs for Texas, without remand for mere expansion of Texas's Transport Rule emissions budgets.[1]

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1. Louisiana also asserts that it should never have been included in the Transport Rule. EPA's Integrated Planning Model ("IPM") data is flawed. "Real world" data shows that Louisiana's emissions fall below the 1% significance threshold established by EPA with respect to every downwind State to which Louisiana was linked. *See* Louisiana's Motion For Stay, or, In the Alternative, For Expedited Review (Doc. No. 1334498) at 6–9. In support of its position, Louisiana

### 2. The Transport Rule is invalid as applied to States linked to areas not designated "nonattainment."

As already noted, EPA must designate areas within a State's borders that are not meeting a NAAQS as "nonattainment" areas. 42 U.S.C. 7407(d). The remainder of the State must be designated "attainment" or "unclassifiable." *Id.* After designations are made, "[t]he Act … shifts the burden to States to propose [SIPs] adequate for compliance with the NAAQS." *EME Homer*, 134 S. Ct. at 1594. SIP requirements to protect areas designated "attainment" or "unclassifiable" are distinct from SIP requirements for nonattainment areas, both in terms of in-state emissions and transported emissions. *See* 42 U.S.C. 7410(a)(2)(A), 7410(a)(2)(I). A contribution to a downwind area designated "attainment" cannot, as matter of law, be a significant contribution to *nonattainment*.

In the Transport Rule, however, EPA imposed significant-contribution reduction obligations for the 2006 fine-particulate NAAQS based on linkages to three areas (the Madison and Cook areas in Illinois and the Marion area in Indiana, *see* 76 FR at 48,242–43 (Table V.D–5)) that EPA has never designated "nonattainment" for that standard. *See* EPA, Green Book, PM-2.5 (2006 Standard) Area Information, http://www.epa.gov/airquality/greenbook/rindex.

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incorporates the arguments advanced in Part II.A of the Industry and Labor Petitioners' opening brief on remand.

html (last visited December 10, 2014). Each of these areas has been designated either "attainment" or "unclassifiable" since August 2011, when EPA published the Transport Rule. *See id.* EPA thus had no authority to mandate "significant contribution" reductions based on linkages to any of these areas. This error infects the 2006-NAAQS FIPs for Alabama, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin. *See* 76 FR at 48,242–43 (Table V.D–5).

Similarly, EPA took final action approving several area redesignations from nonattainment to attainment of Transport Rule NAAQS while the rule was on judicial review. 79 FR 22,415 (Apr. 22, 2014) (Milwaukee, WI); 79 FR 15,019 (Mar. 18, 2014) (Brooke, WV); 78 FR 57,270 (Sept. 18, 2013) (Cuyahoga, OH); 78 FR 53,272 (Aug. 29, 2013) (St. Clair, MI; Wayne, MI); 78 FR 5,306 (Jan. 25, 2013) (Jefferson, AL (2006 fine-particulate NAAQS)); 78 FR 4,341 (Jan. 22, 2013) (Jefferson, AL (1997 fine-particulate NAAQS)); 76 FR 74,000 (Nov. 30, 2011) (East Baton Rouge, LA). The reductions now scheduled to begin January 1, 2015 based on "nonattainment" linkages to these areas, *see* 76 FR at 48,241–46 (Tables

V.D–2, V.D–5, V.D–8); Order 3, *EME Homer*, No. 11-1302 (Oct. 23, 2014) (Doc. No. 1518738) (granting EPA's motion to lift the stay), are likewise unlawful.[2]

**B. EPA Violated Notice-And-Comment Requirements.**

42 U.S.C. 7607(d)(3)'s notice requirements are "more stringent" than the Administrative Procedure Act's. *Union Oil Co. v. EPA*, 821 F.2d 678, 681–82 (D.C. Cir. 1987). A final rule must be a "logical outgrowth" of the proposed rule. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518–19, 548 (D.C. Cir. 1983).

EPA made substantial, undisclosed revisions to the Transport Rule's substance and methodology. Between proposal and finalization, EPA changed "both steps of its significant contribution analysis," altering its "modeling platforms and modeling inputs" and "its analysis for identifying" significant contribution and maintenance-interference. 76 FR at 48,213. The final rule was thus "significantly different … than originally proposed," JA3493, and many of its requirements were dramatically more stringent. Numerous States suffered material emissions-budget cuts between the proposed and final rules because of these

2. EPA disregarded emissions inventories, including upwind-state emissions inventories, established through the redesignation process. *See, e.g.*, 79 FR at 22,415 (approving Wisconsin's emissions inventories). By definition, these inventories are sufficient to demonstrate attainment; any more-restrictive Transport Rule budgets constitute over-control.

changes. Ohio's sulfur-dioxide budgets, for example, were slashed by 33% for 2012 and 23% for 2014 and beyond. *Compare* 75 FR 45,210, 45,291 (Table IV.E–1) (Aug. 2, 2010), *with* 76 FR at 48,269 (Table VI.F–1).

EPA's notice violation was pronounced with respect to Texas. EPA proposed to exclude Texas from the Transport Rule's sulfur-dioxide and annual nitrogen-oxides programs based on modeling reflecting that Texas emissions do not significantly contribute to nonattainment of the fine-particulate standard. 75 FR at 45,255–67, 45,282–84. Yet in the final rule, EPA included Texas as a "significant contributor" of fine particulate matter based on data from a single downwind monitor. 76 FR at 48,241 (Table V.D–2). It also established sulfur-dioxide and annual nitrogen-oxides emissions budgets for Texas, imposing reductions that were not subject to notice and comment. *Id.* at 48,305–06 (Tables VIII.A–3, VIII.A–4); *see* 75 FR at 45,291 (Table IV.E–1), 45,309 (reflecting proposed annual emissions budgets for every Transport Rule State except Texas).

With proper notice, Texas stakeholders would undoubtedly have pointed out that the single monitor to which the State was "significantly" linked was already in attainment status for the fine-particulate standard and was heavily influenced by a local steel mill. *See* 76 FR 29,652, 29,652–53 (May 23, 2011). And although EPA initially "requested comment on whether Texas should be included in the

Transport Rule for annual [fine particulate matter]," 76 FR at 48,214, it conceded that the sole basis for that request was irrelevant to EPA's actual basis for including Texas in the final rule. *See* 75 FR at 45,284; JA1872. Interested parties could be expected to comment only on the monitors that the proposed rule linked to their home States—not on those that, under entirely different models, *might* be linked. *Small Refiner*, 705 F.2d at 549 (requiring reasonable specificity for the range of alternatives under consideration). States cannot be required to provide comments on the entire universe of air-quality monitors. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (explaining that notice-and-comment rulemaking is not a "guessing game" forcing conjecture on a subject that *might* be addressed).

EPA also introduced a new "emissions leakage" methodology as a basis for determining significant contributions. 76 FR at 48,263. When modeled, emissions from Arkansas, Indiana, Louisiana, Maryland, and Mississippi were not found to significantly contribute to downwind nonattainment because those States had no cost-effective reductions available. *Id.* But EPA ultimately regulated the States based on ill-defined "interstate shifts in electricity generation that cause 'emissions leakages.'" *Id.* This concept did not appear in the proposed rule. *See id.*

Finally, whereas the proposed rule contemplated only one phase of reductions for "Group 2" sulfur-dioxide States, 75 FR at 45,216, the final rule

imposed two phases. 76 FR at 48,214. That change likewise fails the "logical outgrowth" test. EPA announced for the first time at finalization that Georgia's 2014 sulfur-dioxide budget must drop significantly from 2012 to 2014 (even though the State had been moved out of "Group 1") to prevent other sources from offsetting planned emissions reductions under non-Transport Rule requirements. *Id.* at 48,261. But the Court has been clear that switching to a new methodology in a final rule "does not advise interested parties how to direct their comments," thus denying them adequate notice. *Envtl. Integrity Project*, 425 F.3d at 998. Individually and in combination, the States' lack of notice requires vacatur. *See id.*

### C. EPA Lacked Authority To Promulgate Certain FIPs With Respect To The 2006 NAAQS.[3]

Transport Rule FIPs addressing the 2006 fine-particulate standard were signed by the EPA Administrator on July 6, 2011. *See* 76 FR at 48,353. Two weeks *later*, EPA published in the *Federal Register* disapprovals of good-neighbor SIPs submitted by Kansas, Indiana, and eight other States covered by the 2006 fine-particulate FIPs. *See, e.g.*, 76 FR 43,143 (July 20, 2011). As the Supreme Court observed in *Train v. NRDC*, EPA "may devise and promulgate" a FIP "*only if* a State fails to submit [a SIP] which satisfies [the section-7410] standards." 421 U.S.

3. This argument is presented on behalf of Kansas and Indiana only.

60, 79 (1975) (emphasis added). Because EPA's FIP authority was never "triggered" under 42 U.S.C. 7410(c), the 2006 NAAQS FIPs promulgated for these ten states must be vacated.

As the Supreme Court observed in *EME Homer*: "EPA's FIP authority is triggered at the moment the Agency disapproves a SIP." 134 S. Ct. at 1598. But the "moment" before EPA disapproves a SIP, its FIP rulemaking authority does not exist. From its inception in 1970, section 7410 has authorized EPA to initiate a FIP rulemaking *only after* EPA has taken final rulemaking action disapproving a submitted SIP. *See, e.g.*, *Train*, 421 U.S. at 79; 42 U.S.C. 1857c-5(c)(1) (1970). In 1990, Congress extended the FIP-promulgation schedule from 120 days to 2 years, allowing States more time to resubmit SIPs that would cure the deficiencies identified by EPA in the SIP disapproval that triggered the FIP rulemaking. 42 U.S.C. 7410(c)(1). While this 1990 change did not address the proposal date for FIPs, nothing in the history of the amendment suggests that it was intended to change the state-federal SIP/FIP relationship to allow EPA to "devise" a FIP prior to disapproval of a SIP. As this Court has recognized, the 1990 "changes to section [74]10, at least as they concern EPA's approval of [SIPs], … did not alter the division of responsibilities between EPA and the states in the section [74]10

process." *Virginia v. EPA*, 108 F.3d 1397, 1409, 1410 (D.C. Cir. 1997). Accordingly, EPA's action in promulgating these FIPs is contrary to section 7410(c).

## CONCLUSION

The Court should vacate the Transport Rule in whole or part.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that this brief has been prepared in Microsoft Word using 14-point Equity typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 6,808 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). The combined word count of the Industry and Labor Petitioners' opening brief on remand and this brief does not exceed 14,000, as mandated by this Court's October 23, 2014 order (Doc. No. 1518738). Microsoft Word was used to compute the word count.

/s/ Bill Davis
Bill Davis

## CERTIFICATE OF SERVICE

On December 10, 2014, this brief was served via CM/ECF on all registered counsel.

/s/ Bill Davis
Bill Davis