ORAL ARGUMENT SCHEDULED FOR APRIL 13, 2012
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.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents.

On Petition for Review of Environmental Protection Agency Final Action
76 Fed. Reg. 48,208

STATE AND LOCAL PETITIONERS' REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Acting Deputy Attorney General
for Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

JON NIERMANN
Chief, Environmental Protection
Division

BILL DAVIS
Assistant Solicitor General

JOHN SCHARBACH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1896
[Fax] (512) 370-9191
Bill.Davis@texasattorneygeneral.gov

COUNSEL FOR STATE AND LOCAL PETITIONERS

[Additional Counsel Listed on
Following Pages]

ADDITIONAL COUNSEL

State of Alabama
Luther J. Strange, III
Attorney General of Alabama
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36104
Tel.: (334) 242-7300
Fax: (334) 242-2433

City of Ames, Iowa
Leslie Sue Ritts
RITTS LAW GROUP, PLLC
620 Fort Williams Parkway
Alexandria, VA 22304-0000
Tel.: (703) 823-2292
Fax: (571) 970-3721
lsritts@rittslawgroup.com

State of Florida
Pamela Jo Bondi
Attorney General of Florida
Jonathan A. Glogau
Chief, Complex Litigation
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel.: (850) 414-3300, ext. 4817
Fax: (850) 414-9650
jon.glogau@myfloridalegal.com

State of Georgia
Samuel S. Olens
Attorney General of Georgia
Isaac Byrd
Deputy Attorney General
John E. Hennelly
Senior Assistant Attorney General
Diane DeShazo
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, GA 30334-1300
Tel.: (404) 657-3977
Fax: (404) 651-6341
ddeshazo@law.ga.gov

State of Indiana
Thomas M. Fisher
Solicitor General of Indiana
Valerie Marie Tachtiris
Deputy Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
Fifth Floor
Indiana Government Center South,
302 West Washington Street
Indianapolis, IN 46204-2770
Tel.: (317) 232-6290
Fax: (317) 232-7979
Valerie.Tachtiris@atg.in.gov

State of Kansas
Jeffrey A. Chanay
Deputy Attorney General
Civil Litigation Division
OFFICE OF THE ATTORNEY GENERAL
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Tel.: (785) 296-2215
Fax: (785) 291-3767
jeff.chanay@ksag.org

Henry V. Nickel
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20037
Tel.: (202) 955-1500
Fax: (202) 778-2201
hnickel@hunton.com

George P. Sibley, III
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23221
Tel.: (804) 788-8200
Fax: (804) 343-4869
gsibley@hunton.com

State of Louisiana
James D. "Buddy" Caldwell
Attorney General
Megan K. Terrell
Chief, Environmental Section
OFFICE OF THE ATTORNEY GENERAL
1885 North Third Street
Baton Rouge, LA 70802-0000
Tel: (225) 326-6085
Fax: (225) 326-6099
terrellm@ag.state.la.us

Louisiana Department of Environmental Quality
Herman Robinson
Executive Counsel
Jackie Marie Scott Marve
Deidra L. Johnson
Kathy M. Wright
Donald James Trahan
Legal Division
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
602 North Fifth Street
Baton Rouge, LA 70802
Tel.: (225) 219-3985
Fax: (225) 219-4068
jackie.marve@la.gov
herman.robinson@la.gov
deidra.johnson@la.gov
kathy.wright@la.gov
donald.trahan@la.gov

Louisiana Public Service Commission
David Richard Taggart
Jeffrey Winston Price
BRADLEY MURCHISON KELLY & SHEA LLC
401 Edwards Street, Suite 1000
Shreveport, LA 71101
Tel.: (318) 227-1131
dtaggart@bradleyfirm.com
jprice@bradleyfirm.com

State of Michigan
John Joseph Bursch
Solicitor General of Michigan
Neil David Gordon
Assistant Attorney General
Sean Peter Manning
Chief, Environmental, Natural Resources, and Agriculture Division
OFFICE OF THE ATTORNEY GENERAL
State of Michigan
525 West Ottawa Street, 7th Floor
P.O. Box 30212
Lansing, MI 48909
Tel.: (517) 373-3826
Fax: (517) 373-3042
burschj@michigan.gov
gordonn1@michigan.gov
manningp@michigan.gov

Mississippi Public Service Commission
Harold Edward Pizzetta, III
Special Attorney to the Attorney General
OFFICE OF THE ATTORNEY GENERAL
Civil Litigation Division
P.O. Box 220
Jackson, MS 39205
Tel.: (601) 359-3680
Fax: (601) 359-2003
hpizz@ago.state.ms.us

State of Nebraska
Jon Cumberland Bruning
Attorney General of Nebraska
Katherine Jean Spohn
Special Counsel to the Attorney General
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920
Tel.: (402) 471-2834
Fax: (402) 471-2957
katie.spohn@nebraska.gov

State of Ohio
Dale T. Vitale
Gregg H. Bachmann
Chris Kim
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
30 East Broad Street
Columbus, OH 43215-3428
Tel: (614) 466-2766
Fax: (614) 644-1926
dale.vitale@ohioattorneygeneral.gov
gregg.bachmann@ohioattorneygeneral.gov
chris.kim@ohioattorneygeneral.gov

State of Oklahoma
Thomas Bates
Chief, Public Protection Unit
Patrick Wyrick
Solicitor General of Oklahoma
P. Clayton Eubanks
Assistant Attorney General
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
Tel.: (405) 522-8992
Fax: (405) 522-0085
clayton.eubanks@oag.ok.gov
tom.bates@oag.ok.gov
patrick.wyrick@oag.ok.gov

City of Springfield, Illinois, Office of Public Utilities (d/b/a City Water, Light & Power)
Henry V. Nickel
George P. Sibley, III
HUNTON & WILLIAMS LLP
(See above)

State of South Carolina
Alan Wilson
Attorney General of South Carolina
James Emory Smith, Jr.
Assistant Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, SC 29211
Tel.: (803) 734-3680
Fax: (803) 734-3677
agesmith@scag.gov

State of Virginia
Kenneth T. Cuccinelli, II
Attorney General of Virginia
E. Duncan Getchell, Jr.
Solicitor General of Virginia
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Tel.: (804) 786-2436
Fax: (804) 786-1991
dgetchell@oag.state.va.us

State of Wisconsin
Thomas James Dawson
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857
Tel.: (608) 266-8987
Fax: (608) 266-2250
dawsontj@doj.state.wi.us

[The Public Utility Commission of Texas, the Railroad Commission of Texas, the Texas Commission on Environmental Quality, and the Texas General Land Office are represented by the counsel appearing on the cover of this brief.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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

Clean Air Act

Other Statutes

Federal Register

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
CAIR	Clean Air Interstate Rule (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 Fed. Reg. 25,162 (May 12, 2005))
CSAPR	Cross-State Air Pollution Rule (Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone, and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011))
EGU	Electric generating unit
EPA	United States Environmental Protection Agency
EPA Br.	Respondents' brief (Doc. No. 1361451)
FIP	Federal implementation plan
Industry Br.	Industry and Labor Petitioners' opening brief (Doc. No. 1357526)
IPM	Integrated Planning Model
JA	Joint Appendix
NAAQS	National ambient air quality standard(s)
NODA	Notice of Data Availability
NO_X	Nitrogen oxides
NO_X SIP Call	Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group

	Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998)
$PM_{2.5}$	Fine particulate matter (less than 2.5 micrometers in diameter)
Proposed Rule	Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210 (Aug. 2, 2010)
Response to Comments	EPA, Response to Comments on the Proposed Transport Rule, EPA-HQ-OAR-2009-0491-4513 (Aug. 2, 2010)
SIP	State implementation plan
State Br.	State and Local Petitioners' opening brief (Doc. No. 1357570)
State Int.-Resp. Br.	State Intervenor-Respondents' brief (Doc. No. 1362256)
SO_2	Sulfur dioxide
VOC	Volatile organic compound

SUMMARY OF THE ARGUMENT

CSAPR fails for several reasons. Its FIP-first approach violates the CAA's cooperative federalism, its provisions regarding significant contribution and interference with maintenance are not true to statutory text, and numerous notice problems marred the rulemaking process that produced it. Extensive though they are, EPA's attempts to save the rule are unavailing.

In response to the State and Local Petitioners' challenge to CSAPR's issuance of FIPs before calling for SIPs, EPA asserts that the CSAPR States' failure to submit approvable SIPs triggered its duty to promulgate FIPs. But the States never had a chance to submit SIPs addressing CSAPR's requirements; EPA's FIPs unlawfully imposed requirements that did not exist when States were required to revise their SIPs. And nothing in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), authorized EPA to bypass the role reserved for the States in the section-110 regulatory program.

EPA's lengthy defense of CSAPR's attempted implementation of section 110(a)(2)(D)(i)(I)'s "contribute significantly" language likewise fails. EPA relies heavily on *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam), all but ignoring the Court's subsequent decision in *North Carolina*, which clarified *Michigan* in ways that CSAPR cannot survive. And EPA's appeal to the purported reasonableness of CSAPR's approach does not excuse the rule's departure from section 110(a)(2)(D)(i)(I)'s text.

CSAPR's provisions addressing "interfere[nce] with maintenance" are likewise invalid. Instead of following the Court's instruction in *North Carolina* to give

independent meaning to this statutory phrase, CSAPR implements the maintenance language in the same manner in which it implements section 110(a)(2)(D)(i)(I)'s "contribute significantly" language and fails to account for important distinctions the CAA creates between attainment and nonattainment areas.

Finally, EPA cannot deny the notice violations that the State and Local Petitioners noted in their opening brief. Conceding that CSAPR differed substantially from the Proposed Rule, EPA claims that all of the relevant changes were disclosed through NODAs. But the cited NODAs, which essentially told stakeholders that there were vaguely described needles buried somewhere in the CSAPR docket's haystack, hardly satisfied the CAA's stringent notice requirements. And EPA's attempts to explain the Proposed Rule's failure to disclose any "significant" $PM_{2.5}$ linkage for Texas or provide the State with proposed annual SO_2 and NO_X emissions budgets fall conspicuously short of what CAA section 307(d) requires.

ARGUMENT

I. EPA Lacked Authority to Impose the CSAPR FIPs.

Throughout its brief, EPA recites in various ways the mantra "when a State fails to submit an approvable SIP, EPA must promulgate a FIP." *See, e.g.*, EPA Br. at 45. But that mantra fails to engage Petitioners' fundamental point: The content required of a SIP limits the content allowed in a FIP. Because CSAPR's FIPs establish new requirements

that no CSAPR State was called upon to include in its prior SIP submission, the CSAPR FIPs exceed EPA's authority.

A. EPA's FIPs Cannot Address Requirements That Were Not Defined When CSAPR States Were Required To Submit Revised SIPs.

Section 110 is not self-executing. Under the section-110 regulatory program, EPA's primary role is to promulgate legislative rules defining air-pollution requirements. The States then have the primary responsibility to implement those requirements through SIPs. If a State fails to submit a SIP that satisfies EPA's rules, EPA must adopt a FIP under section 110(c). But the scope of that FIP is determined by the scope of the State's SIP obligation. A FIP is a "plan (or portion thereof) promulgated by the Administrator *to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy*" in a State submission. 42 U.S.C. § 7602(y) (emphasis added). FIPs, in other words, focus exclusively on a "deficiency" in implementing an EPA rule that a State has "fail[ed] to correct," H.R. REP. 101-490, at 219 (1990), not on anticipation of requirements not yet developed.

This limitation on EPA's FIP power is particularly important in the context of section 110(a)(2)(D) with respect to regional pollution. Since 1998, EPA has implemented that provision by determining through legislative rulemaking whether, and to what extent, States in defined multi-State regions either "contribute significantly" to nonattainment or "interfere" with maintenance as to $PM_{2.5}$ and ozone NAAQS in downwind States. *See* 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998). For States in

multi-State regions where "all downwind nonattainment and maintenance problems are caused by the combined contributions of local emissions and transported emissions from multiple upwind States," EPA has opted to avoid "limitations . . . [that would be] so onerous as to make the control regime practically unworkable." EPA Br. at 29. Rather, EPA has defined by legislative rule the reductions that each State in the regional program must implement. *See* 63 Fed. Reg. at 57,369.

In the NO_X SIP Call, EPA explained that this approach is consistent with its broader role under section 110. *Id.* This Court agreed, finding that EPA had not intruded on States' power to determine "'which sources would be burdened by regulation and to what extent.'" *Michigan*, 213 F.3d at 686 (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasis omitted)). EPA's NO_X emissions budgets, according to the Court, left the States with "real choice" regarding how to comply with the rule and allowed the States to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687-88.

In CSAPR, EPA gave States no choice in the implementation of its rule. EPA instead made those choices for them. EPA's core justification for these FIPs is that, when called upon to submit SIPs before the CSAPR rulemaking had even begun, each CSAPR State failed to anticipate the outcome of CSAPR, therefore authorizing FIPs imposing CSAPR-defined reductions. But as discussed below, no State is "required" to be clairvoyant, and a SIP is not "deficient," within the meaning of section 110(c), for

failing to include *new*, not-yet-defined requirements that this Court required EPA to define on remand "from the ground up." 531 F.3d at 929.

B. CSAPR's FIPs Are Unlawful Because No State Was Required To Address CSAPR-Defined Reductions in Pre-CSAPR Submissions.

In defending CSAPR, EPA describes at great length the complexity of defining regional section-110(a)(2)(D) requirements and EPA's broad discretion to determine how much to control, who must control, and on what schedule. EPA Br. at 29. At the same time that it describes the complex and discretionary nature of its rulemaking decisions, EPA says that it had no choice but to issue the CSAPR FIPs because States had failed to submit CSAPR SIPs. *Id.* at 44-49.

EPA repeats, in many different ways, the idea that when a State fails to submit an approvable SIP, EPA must promulgate a FIP. *E.g.*, EPA Br. at 45. While this statement is true, it is irrelevant to the question here: Was any CSAPR State required to submit a SIP mandating the state-wide reductions that EPA later defined by rule for each CSAPR State? Because a State's SIP obligation does not include implementation of a rule not yet issued, EPA could not impose such requirements on States through FIPs, so the "SIP default/FIP promulgation" mantra misses the mark.

Equally hollow is EPA's suggestion that "[a]ny State that wanted to develop its own SIP after *North Carolina* made clear that CAIR would be replaced *could have done so*" by complying with EPA guidance. *See* EPA Br. at 48. EPA neither cites that guidance nor mentions that it was released nearly three years after the 2006 $PM_{2.5}$ NAAQS was

promulgated—on the eve of the States' deadline to make their SIP submissions. *See* Memorandum from Director William T. Harnett, Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour $PM_{2.5}$ NAAQS (Sept. 25, 2009) (JA__).

Even if it had been timely promulgated, EPA's guidance would have been useful only to States outside the CSAPR region. It provides no answers for the States EPA identified as likely contributing to a region-wide problem that necessitated a multi-State solution. As EPA explains, its "task was to develop a regulatory approach that addressed the *entirety* of this complex, interstate pollution issue, where contributions from numerous upwind States typically are linked to particular downwind nonattainment and maintenance problems." EPA Br. at 13. No State was required to predict the outcome of that comprehensive rulemaking, which defined the interstate-transport requirements under EPA's multi-State approach.

A comparison of the experience of Kansas, *see* State Br. at 29-31, and Delaware, *see* State Int.-Resp. Br. at 9, illustrates the distinction EPA has made among the States. Each of those States submitted a SIP attempting to demonstrate that it did not contribute significantly to nonattainment or interfere with maintenance. EPA disapproved Kansas's submittal based on CSAPR modeling that included Kansas in the CSAPR program. EPA approved Delaware's submittal after the final CSAPR had excluded Delaware from the program. In that approval, EPA made clear that the SIP

would have been disapproved if Delaware were subject to the final CSAPR. *See* 76 Fed. Reg. 53,638, 53,638-39 (Aug. 29, 2011). Because—and only because—Delaware was not included in CSAPR, EPA could approve the SIP, even though Delaware's technical demonstration was no more robust than the CAIR-based modeling provided by Kansas. *Id.* In short, whatever EPA may say now, the truth is that no submission by any potential CSAPR State could be approved unless EPA concluded, in the final CSAPR, that the State was not in that interstate program.[1]

C. EPA Had No Authority To Adopt CSAPR FIPs Based on the 1997 NAAQS.

EPA cannot rely on *North Carolina* to justify skipping the SIP process and imposing CSAPR FIPs addressing the 1997 $PM_{2.5}$ and ozone NAAQS. *See* EPA Br. at 49-53. In CAIR, EPA promulgated a final rule establishing State budgets for CAIR

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1. EPA suggests that Kansas's SIP submission might have been approved had it been supported by "any technical demonstration." EPA Br. at 47. But Kansas did provide a technical demonstration based on EPA's own CAIR modeling showing no significant contribution to nonattainment of the 1997 annual $PM_{2.5}$ NAAQS, *see* KS SIP Submission, at Section E (JA__), and significant cuts in point-source NO_X and SO_2 emissions as part of its regional-haze SIP. *Id.*, at Section D, 6-7 (JA__-__).

Delaware's submission was similar in terms of technical content but was judged by a different standard. That standard was akin to the standards used to judge submissions by States not subject to a regional section-110(a)(2)(D) regulatory program. Under this approach, EPA has never approved a section-110(a)(2)(D) SIP that required reductions beyond those already required for in-state reasons but instead has found in each instance that the State did not significantly contribute to another State's nonattainment. *See, e.g.*, 75 Fed. Reg. 72,705 (Nov. 26, 2010); *cf. id.* at 72,707 (noting that EPA's approach, applied in the case of Delaware, applies only "in situations where there is not evidence of widespread interstate transport").

States and gave those States 18 months to implement the budgets through SIPs. 70 Fed. Reg. at 25,317-33. Shortly thereafter, EPA proposed FIPs that would be finalized if a CAIR State did not submit a CAIR SIP within that period. 70 Fed. Reg. 49,708 (Aug. 24, 2005). In *North Carolina*, the Court remanded the original CAIR and the CAIR FIPs promulgated for some States. 531 F.3d at 929-30.

In the relief section of its opinion, the Court made clear that EPA was required to "redo its [CAIR] analysis from the ground up," that a deadline had to be established "for states to eliminate their significant contributions to downwind nonattainment" (as redefined on remand), and that EPA must establish new "interfere with maintenance" rules that could add more States to the regional program. *Id.* at 929-30. Thus, consistent with the statutory text, this Court's precedent, and the nature of the section-110 program, the remand order contemplated that "States," *not* EPA, would be responsible for implementing EPA's new section-110(a)(2)(D) rules. *See Michigan*, 213 F.3d at 687-88 (upholding an approach that gave States "real choice" as to how to implement EPA-defined requirements); *Natural Res. Def. Council v. EPA*, 22 F.3d 1125, 1136-37 (D.C. Cir. 1994) (per curiam) (preserving States' role to act even though the statutory deadline to do so had passed due to unlawful delay by EPA). But on remand in CSAPR, instead of adopting budgets *for States to implement through SIPs*, EPA adopted FIPs for each CSAPR State requiring EPA-mandated emissions reductions to begin in 2012 and precluding any SIPs at the outset of the program.

EPA now contends that its 2005 findings of failure to submit SIPs for the 1997 NAAQS triggered section-110(c) authority to impose CSAPR FIPs. EPA Br. at 49-53. As already noted, because these findings related to SIP requirements that predated CSAPR, EPA could not promulgate CSAPR FIPs based on them. But even if EPA could have based a FIP on those findings, its authority to do so ended, as EPA itself recognized, when it approved SIPs under CAIR addressing those NAAQS. *See, e.g.*, 72 Fed. Reg. 62,338, 62,341 (Nov. 2, 2007) (explaining that "once EPA approves a State's full CAIR SIP, EPA no longer has authority for the CAIR FIP in that State to the extent of that approval").

EPA also argues that *North Carolina*'s CAIR remand somehow revived EPA's CAIR FIP authority, which could then be used to promulgate CSAPR FIPs. EPA Br. at 51. EPA reaches that conclusion by arguing that *North Carolina* impliedly abrogated all previously approved CAIR SIPs. 76 Fed. Reg. at 48,219. But EPA's CAIR SIP approvals were not before the Court in *North Carolina*. And, at EPA's request, the Court agreed on rehearing to remand "without vacatur" so that CAIR would "remain in effect" until it was replaced. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). Indeed, EPA approved some SIPs addressing interstate transport for the 1997 NAAQS after the *North Carolina* remand order, acknowledging that those approvals foreclosed FIPs. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009).

As to States added in CSAPR and States required to address EPA's new "interfere with maintenance" rules promulgated for the first time in CSAPR, EPA provides no justification for promulgating CSAPR FIPs, except that those States failed to submit SIPs that anticipated the new CSAPR "significant contribution" and "interfere with maintenance" requirements. For the reasons discussed above, CSAPR FIPs cannot be based on such a "failure."

II. CSAPR's Significant-Contribution Analysis Is Unlawful.

As already noted, CSAPR's approach to section 110(a)(2)(D)(i)(I)'s key phrase "contribute significantly" exceeds EPA's statutory authority and violates controlling precedent. State Br. at 31-37. EPA offers two primary responses to these points—that *Michigan* supports CSAPR's cost-based approach and that, given the complexities of cross-state $PM_{2.5}$ and ozone regulation, the rule's approach is reasonable. EPA Br. at 17-44. Neither of those responses saves the rule.

Despite EPA's claim, *id.* at 21-22, 25, petitioners are not trying to religitate matters *Michigan* resolved. Rather, they are asserting that CSAPR, like CAIR, deviated from the approach to section 110(a)(2)(D)(i)(I) that *Michigan* approved. And whether CSAPR is a "reasonable" way for EPA to address the complex problem of interstate air pollution is irrelevant. The question is whether CSAPR operates within the statute's parameters. It does not.

A. Although *Michigan* Allows EPA To Consider Cost, *North Carolina* Forbids the Manner in Which EPA Did So in CSAPR.

Contrary to EPA's suggestions, *id.* at 19, 21-22, petitioners do not deny that *Michigan* approved EPA's consideration of emissions-reduction costs when defining States' "significant" contributions under section 110(a)(2)(D)(i)(I). *See* 213 F.3d at 675-79. The question here, however, is whether EPA may consider cost-effectiveness only to ensure that upwind States do not incur excessive burdens or whether, for upwind States modeled to exceed the *de minimis* air-quality threshold, it may use cost to determine those States' "significant" contributions, seeking to ensure only that all downwind air-quality problems are *collectively* resolved. *See* State Br. at 34-35.

If *Michigan* left any lingering doubt on this point, *North Carolina* resolved it. The Court explained that,

> [w]hile EPA may require 'termination of only a *subset of each state's contribution*,' by having states 'cut[ ] back the amount that could be eliminated with "highly cost-effective controls,"' *Michigan*, 213 F.3d at 675 (emphasis added), EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply.

531 F.3d at 918. *Michigan* held only that "EPA may, 'after [a state's] reduction of all [it] could . . . cost-effectively eliminate[ ],' consider 'any remaining "contribution"' insignificant." *Id.* at 917 (alterations in original); *see* State Br. at 34.

CSAPR ignores this explanation of section 110(a)(2)(D)(i)(I). It applies generic cost thresholds to two groups of States, 76 Fed. Reg. at 48,249-52, producing the

collective downwind result that EPA desires but neglecting to consider the effect on individual upwind States. Although EPA defends its approach by stating that "*North Carolina* required [it] to determine each upwind State's *contributions* individually, and [CSAPR] clearly complied with that directive," EPA Br. at 36, it overlooks the text of section 110(a)(2)(D)(i)(I), which requires not only *determination* of individual States' significant contributions, but *prohibition* of those specific contributions. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The statute does not license prohibition of significant contributions plus whatever remaining *insignificant* contribution a State can cost-effectively eliminate.

Although EPA also claims to have used a "combined" air-quality and cost-effectiveness approach in CSAPR, EPA Br. at 17, 31, 34, that claim is misleading at best. EPA did consider air quality at the first phase of its analysis, explaining that "states whose contributions are below [the 1%-of-the-NAAQS] thresholds do not significantly contribute to nonattainment" and are thus not subject to the rule. 76 Fed. Reg. at 48,236; *see* State Br. at 12; EPA Br. at 17 (noting that EPA "began" by considering air quality). But in phase two, EPA defined the remaining States' "significant contributions" based exclusively on cost, abandoning any further reference to individual upwind *contributions* and examining only downwind *results* to confirm that CSAPR's emissions-reduction requirements collectively resolved the targeted air-quality problems. *See* 76 Fed. Reg. at 48,248-55; State Br. at 12-13; EPA Br. at 17-18, 31-32, 34 & n.21, 35;

see also id. at 33 n.20 (conceding that EPA never analyzed each State's remedy-case contributions).

Accordingly, CSAPR regulates States whose individual contributions exceed the *de minimis* threshold by looking only to whether pollution can be cost-effectively reduced, without reference to whether the required reductions make a cognizable contribution to other States. *See* EPA Br. at 31-32. EPA's analysis thus reflects no concern for, or analysis of, the "amounts" of emissions, 42 U.S.C. § 7410(a)(2)(D)(i)(I), that upwind States are ultimately required to prohibit. EPA Br. at 32 (citing 76 Fed. Reg. at 48,246-65).

Although EPA also attempts to cabin *North Carolina*'s guidance on section 110(a)(2)(D)(i)(I) to particular aspects of CAIR, *id.* at 23-24, that effort fails. While *North Carolina*'s dispositive language appears in three different sections of the opinion (those addressing CAIR's trading program, SO_2 budgets, and NO_X budgets), the common thread is that EPA's cost-based, results-oriented approach to "significant contribution" does not comport with section 110(a)(2)(D)(i)(I)'s requirement that each State eliminate its own contribution to each other State. 531 F.3d at 908, 918, 921. And just because EPA may have fixed some of the specific flaws *North Carolina* identified in CAIR does not mean that CSAPR "faithfully" implements section 110(a)(2)(D)(i)(I). EPA Br. at 24.

Notably, EPA asserts only that CSAPR's "emissions budgets were developed using a *more* State-specific" analysis than the regional analysis used in CAIR. *Id.* at 24

(emphasis added). Instead of "pick[ing] a cost for a region," 531 F.3d at 918, EPA picked costs for two groups of States. 76 Fed. Reg. at 48,249-52; *see* EPA Br. at 35 (acknowledging that "the specified cost thresholds were applied consistently to the States subject to [CSAPR]"). Contrary to EPA's assertion, petitioners *do* challenge whether CSAPR's "cost-effectiveness criterion . . . was applied . . . in a sufficiently State-specific manner." EPA Br. at 35; *see* 76 Fed. Reg. at 48,252 (reflecting EPA's focus on the collective air-quality result at downwind monitors, not CSAPR's impact on individual upwind States). And once again, the Court has already addressed that issue, holding that EPA cannot, consistent with section 110(a)(2)(D)(i)(I), rely on *Michigan* to depart from a State-by-State approach by "deem[ing] 'significant' any emissions that sources can eliminate more cheaply." *North Carolina*, 531 F.3d at 918.

B. The Complexities of Interstate Air Pollution Do Not License EPA To Disregard the Text of Section 110(a)(2)(D)(i)(I).

The State and Local Petitioners do not dispute that regulation of interstate air pollution presents a complex problem. But EPA has no power to rewrite statutory text—even where, as here, it contends that implementing the language Congress provided will be "less effective, . . . in terms of environmental results, costs, and workability," EPA Br. at 27, than adopting an alternative approach of its own making.

For that reason, the Court should ignore EPA's policy arguments for exceeding the limits of section 110(a)(2)(D)(i)(I). It should also recognize that the State and Local

Petitioners do not offer competing "policy arguments." *Id.* at 19. Petitioners' arguments are based on the text of section 110(a)(2)(D)(i)(I).

In any event, EPA's complexity defense is overstated. Contrary to EPA's suggestion, *id.* at 28-29, CSAPR "significantly" links several States to just one monitor each for a given pollutant. *See* 76 Fed. Reg. at 48,241-44, 48,246. For those States, no complex analysis is required to adopt a contribution-focused approach. And EPA has the tools needed to craft such an approach for other States as well. *See* EPA Br. at 33-34 n.20 (citing, *e.g.*, Annual $PM_{2.5}$ AQAT, Supporting & Related Material EPA-HQ-OAR-2009-0491-4458 (posted July 11, 2011) (JA__) (spreadsheets identifying each State's $PM_{2.5}$ contribution caused by SO_2 emissions)).

Moreover, to the extent EPA argues that deviating from CSAPR's approach would yield unjustifiably "onerous" results in some States, *id.* at 29, it ignores the Court's recognition that considering cost in the way *Michigan* approved, *see* State Br. at 34, would enable it to achieve "something measurable towards" the statutory objective without imposing excessive burdens. *North Carolina*, 531 F.3d at 921. The approach that the State and Local Petitioners advance—which differs from the "fixed air quality threshold approach" that EPA discusses, EPA Br. at 28-29, in that it allows consideration of cost to reduce unreasonable burdens—would comply with both the statute and this Court's precedent.

C. EPA's Assertions Regarding Waiver, Hypothetical Complaints, and the Standard for Reversal Are Unavailing.

EPA asserts that petitioners waived their challenge to CSAPR's significant-contribution analysis, *id.* at 26, 32 & n.18, that they cannot identify concrete examples of harm, *id.* at 19, 32-33, 37, and that CSAPR will survive judicial review as long as it is not "arbitrary or capricious." *Id.* at 20, 31, 41. Each of those assertions fails.

As addressed in the Industry and Labor Petitioners' reply brief, EPA's waiver argument fails in light of comments filed on the "significant contribution" point and EPA's rejection of those complaints. *See* Industry Reply Br. at 5-6; *see also* Response to Comments at 1394 (comment from Wisconsin that EPA was over-emphasizing cost-effectiveness and under-emphasizing contribution). Its hypothetical-complaint argument fails because EPA does not, and cannot, deny that it failed to collect and calculate data necessary to make CSAPR comply with the statute. *See* Industry Reply Br. at 6 n.1. And reversal is proper not only if the Court concludes that CSAPR is arbitrary and capricious, but also if the rule exceeds EPA's statutory authority. 42 U.S.C. § 7607(d)(9)(C). For the reasons already noted, it does.

III. EPA Failed to Comply with *North Carolina*'s Mandate To Give "Interfere with Maintenance" Independent Meaning.

In CAIR, EPA attempted to address section 110(a)(2)(D)(i)(I)'s "interfere with maintenance" requirement by focusing only on nonattainment areas that would come into attainment after the abatement of significant contributions. 70 Fed. Reg. at 25,193

& n.45. The Court found EPA's failure to protect attainment areas that were on the verge of slipping into nonattainment from emissions that "interfere with maintenance" to be at odds with both the CAA's plain language and traditional canons of construction. *North Carolina*, 531 F.3d at 909-10. It therefore remanded with explicit instructions to cure this problem. *Id.* at 910, 930. The question now is whether EPA complied with that mandate. *See United Auto., Aerospace & Agric. Implement Workers v. OSHA*, 976 F.2d 749, 750 (D.C. Cir. 1992) (per curium) ("[T]he court retains a residual jurisdiction to enforce its mandate . . . ." (citing *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977)). It did not.

North Carolina made clear that, because "contribute significantly to nonattainment" and "interfere with maintenance" are "connected by a disjunctive," the two terms must be given "separate meanings . . . ." 531 F.3d at 910. In CSAPR, EPA did expand the program to cover some attainment areas, but it failed to develop and apply an independent "interfere with maintenance" standard to address upwind emissions affecting these new "maintenance" monitors. Instead, EPA treated emissions that "interfere with maintenance" in attainment areas the same way it treated emissions that "contribute significantly" to nonattainment in nonattainment areas. 76 Fed. Reg. at 48,227-28. It did not give the terms separate meanings consistent with either section 110(a)(2)(D)(i)(I)'s plain language or relevant canons of construction.

EPA's failure to do so is arbitrary because the CAA treats attainment and nonattainment areas quite differently. *See* State Br. at 38-39. EPA glosses over that problem, suggesting that there is no meaningful difference because the CAA requires "plans" for both attainment and nonattainment areas. EPA Br. at 56-57. EPA misses the point. What matters is not the existence of plans but their required content. Nonattainment plans require affirmative emissions reductions. *See* 42 U.S.C. § 7502. Plans for areas that are in attainment do not, *see id.* § 7471, unless actual increases in ambient concentrations trigger contingent reduction requirements. *Id.* § 7505a. By failing to explain and justify its decision to address these two distinct problems with one uniform approach, EPA neglected not only this Court's instruction in *North Carolina*, but also its "duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule[.]" *See Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam) (internal quotation marks omitted).

This approach creates the bizarre result of requiring upwind States to reduce emissions when downwind "maintenance" States are not required to do anything. Allegan County, Michigan is a perfect example. Allegan County is in attainment and, based on the section-175A maintenance plan developed by Michigan and approved by EPA, will remain in attainment for ozone for the next 10 years without any CAIR- or CSAPR-imposed reductions. Redesignation of the Allegan County Area to Attainment

for Ozone, 75 Fed. Reg. 42,018, 42,027-28 (July 20, 2010) (explaining EPA's conclusion that "Michigan has demonstrated maintenance without any additional CAIR requirements"). And if Allegan County drifts back toward nonattainment, the contingency measures specified in Michigan's EPA-approved maintenance plan are reductions in local VOC emissions, not reductions in upwind NO_X emissions. *Id.* at 42,029. Mandating CSAPR reductions to abate significant contributions to nonattainment in Allegan County thus illustrates how EPA's approach to maintenance is out of step with the CAA's approach to protection of areas that meet NAAQS.

EPA does not address any of these facts. It instead tells the Court to ignore the Allegan County example because "no State is regulated under [CSAPR] due *solely* to linkages to that receptor." EPA Br. at 57 (emphasis added); *see id.* n.32 (incorrectly suggesting, *see* 76 Fed. Reg. at 48,246, Table V.D-9, that only a supplemental rule links CSAPR States to Allegan County). That observation does not mean that the Allegan County example is "not properly before the Court." EPA Br. at 57. And although EPA argues that much of the ozone in Allegan County is attributable to upwind emissions addressed by other interstate-transport rules, *id.*, EPA fails to acknowledge that both Michigan and EPA concluded that reductions achieved through the NOx SIP Call were "permanent and enforceable" and that no further reductions in upwind emissions would be necessary to maintain standards. 75 Fed. Reg. at 42,025, 42,027-28.

In all events, even if the Court concludes that EPA gave independent meaning to "interfere with maintenance," EPA's maintenance approach is still invalid. The method EPA used to identify *de minimis* contribution thresholds and quantify required reductions in the maintenance context is identical to the method used in the significant-contribution context. And as already noted, that method is fatally flawed.

IV. EPA Did Not Provide Adequate Notice and Opportunity to Comment.

As previously explained, EPA violated CAA section 307(d) by failing to provide notice and an opportunity to comment on substantial methodological changes between the Proposed Rule and CSAPR. State Br. at 42-55. EPA's responses ignore the relevant legal standard, confirm that the Proposed Rule's "basic" approach changed substantially, and highlight the degree to which critical information—to the extent it was mentioned at all—was buried in the massive CSAPR docket. In essence, EPA demands unceasing vigilance, requiring anyone potentially affected by a rule to know exactly where to look, what deductions to draw, and the significance of every cryptic statement. Section 307(d), however, is not nearly so demanding.

A. EPA Asserts an Inapplicable Bar to Judicial Review and Relies on Inapposite Case Law.

EPA first asserts that judicial review of claims raised in pending administrative-reconsideration petitions is premature. EPA Br. at 98. But there's a reason EPA cites nothing to support that assertion. Were it correct, EPA could postpone judicial review indefinitely by declining to rule on such petitions (which, under the CAA, need not be

resolved before judicial review begins, *see* 42 U.S.C. § 7607(b)(1), (d)(8)). Here, EPA has already sat on those petitions for approximately half a year. *See* Texas Docketing Statement, Addendum at 1-3 (Doc. No. 1337359). In any event, the Court has jurisdiction to review EPA's failure to provide notice under the All Writs Act, 28 U.S.C. § 1651(a). *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (mandamus relief is available to prevent agencies from thwarting judicial review); *Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 170 (D.C. Cir. 1985) (a petition for review may be treated as a petition for writ of mandamus).[2]

EPA next seeks refuge in case law addressing the APA's notice requirements, *see* EPA Br. at 98—which, as already noted, are less exacting than the CAA's. State Br. at 42-44. In any event, *American Coke & Coal Chemical Institute v. EPA* (cited in EPA Br. at 98, 105) involved a proposed rule that clearly explained both the ultimate methodology and the potential data EPA would use in formulating the final rule, where EPA provided an opportunity to comment on the methodology, data, and potential outcomes. 452 F.3d 930, 939-40 (D.C. Cir. 2006). And *Northeast Maryland Waste Disposal Authority* (cited in EPA Br. at 98, 108) unremarkably approved EPA's act of collapsing three proposed classifications into two. 358 F.3d at 951-52. Those cases do not describe what happened here.

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2. Additionally, EPA's defense could not apply to Texas's notice challenge, which EPA explicitly addressed in the final rule. 76 Fed. Reg. 48,214.

B. EPA's NODAs Did Not Provide Adequate Notice of Significant Changes to EPA's Approach in CSAPR.

Although EPA initially claims to have "thoroughly explained its proposed methodologies, assumptions, data and legal interpretations" in the Proposed Rule, it later retreats to the position that the Proposed Rule merely announced CSAPR's "basic" approach and methodology. EPA Br. at 99, 100. Even that lesser claim is unsupportable.

EPA does not dispute that CSAPR differed significantly from the Proposed Rule. Rather, it relies heavily on sparsely worded NODAs that required review of, and comment on, voluminous new data and modeling algorithms within several weeks. *Id.* at 99-101 (citing 75 Fed. Reg. 53,613 (Sept. 1, 2010) (JA__); 75 Fed. Reg. 66,055 (Oct. 27, 2010) (JA__); 76 Fed. Reg. 1,109 (Jan. 7, 2011) (JA__)). Divining the final rule from those NODAs, especially where stakeholders did not know the effect of previous NODAs before being asked to comment on the next, would necessitate the very "telepathy" this Court has refused to require. *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) (per curiam).

As already noted, IPM is third-party software—and, as such, inaccessible to those unable to pay a hefty fee. *See* Response to Comments at 1361-63 (comment by association of downwind States, including five Intervenor-Respondents, criticizing IPM for its proprietary nature, historical inaccuracy, opacity, unreproducible results, and cost); State Br. at 45 (referencing declarations that, contrary to EPA's claim, EPA Br. at 101

n.63, are properly cited because they relate to notice issues for which there is no record and contain information cited in petitions for administrative reconsideration). It was not feasible for States either to predict how EPA's various IPM modifications would alter state budgets or to conclude, based on EPA's NODAs, that SO_2- and NO_X-emissions budgets would be cut by as much as 50%. *See* State Br. at 47-50.

EPA's response to the example of Florida, EPA Br. at 104-05, only highlights the notice problem. EPA did not base Florida's proposed ozone-season NO_X budget on *2007 modeled* emissions (74,000 tons) as its response implies, *id.* at 104, but rather on *2009 actual* emissions (56,939 tons). *Compare* 75 Fed. Reg. at 45,286 *with id.* at 45,291; *see* 76 Fed. Reg. at 48,260. Yet in CSAPR, EPA based Florida's budget of 27,825 tons on *modeled 2009* data, 76 Fed. Reg. at 48,262, resulting in a 51% budget reduction from the Proposed Rule. EPA's response that Florida should have anticipated the significant difference between its proposed and final budgets misses the proper comparison: proposed-modeled (74,000 tons) to final-modeled (27,825 tons) budgets, a 62% change.

Although EPA also claims that petitioners had notice that state budgets "might" be lower, it supports that claim with citations to the *final* rule. EPA Br. at 101-02. EPA's explanation in CSAPR of changes from the Proposed Rule obviously cannot cure its notice violation. Nor can EPA rely on other parties' comments. *See id.* at 99. As the Court has explained, "notice necessarily must come—if at all—from the agency." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *see also*

McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (explaining that "EPA's consideration of the comments received in response [to inadequate notice] . . ., no matter how careful, cannot cure the defect").

EPA's claim that its NODAs provided adequate notice of linkage changes again confuses a warning that ill-defined changes "might" occur, EPA Br. at 106, with the provision of adequate notice. Moreover, the claim that all States had, "for each pollutant, at least one linkage in common with the linkages in the proposal," *id.* at 107, is incorrect. Unlike CSAPR, the Proposed Rule did not "significantly" link Texas to any location for $PM_{2.5}$, and it linked Kansas to wholly different locations than did CSAPR. *See* State Br. at 51. In any event, EPA's assertion skirts the core concern: that petitioners were not given notice of new linkages unidentified at the proposal stage—critical information that could, for example, determine whether a State would be placed into SO_2 Group 1 or 2.

Finally, the Court should reject EPA's suggestion that its recent corrections "render any notice defects harmless." EPA Br. at 105 (citing 77 Fed. Reg. 10,324 (Feb. 21, 2012); 77 Fed. Reg. 10,342 (Feb. 21, 2012)). These revisions eschewed reconsideration of the fundamental methodological problems on which all petitioners' notice claims are based. *See* 77 Fed. Reg. at 10,325. And although they purportedly addressed "many" of the errors at issue, *id.*, they did not, for instance, correct "any alleged defects" in Georgia's budgets. EPA Br. at 114. As already noted, EPA made no

corrections to Georgia's budgets based on the State's Multipollutant Control Rule—a failure that unquestionably caused prejudice. *See* State Br. at 55.

C. The Proposed Rule Did Not Provide Adequate Notice of Texas's Inclusion in CSAPR.

In response to the notice failures with respect to Texas, *see* State Br. at 52-54, EPA claims that the Proposed Rule sought comment on whether Texas should be included on the basis of the actual "impact of Texas emissions on areas in another State or States." EPA Br. at 108. In fact, the Proposed Rule reflected that Texas emissions fell below the *de minimis* threshold, 75 Fed. Reg. at 45,255; *see* EPA Br. at 108, and noted only one possible basis for inclusion: that CSAPR might reduce the price of high-sulfur coal, leading Texas EGUs to switch to that fuel and thereby increase the State's overall SO_2 emissions. *Id.* at 45,284.[3]

The Proposed Rule stated that, "[f]or this reason, EPA takes comment on whether Texas should be included in the program." *Id.* And unsurprisingly, the comments EPA received focused on that reason. Response to Comments at 434, 450, 525-27, 532-33, 551, 560 (JA__, __, __, __, __, __). EPA later admitted, however, that

3. EPA's attempted justification for including several other States based on this "emissions leakage" theory highlights its lackadaisical approach to notice. While conceding that it "did not use this specific terminology in the proposal," EPA references a single paragraph about shifting generation amid a larger discussion of coal prices. EPA Br. at 113 (citing 75 Fed. Reg. at 45,284). This paragraph neither mentions Indiana, Louisiana, or Maryland nor meaningfully discusses the methodology EPA ultimately used. *See* State Br. at 54.

the fuel-switching issue was irrelevant to the basis for Texas's inclusion in CSAPR. *Id.* at 563-64 (JA__); *see also* EPA Br. at 110 (citing a Sierra Club comment that was similarly irrelevant to the final basis for Texas's inclusion). EPA also failed to provide Texas the most basic information that every other State included in the rule's annual programs received: proposed annual SO_2 and NO_X emissions budgets and disclosure of at least one proposed "significant" linkage. *See* State Br. at 53.

EPA now claims that the change from the Proposed Rule to CSAPR resulted from its initial use of an incorrect figure for Texas emissions sources. EPA Br. at 109. But it cites nothing in the record to support the notion that Texas was included due solely to a change in data, rather than a change in EPA's models. And as explained at the stay stage, running the "corrected and updated" Texas emissions-projection data through the Proposed Rule's methodology does *not* result in Texas making a significant $PM_{2.5}$ contribution. Decl. of Ralph E. Morris, ¶¶ 3, 17-20, Case No. 11-1315, Doc. No. 1336040 (Exh. 11) (JA__). Like other interested parties, Texas was entitled to comment on the application of EPA's modeling methodology before being regulated by it.

EPA next asserts that Texas should have known its SO_2 budget, referencing a "potential" budget Luminant developed. EPA Br. at 111 n.71. But contrary to EPA's claim, this estimate was off by 61,000 tons. 76 Fed. Reg at 48,269 (reflecting Texas's 243,954-ton SO_2 budget). And the Luminant Powerpoint EPA cites is dated June 9,

2011—long after the public-comment period closed. *See* 75 Fed. Reg. at 45,210. These observations reflect that, given the limited data EPA provided, it was impossible to make even an *inaccurate* budget estimate anywhere near the time an interested party would have needed to make an accurate one.

Finally, although EPA bills Texas's failure to provide comments "as [a] strategic choice," EPA Br. at 110, it is unclear what strategy silence on this critical point could have furthered. Texas failed to provide relevant comments because EPA failed to give it reason to. Accepting EPA's suggestion that Texas's contributions at Madison County's Granite City monitor were close enough to the *de minimis* line to warrant comment, *id.*, would counsel paranoia; under that view, *every* linkage in the upper end of the *de minimis* range would warrant prophylactic treatment by every State potentially covered by the rule, resulting in a flood of distracting and unnecessary comments. *See* State Br. at 51 (noting the large number of potentially relevant monitors). That is not what the CAA requires.

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As the Court has explained, EPA's obligation to provide notice with "reasonable specificity" is "doubly true" under the CAA, and EPA must "issue a specific 'proposed rule' as a focus for comments." *Small Refiner*, 705 F.2d at 549; *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (noting that commenters are entitled to "trust an agency's representations about which particular aspects of its proposal are open for

consideration"). Because EPA neglected that obligation here, issued a final rule that was not a "logical outgrowth" of the Proposal Rule, and deprived the State and Local Petitioners of the notice they needed to make rule-changing comments, CSAPR is invalid.

CONCLUSION

The Court should grant the previously requested relief. *See* State Br. at 56.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Acting Deputy Attorney General
for Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

JON NIERMANN
Chief, Environmental Protection Division

/s/ Bill Davis
BILL DAVIS
Assistant Solicitor General

JOHN SCHARBACH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1896
[Fax] (512) 370-9191
Bill.Davis@texasattorneygeneral.gov

COUNSEL FOR STATE AND LOCAL
PETITIONERS

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that the accompanying brief has been prepared in Word Perfect 12 using 14-point Garamond typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 6,937 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). The combined words of the Industry and Labor Petitioners' reply brief and the State and Local Petitioners' reply brief do not exceed 14,000, as mandated by this Court's January 18, 2012 Order (Doc. No. 1353334). Word Perfect 12 was used to compute the word count.

Dated: March 12, 2012

/s/ Bill Davis
Bill Davis

CERTIFICATE OF SERVICE

I certify that, on March 12, 2012, I electronically filed the foregoing reply brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. In addition, a copy of the documents will be served by first class U.S. mail on the non-CM/ECF registered participant listed below.

Kimberly P. Massicotte
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06106

I further certify that nine (9) paper copies of the documents will be hand-delivered to the Clerk of the Court.

/s/ Bill Davis
Bill Davis