

No. 16-1406 (and consolidated cases)

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**In the United States Court of Appeals**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WISCONSIN, ET AL.,  
PETITIONERS,

*v.*

ENVIRONMENTAL PROTECTION AGENCY AND  
E. SCOTT PRUITT, RESPONDENTS

On Petition for Judicial Review of Final Agency Action of  
the United States Environmental Protection Agency  
81 Fed. Reg. 74,504 (Oct. 26, 2016)

**REPLY BRIEF OF STATE PETITIONERS, CEDAR FALLS  
UTILITIES, AND CITY OF AMES, IOWA**

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<sup>1</sup> *Authorities upon which we chiefly rely are marked with asterisks.*

## GLOSSARY

<b>APA</b>	Administrative Procedure Act
<b>CAIR</b>	Clean Air Interstate Rule
<b>CAM<sub>x</sub></b>	Comprehensive Air Quality Model with Extensions
<b>CSAPR</b>	Cross-State Air Pollution Rule
<b>DNR</b>	Wisconsin Department of Natural Resources
<b>DV</b>	design value
<b>EGU</b>	electric generating unit
<b>EPA</b>	Environmental Protection Agency
<b>FIP</b>	federal implementation plan
<b>JA</b>	Joint Appendix
<b>NAAQS</b>	National Ambient Air Quality Standards
<b>NO<sub>x</sub></b>	nitrogen oxide
<b>PSC</b>	Wisconsin Public Service Commission
<b>ppb</b>	parts per billion
<b>SIP</b>	state implementation plan
<b>TSD</b>	Technical Support Document
<b>VOC</b>	volatile organic compound

## INTRODUCTION AND SUMMARY OF ARGUMENT

EPA's Response Brief fails to rebut the numerous legal defects in the "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS." 81 Fed. Reg. 74,504 (October 26, 2016) ("Rule"). When addressing the fact that the agency never considered whether imposing FIPs on individual States complied with the Good Neighbor Provision's "significant[ ]" downwind reductions provision or would be cost-justified, EPA seeks to change the topic, pointing out that courts have rejected different cost-related challenges to other interstate-transport rules. EPA does not point to anywhere in the record where it conducted this necessary analysis, a failing which led the agency to impose substantial costs upon States with no meaningful downwind benefits.

The agency's answers to Petitioner States' other critiques are similarly insufficient. EPA does not adequately respond to the States' objection that its "grid-cell" approach overstated ozone at coastal monitors; instead, EPA merely defends its general modeling approach, not that approach's reasonableness for coastal areas. Nor does EPA rationally explain how it could fail to timely act on state-submitted SIPs and then use information developed after the statutory deadline to reject

those SIPs. EPA is unable to justify classifying ozone formed in part from biogenic emissions as entirely anthropogenic ozone, causing it to erroneously deem States such as Iowa “significant” downwind contributors. And EPA cannot reconcile its contradictory positions in this case and in *Murray Energy Corp. v. EPA*, No. 15-1385.

In all, this Court should vacate the Rule.

## ARGUMENT

### **I. EPA Cannot Impose A FIP On A State Without Considering Whether That FIP Will Produce “Significant[ ]” Downwind Reductions And Will Be Cost-Justified<sup>2</sup>**

EPA violated both the Good Neighbor Provision and basic principles of administrative law by imposing FIPs without considering whether each FIP would achieve “significant[ ]” downwind reductions, 42 U.S.C. § 7410(a)(2)(D)(i)(I); *see Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000), or addressing “an important aspect” of the problem: whether a FIP’s minimal benefits justified its substantial costs, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *see Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). States’ Br. 15–16. Under

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<sup>2</sup> The footnotes attendant to the headers in the State Petitioners’ Opening Brief identify which parties join which arguments.



EPA's own figures, the only downwind "benefit" from imposing FIPs on Wisconsin and Iowa are a .0002 and .0005 ppb change in a single downwind receptor, with similar minimal reductions for other States. States' Br. 18–22. EPA imposed costly FIPs upon these States without even considering whether these FIPs would lead to any "significant[ ]" downwind pollution reductions or would be cost-justified.

EPA incorrectly argues that the States are asking for a "formalized cost-benefit analysis." EPA Br. 103–06. State Petitioners' argument is far more modest: EPA was required to "pay[ ] attention to" whether any particular FIP "does significantly more harm than good." *Michigan*, 135 S. Ct. at 2707. EPA's assertion that "Petitioners have not pointed to language in the Good Neighbor Provision that requires at least 'some attention to cost,'" EPA Br. 105, is refuted by State Petitioners' repeated statutory argument that EPA can regulate only emissions that "contribute *significantly* to nonattainment" or "*interfere* with maintenance," 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphases added); States' Br. 14, 16, 17, language that this Court has held logically includes cost considerations, *see Michigan*, 213 F.3d at 678. In addition, administrative-law principles require agencies to consider whether

regulations “do[ ] significantly more harm than good.” *Michigan*, 135 S. Ct. at 2707; accord *State Farm*, 463 U.S. at 43–44.

EPA also falsely claims that this argument was already rejected by the Supreme Court in *EME Homer* and this Court in *Michigan*. EPA Br. 106–10. The dispute in *EME Homer* was over how “to allocate responsibility” among upwind States. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014). EPA assigned reductions based on what could be achieved below “the cost threshold set by the Agency,” while certain petitioners argued that EPA needed to “allocate responsibility . . . proportional[ly] to each State’s contribution to the problem.” *Id.* at 1604–06 (citation omitted). In *Michigan*, petitioners objected that EPA should not have imposed a *uniform* cost threshold, but instead should have adjusted the cost threshold based on each State’s “respective [ ] contribution[ ] to downwind nonattainment” and “distance” from the nonattainment area. 213 F.3d at 679. Petitioner States here are not arguing that EPA’s methodology misallocates emission reductions among States—such that some States’ obligations would be adjusted upwards, and some would be adjusted downwards—which was the argument at issue in *EME Homer* and *Michigan*. Rather, Petitioner

States' argument is that EPA failed to consider whether the reductions that any particular FIP will achieve are simply too *insignificant* and not *cost-justified*, as a matter of the Good Neighbor Provision's text and basic principles of administrative law. *EME Homer* and *Michigan* did not involve the type of insignificant reductions at issue here, and thus neither the Supreme Court nor this Court had reason to consider the argument that Petitioner States raise.

Putting EPA's mischaracterizations of Petitioner States' argument aside, EPA's primary response is that EPA "did evaluate costs" in two ways: when "select[ing] the appropriate [cost-threshold] level," EPA Br. 106–10, and in its "Regulatory Impact Analysis," which "examined [ ] costs and benefits at a regional scale," EPA Br. 110–13. Neither analysis addresses the relevant issue. The cost threshold EPA selected (\$1,400 per ton) represents the costs of implementing certain control technology, and EPA set emissions budgets for States by estimating the reductions available if EGUs adopted all controls at or below that cost. *See* States' Br. 7–10. But emissions reductions *actually available* vary by State, depending on what control technology is currently in use, such that downwind reductions can be achieved by installation of certain

technologies. EPA failed to consider whether the anticipated emissions reductions from any FIP are sufficiently “significant[ ]” and cost-justified. For Wisconsin and Iowa, EPA’s data show that the answer is clearly “no,” and similar problems appear to exist for other States. States’ Br. 18–22. After all, in States like Wisconsin, most EGUs have “already” incorporated the technology available for \$1,400 or less, so the marginal improvement from Wisconsin’s FIP is near zero. See Wisconsin DNR Comment, at 1, EPA-HQ-OAR-2015-0500-0299 (JA\_\_).

EPA’s “Regulatory Impact Analysis” is similarly insufficient. This analysis was conducted “at a *regional* scale,” EPA Br. 111 (emphasis added); EPA Response to Comments, at 457, EPA-HQ-OAR-2015-0500-0572 (JA\_\_), so it did not examine *state-by-state* the issue that the States raise. Given that the Good Neighbor Provision “addresses each *individual State’s* obligations,” EPA cannot justify imposing a FIP on a State with no meaningful downwind benefit by relying on the benefits achieved by FIPs in other States. States’ Br. 22.

In an implicit recognition that neither the cost-threshold methodology nor Regulatory Impact Analysis deal with the issue the States raised, EPA and State Intervenors attempt some back-of-the-

envelope math. They argue that the “monetized health benefits” of reducing emissions—which they claim are \$6,000 to \$9,000 per ton—“far exceed” the costs of less than \$1,400 per ton. EPA Br. 111–12 (emphasis omitted); State Intervenors’ Br. 19–20. EPA cannot evade its obligation to meaningfully analyze the reasonableness of imposing FIPs on specific States through its briefing in this case. Agency action can be sustained only on “grounds upon which the [agency] itself based its action.” *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). In any event, EPA’s belated efforts fail to explain why it could impose FIPs on States without meaningfully contributing to the Good Neighbor Provision’s goals. The asserted \$6,000 to \$9,000 in “monetized health benefits”—even if credible—do not measure *downwind* benefits, but aggregate “health benefits,” many of which accrue to those living nearby (i.e., in the upwind State), or in downwind areas *without any maintenance or nonattainment issues*. EPA may invoke the Good Neighbor Provision only to regulate emissions that “contribute significantly to nonattainment” or “interfere with maintenance” in a downwind State. 42 U.S.C. § 7410(a)(2)(D)(i)(I).<sup>3</sup>

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<sup>3</sup> State Intervenors argue that while the downwind benefits might be “small,” the “costs are as proportionately small.” State Intervenors’

Finally, EPA defends its inclusion of Wisconsin (and presumably other similarly situated States) as preventing “potential increases” in Wisconsin emissions and refers to “the original CSAPR [rule] where several states were included . . . based on the reasonable concern that . . . emissions could increase.” EPA Br. 109 (citing 76 Fed. Reg. 48,263). But with the original CSAPR, EPA relied on actual “analysis reveal[ing] that . . . emissions in each of the states would increase . . . due to interstate shifts in electricity generation.” 76 Fed. Reg. 48,263. This time, EPA did not provide any similar evidence or analysis. *See* 80 Fed. Reg. 75,738–39 (Proposed Rule); EPA Response to Comments at 148–49 (JA\_\_); 81 Fed. Reg. 74,553 (Final Rule). Regardless, “potential [emissions] increases” could not have been the justification for including Wisconsin in the Rule

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Br. 19. State Intervenor ignore, *inter alia*, the significant overhead compliance costs from a State being subjected to a FIP. The \$1,400/ton cost threshold represents the *marginal* cost of control technology to eliminate one ton of emissions. The full costs to a State and its EGUs include all regulatory compliance costs that would be avoided if that State were excluded from the Rule. Although EPA failed to analyze these costs on a state-by-state basis, it did conduct this analysis for Florida. EPA found that excluding Florida reduced its regulatory burden by \$1.35 million, 81 Fed. Reg. 74,524, 74,583, strongly suggesting that, if EPA conducted this mandatory analysis for all States, it would conclude that this overhead dwarfs whatever “few dollars” of benefit, *see Michigan*, 135 S. Ct. at 2707, come from a downwind change of a few ten-thousandths of a part per billion.

because then EPA would have acted arbitrarily by treating similarly situated States unequally: EPA, for example, excluded Delaware from the Rule without any evidence suggesting that Delaware's emissions were any less likely to “potential[ly] increase[ ]” than Wisconsin's. *See* 81 Fed. Reg. 74,553.

## **II. EPA Arbitrarily Ignored Monitored Data When Identifying Maintenance Receptors**

State Petitioners incorporate Industry Petitioners' Reply Brief section I here. *See* D.C. Circuit Handbook at 37.

## **III. EPA's Approach To Coastal Monitors Was Unreasonable**

Contrary to EPA's suggestion, State Petitioners do not contend that “use of a ‘grid-cell’ approach . . . was unlawful” as a general matter. EPA Br. 56–57. Indeed, elsewhere in its brief, EPA appears to recognize that State Petitioners challenge its misapplication of this approach to near-shoreline monitors. EPA Br. 60 n.15 (“Petitioners do not object to the *concept* of a multi-cell approach.”). EPA's defense of its general approach is, therefore, inapposite. EPA Br. 57, 59–60, 61. What *is* relevant is that EPA offers no persuasive defense of its unmodified use of that approach in identifying near-shoreline “problem” receptors, which produced

inflated ozone-concentration projections and contravened *Michigan v. EPA*, 213 F.3d 663. States' Br. 24–29.

Air-quality receptors are located on land because people live—and breathe—on land. EPA's argument that offshore ozone affects near-shoreline receptors because "offshore air is commonly blown onshore," EPA Br. 60–61, is no argument for the approach it took because the receptors operate continuously and *themselves* measure ozone concentrations that include ozone arriving from "onshore wind flows," *see* 81 Fed. Reg. 74,534. Indeed, EPA recognized that "coastal sites [i.e., *on-land* receptors] by the nature of their location near large water bodies often measure ozone concentrations in air from over the water when winds are blowing from the water to the land." *Id.* Thus, the record does not support any claim that it was necessary or appropriate to include over-water concentrations—in addition to or instead of on-shore concentrations—in identifying problem receptors.

EPA's argument that it used its grid-cell approach "only to identify problem receptors," EPA Br. 58, is misleading. Over-projections of ozone at near-shoreline receptors in step one—involving identification of downwind receptors—have cascading effects throughout the Rule's four-



step methodology. *See, e.g.*, Industry Petitioners’ Br. Section II; Industry Petitioners’ Reply Br. Section II. EPA’s methodology led to identifying problem receptors based on elevated offshore ozone concentrations that cannot be said to exist—or to represent ozone concentrations—at the receptor, while ignoring other factors that contributed to over-control of upwind-state emissions. *See id.*

In asserting that use of “relative response factors” avoided identifying monitors as problem receptors “*solely* on the basis of *routinely* elevated levels of [over-water] ozone,” EPA Br. 59 (emphases added), EPA tacitly concedes it may have identified at least some putative “problem” receptors based, at least in part, on “elevated” offshore ozone. EPA does not refute State Petitioners’ point that “EPA-projected DVs [design values] at . . . half [of the near-shoreline receptors EPA examined] overstated ozone by 0.5 ppb or more.” States’ Br. 26 (citing 81 Fed. Reg. 74,534 & n.122); *see* EPA Br. 61–62. A 0.5-ppb overstatement is significant given that the Rule classifies monitors as being (or as not being) “problem” receptors based on projected DVs that barely exceed (or, conversely, barely *miss* exceeding) the attainment level by as little as 0.1 ppb—*one-fifth* the level EPA here implies is inconsequential. *See* 81 Fed.

Reg. 74,533 Tables V.D-1, V.D-2; *e.g., id.* Table V.D-2 (showing Richmond, NY, receptor's projected average-DV as only 0.1 ppb below 75.9-ppb attainment level).

In fact, EPA's characterization of its method as unbiased for near-shoreline monitors is belied by data in "Analysis of 3x3 vs Monitor Cell Projected Design Values," EPA-HQ-OAR-2015-0500-0545 (JA\_\_), for the eight near-shoreline monitors EPA examined, 81 Fed. Reg. 74,534. Those data show that: six out of eight of the monitors (75 percent) have lower projected DVs with the monitor-cell approach than with EPA's grid-cell approach;<sup>4</sup> among these six monitors, ozone is over-projected by as much as 1.9 ppb; the total amount of over-projection for these six monitors is 6.0 ppb; and thus, the average over-projection for these six monitors is 1.0 ppb—a significant amount in the context of EPA's DV projections. In short, EPA's claim that its approach "falls in the middle of the possible

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<sup>4</sup> By EPA's own logic, its approach *as applied to near-shoreline monitors* tended to overestimate ozone. EPA says its analysis showed that "for 75% of [all Eastern-U.S.] receptors, the grid-cell approach resulted in *lower* ozone concentrations than under the monitor-cell approach, suggesting that, if anything, . . . the grid-cell approach tended to underestimate . . . ozone." EPA Br. 61; *see also* 81 Fed. Reg. 74,534. Because, conversely, the same percentage (75%) of near-shoreline monitors had *higher* projected ozone using EPA's approach, that approach "tended to [*over*]estimate . . . ozone" at near-shoreline monitors.

spectrum,” and therefore is “comparatively unbiased,” EPA Br. 62, is not supported by EPA’s own data.

Furthermore, EPA’s assertion that *Michigan* is “inapposite” and “not instructive,” EPA Br. 58, is incorrect. This Court made clear in *Michigan*, by repeatedly and emphatically distinguishing between ozone concentrations offshore (on the one hand) and ozone concentrations “in any *state*” (on the other hand), that this distinction is at the heart of its holding on this issue. *Michigan*, 213 F.3d at 681 (emphasis in original); *see id.* (“EPA failed to explain how Wisconsin contributes to nonattainment *in any other state*” (emphasis in original); EPA “does not show on the record that Wisconsin’s ozone contribution affects any onshore *state* nonattainment” (emphasis added)). Insofar as it uses offshore-ozone projections, EPA’s unmodified grid-cell approach here is inconsistent with demonstration of “direct[ ] link[s] . . . to nonattainment in any *state*.” *Id.* (emphasis in original), *quoted in* EPA Br. 59.

Finally, EPA’s proffered excuse, EPA Br. 63 n.16, for its refusal even to assess the highest-overland-grid-cell approach should not be credited, *see* States’ Br. 27–28 (discussing highest-overland-grid-cell approach and how that approach would have satisfied EPA’s objectives).

That EPA can cite nothing in the record to address comments on the matter reinforces the conclusion that the only (purported) rationale for EPA's rejection comes too late. *Chenery*, 318 U.S. at 88.<sup>5</sup>

#### **IV. EPA Does Not Provide A Sufficient Justification For Its Failure To Timely Act On State-Submitted SIPs**

Congress established procedures for States to follow when submitting SIPs to EPA, 42 U.S.C. § 7410(a), and for EPA when reviewing SIPs and, if necessary, preparing a FIP in place of a SIP, 42 U.S.C. §§ 7410(c) & (k). Congress required swift action on SIPs based on the best information available to EPA at the time it conducts its review. Congress did not permit EPA, as it did here, to withhold denial of a SIP well past its “deadline for action” until information could be developed to justify imposition of a FIP. States’ Br. 29–38.

EPA first incorrectly claims that this case is a collateral attack on EPA's denial of State SIPs. EPA Br. 114–15. Not so. It is the FIP that is defective, and the FIP that is attacked here as arbitrary and capricious because it is patently inconsistent with Congress' intent for SIP review.

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<sup>5</sup> Similarly impermissible is EPA's post-hoc rationalization that Allegan was a problem receptor under either the grid-cell or monitor-cell approach. EPA Br. 62.

EPA then complains that if it were required to act within the statutory deadlines set forth in the Act, it “would be forced to disapprove more submissions based on inadequate analyses or support.” EPA Br. 117–18. But no State goes through the significant time and expense of preparing and submitting a SIP believing it to be deficient and expecting disapproval. Furthermore, EPA should be engaged with the State during the development of a SIP and may make a formal determination that the SIP is administratively and technically complete. 40 C.F.R. § 51.103(b)–(c) (permitting and contemplating consultation between the State and the EPA during the SIP process); 40 C.F.R. pt. 51, app. V (criteria for determining technical completeness of SIPs). Thus, EPA itself can address at an early stage its concerns about having to make decisions “based on inadequate analyses or support.”

EPA also suggests that forcing it to act within 12 months as Congress directed would prohibit it from considering additional information to later disapprove a SIP. EPA Br. 118. On the contrary, EPA always has authority to consider new information, during and after the 12-month review period, and may call for a SIP to be revised, 42 U.S.C. § 7410(k)(5) (calls for plan revisions), or may otherwise correct a

SIP decision, 42 U.S.C. § 7410(k)(6) (corrections). EPA may also partially approve or conditionally approve a SIP pending development of new information. Of course, none of these scenarios occurred here. EPA simply ignored the statutory procedure and waited for information to justify a FIP in place of certain SIPs. EPA may loathe the procedures to call for revisions of a SIP or to correct a decision it made, but that is the framework Congress established.

EPA relies on *Michigan*, 213 F.3d 663, in support of its decision to delay SIP denials until information sufficient to justify a FIP could be proposed. EPA Br. 118. However, *Michigan* involved a “SIP-call” under 42 U.S.C. § 7410(k)(5). There, EPA already approved various SIPs, and then later when new information was developed, availed itself of the revision procedures at Section 7410(k)(5). Perhaps that should have happened here, but it did not. And that is why the Rule is procedurally defective. 5 U.S.C. §§ 706(2)(A) & (D).

State Intervenors are correct that EPA’s failure to act on a SIP within 12 months did not mandate a specific outcome (approval). State Intervenors’ Br. 23–25. But State Intervenors ignore that the Act requires an action by EPA within that 12-month period, whether it be

approval, disapproval, or some combination of each. 42 U.S.C. § 7410(k)(2); *see also* § 7410(k)(3) (full and partial approval and disapproval), and § 7410(k)(4) (conditional approval). The EPA may not lie in wait for years until conditions support the outcome it desires.

EPA and State Intervenors assert that EPA's actions were consistent with cooperative federalism, and yet imply that if EPA were derelict in meeting its statutory procedural requirements (as it was here), then the State should sue EPA to compel action. EPA Br. 116 n.36; State Intervenors' Br. 24. While that may be a remedy in some circumstances, it should not be the default. Congress intended for the States and EPA to be cooperative. States already bear enormous costs to prepare implementation plans and they should not be expected to also bear uncertain costs to sue their federal partner and force it to adhere to the Act's procedural requirements.

#### **V. EPA Unlawfully Included Biogenic Emissions Of Ozone Precursors When Identifying Significant Upwind States**

State Petitioners argued that EPA's modeling overstated anthropogenic ozone at the critical step of identifying "significant" upwind contributors to downwind receptors. States' Br. 38–41. EPA did this by treating some biogenic emissions as anthropogenic. This violated

the Good Neighbor Provision, which is limited to “emissions activity” that is “prohibit[able]”—in other words, *anthropogenic* emissions. *Michigan*, 213 F.3d at 677; 42 U.S.C. § 7410(a)(2)(D)(i)(I); States’ Br. 38. As a result, EPA unlawfully included Iowa (at least) in the Rule, given that its only downwind “link” was barely over EPA’s threshold for significance (.06 ppb over the .75 ppb threshold). States’ Br. 40–41.

EPA responds with bare assertions that the model it used to determine if a given State had “significant” downwind impact is within its professional discretion. EPA Br. 70–72. Yet State Petitioners’ argument raised more than a matter of experts’ choice of a model; the States demonstrated that the linkage performed by EPA at step two was inconsistent with the plain language of the Act. EPA must limit its focus to anthropogenic emissions at step two, because the Act applies expressly to ozone from “sources” and “activities” that are man-made.

The States explained that EPA’s modeling of “significance” was arbitrary and not within agency discretion because the model it used to assign culpability for downwind ozone (the APCA model) was biased by deeming all ozone formed from biogenic emissions that interact even minimally with anthropogenic emissions to be wholly anthropogenic.



The States pointed to the developer’s handbook for this model, which states that it “is not really a ‘source apportionment’ technique because it expresses biases”—and thus “it is referred to as a ‘culpability assessment.’” In fact, it “results in more ozone formation attributed to anthropogenic NO<sub>x</sub> sources and less ozone formation attributed to biogenic sources.” ENVIRON, CAMx User’s Guide, v. 6.2, at 169 (March 2015), [http://www.camx.com/files/camxusersguide\\_v6-20.pdf](http://www.camx.com/files/camxusersguide_v6-20.pdf); see 81 Fed. Reg. 74,536 n.124 (citing this technical document). EPA does not deny the bias. Instead, it argues that the model it used is better designed for “developing a control strategy.” EPA Br. 71–72. But EPA did not use the model to “develop[ ] a control strategy”; that came later, at step three of EPA’s four-step process. See States’ Br. 7–10. EPA used its “biase[d]” model at step two, where the goal was to *quantify* human-sourced downwind contributions to identify “significant” upwind contributors. States’ Br. 8; 81 Fed. Reg. 74,518. At that stage, “biases” mattered a lot—and resulted in Iowa’s erroneous inclusion in the Rule.

EPA’s only other response is that this argument is waived because no one raised it during the comment period. EPA Br. 72. In fact, Cedar Falls Utilities commented that “EPA’s Modeling for the Proposal Was Not

Reasonably Designed to Identify Human Activity Sources,” that it was “not justified or applied in accordance with the law,” and that EPA “arbitrarily rejected the use of modeling better suited to tell it whether given states’ emissions are significant in terms of anthropogenic sources of NO<sub>x</sub>.” Cedar Falls Utilities Comment, at 9–10, EPA-HQ-OAR-2015-0500-0325 (JA\_\_). Cedar Falls’ comment also referenced and attached an analysis by Alpine Geophysics which conducted modeling “better suited to tell it whether given states’ emissions are significant in terms of anthropogenic sources of NO<sub>x</sub>” and found that, under proper modeling, Iowa’s contribution would be only .44 ppb, well below the .75 ppb threshold. Cedar Falls Utilities Comment Exhibits, Ex. D, at 1, 8, EPA-HQ-OAR-2015-0500-0369 (JA\_\_).

## **VI. EPA’s Positions In This Case And In The *Murray Energy* Litigation Are Irreconcilable**

EPA has no meaningful response to State Petitioners’ argument that EPA has taken irreconcilable positions between this case and *Murray Energy*, No. 15-1385. States’ Br. 44–47. In *Murray Energy*, EPA explained that, in setting downwind States’ NAAQS obligations, the agency refuses to account for the fact that States cannot control interstate pollution because “[i]nterstate emissions are regulated under

the Good Neighbor Provision.” EPA Br. 99, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. July 29, 2016). Yet, here, EPA justified the Rule on the basis that interstate emissions are not fully controlled by EPA’s current Good Neighbor Provision regulations. 81 Fed. Reg. 74,508. EPA attempts to avoid this contradiction by suggesting that it “will promulgate” additional regulations. EPA Br. 122. While EPA can, of course, issue a “partial remedy” for the interstate transport problem, EPA Br. 122, it cannot impose NAAQS obligations on downwind States that are applicable now based upon the false claim that its extant Good Neighbor Provision regulations are already a *complete* remedy. In truth, EPA will never, as a practical matter, fully address the interstate pollution problem and must make accommodations for downwind States to reflect this reality. States’ Br. 47. But, meanwhile, given that this Court has jurisdiction over this case and *Murray Energy*, Petitioner States respectfully request that this Court make clear to EPA that it cannot offer contradictory defenses of its rules before this Court.

## **VII. This Court Should Vacate The Rule In Its Entirety**

Environmental Intervenors ask this Court, if it accepts any of State Petitioners’ arguments, to remand without vacating the Rule. Envtl.

Intervenors Br. 16–19. EPA does not ask for this more limited remedy, and with good reason: the “[n]ormal[ ]” remedy “when [this Court] find[s] a rule is invalid is to vacate.” *See Humane Soc’y of U.S. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) (citation omitted). This Court will sometimes “remand without vacatur, depending upon the seriousness of the [rule’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of vacating the Rule.” *Id.* (citation omitted); *see Allied-Signal, Inc. v. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Here, EPA’s numerous failures are “major shortcomings that go to the heart of” the Rule, “mak[ing] vacatur appropriate.” *Humane Soc’y*, 865 F.3d at 614–15. As for practical consequences, several of Petitioner States’ objections are about including some States under this Rule *at all*. It would be inequitable to continue to subject States to the Rule’s significant burdens when, upon a proper analysis, those States will be excluded entirely.

## CONCLUSION

The Rule should be vacated.

Dated: March 19, 2018

Respectfully Submitted,

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s/ Misha Tseytlin

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(C) because this brief contains 4,488 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). The total number of words contained in this brief and the Industry Petitioners' Reply Brief does not exceed 9,000 words, per this Court's Order of September 6, 2017.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: March 19, 2018

s/ Misha Tseytlin

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MISHA TSEYTLIN



**CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: March 19, 2018

s/ Misha Tseytlin

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