ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1406 (consolidated with Nos. 16-1410, 16-1428, 16-1429, 16-1432, 16-1435, 16-1436, 16-1437, 16-1438, 16-1439, 16-1440, 16-1441, 16-1442, 16-1443, 16-1444, 16-1445, 16-1448, and 17-1066)

STATE OF WISCONSIN, *et al.*,

***Petitioners*,**

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

***Respondents*.**

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

JOINT BRIEF OF INDUSTRY RESPONDENT-INTERVENORS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

All parties, including intervenors, and *amici curiae* appearing in this Court are listed in the Joint Opening Brief of Industry Petitioners. Because these consolidated cases involve direct review of a final agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

B. Ruling Under Review

A reference to the ruling at issue appears in the Joint Opening Brief of Industry Petitioners.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court, apart from Case No. 17-1066, which was transferred to this Court from the United States Court of Appeals for the Eighth Circuit (which took no dispositive or other action on the merits of the case) and was consolidated with the other cases herein, under lead case No. 16-1406. Undersigned counsel are not aware of any other related cases currently pending in this Court or in any other court.

RULE 26.1 DISCLOSURE STATEMENTS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Cir. R. 26.1, Industry Respondent-Intervenors make the following statements:

The *Utility Air Regulatory Group* ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations. UARG participates on behalf of certain of its members collectively in Clean Air Act administrative proceedings that affect electric generators and in litigation arising from those proceedings. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Murray Energy Corporation is a corporation organized and existing under the laws of the State of Ohio. Murray Energy's parent is Murray Energy Holdings Company, which itself has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

The *Environmental Committee of the Florida Electric Power Coordinating Group, Inc.* ("FCG-EC") certifies that the Florida Electric Power Coordinating Group, Inc. ("FCG") is a non-governmental corporate entity organized under Florida law. The FCG is a trade association and does not have a parent corporation. No publicly held corporation owns ten percent or more of the FCG's stock.

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GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

The Act	Clean Air Act
The Agency	United States Environmental Protection Agency
CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CSAPR	Cross-State Air Pollution Rule
EGUs	electricity-generating units, or electric generating units
EPA	United States Environmental Protection Agency
FIP	federal implementation plan
JA	Joint Appendix
NAAQS	national ambient air quality standard(s)
NOx (or NO_x)	nitrogen oxide or nitrogen oxides
RTC	EPA Response to Comments document
SCR	selective catalytic reduction
SIP	state implementation plan
SNCR	selective non-catalytic reduction
UARG	Utility Air Regulatory Group

JURISDICTION

These petitions for review challenge the "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS [National Ambient Air Quality Standard]" ("CSAPR Update Rule" or "Rule"), an Environmental Protection Agency ("EPA" or the "Agency") regulation under the Clean Air Act ("CAA" or the "Act"). 81 Fed. Reg. 74,504, 74,510 (Oct. 26, 2016) (citing CAA §§ 110(a)(2)(D)(i)(I), 110(c)(1), 42 U.S.C. § 7410(a)(2)(D)(i)(I), (c)(1)), Joint Appendix ("JA") ___. The petitions were timely filed under CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether it was lawful and reasonable for EPA, in promulgating the CSAPR Update Rule with a compliance deadline of May 1, 2017, to decline to base the Rule's emission budgets on emission controls and emission reductions that EPA determined could not be implemented and achieved by that date.

2. Whether it was lawful and reasonable for EPA to include in the CSAPR Update Rule a provision permitting electricity-generating units ("EGUs") to use, as part of their compliance with CSAPR as updated by the Rule, a fraction of those EGUs' lawfully banked CSAPR emission allowances—subject to a stringent conversion ratio as well as to variability limits and emission allowance penalty provisions, restricting use of those banked CSAPR allowances.

3. Whether EPA lawfully and reasonably determined that no basis existed to require any additional emission reductions under the Rule for the purpose of

addressing ozone air quality specifically in Delaware, given EPA's projection that no air-quality receptor in that state would fail to attain and maintain the 2008 ozone NAAQS.

STATUTES AND REGULATIONS

Relevant CAA provisions are reproduced in the Statutory Addendum in the Joint Opening Brief of Industry Petitioners, the Addendum to the Proof Opening Brief of Petitioner Conservation Groups and Petitioner State of Delaware ("Delaware/Envtl. Pet. Br."), and the Statutory and Regulatory Addendum in Respondent EPA's Initial Brief ("EPA Br.").

STATEMENT OF THE CASE

To avoid duplication, this brief does not repeat the statement of the case in the Joint Opening Brief of Industry Petitioners (at 2-5) or the portions of the background factual information included in the statement of the case in EPA's brief (at 3-22) that pertain to issues addressed herein.[1] *See* D.C. Cir. R. 28(d)(2).

[1] This reference to the EPA brief's statement of the case should not be construed as necessarily indicating agreement by Industry Respondent-Intervenors with every characterization or statement in that statement of the case (or as indicating agreement with any given part of EPA's brief).

SUMMARY OF ARGUMENT[2]

Delaware and Environmental Petitioners' challenge to the CSAPR Update Rule as insufficiently stringent is unavailing, and their arguments should be rejected.

First, there is no merit to their argument that EPA should have required emission reductions beyond those it determined were feasible and cost-effective to implement by the beginning of the 2017 ozone season. The Rule's May 1, 2017 compliance deadline reflects EPA's reasonable harmonization of the Rule's compliance timeframe with the relevant NAAQS attainment schedule, consistent with this Court's precedent. Moreover, EPA could not have established any earlier compliance deadline, as key issues concerning its regulatory authority remained judicially unresolved until shortly before the Agency began its rulemaking. Furthermore, EPA's focus in interstate-transport rulemakings on those emission reductions that are shown to be feasible and cost-effective to implement by the applicable rule's compliance deadline is an essential element of the Agency's consideration of emission-control costs, which this Court and the Supreme Court have affirmed. In any event, the premise of Delaware and Environmental Petitioners' argument—*i.e.*, that the Rule's emission-reduction requirements fall short of providing

[2] This brief responds to arguments in the Brief of Petitioners State of Delaware Department of Natural Resources and Environmental Control ("Delaware") and Sierra Club and Appalachian Mountain Club (collectively, "Environmental Petitioners"). This brief supplements and elaborates on points made in Argument I of EPA's brief.

a full remedy for interstate transport with respect to the 2008 ozone NAAQS—is conjectural and does not reflect EPA's actual determinations in the Rule.

Second, there is no legal infirmity to EPA's determination to permit a limited number of lawfully banked CSAPR ozone-season nitrogen oxide ("NOx") emission allowances to be used in complying with CSAPR as updated by the CSAPR Update Rule. The Rule's design includes restrictions—in the form of variability limits, assurance levels, and associated compliance penalties—on EGUs' ability to use banked allowances for compliance, assuring that emission reductions will be achieved to accomplish the Rule's objectives. EPA added to those limitations a stringent "surrender" ratio to remove from the allowance market the vast majority of EGUs' banked ozone-season NOx allowances, while allowing a fraction of these allowances to retain a measure of market value in order to help achieve the Rule's ozone-reducing purposes. Delaware and Environmental Petitioners do not, and cannot, show that EPA was compelled to go even further by taking the radical step of confiscating or otherwise devaluing the banked allowances altogether.

Finally, contrary to Delaware's argument, EPA had no obligation to base the Rule's emission-reduction requirements on already-expired NAAQS attainment dates for areas in that state (attainment dates that those areas actually met), where the earliest compliance date EPA conceivably could have set—May 1, 2017—was in fact the compliance date established by the Rule. EPA reasonably used 2017 as its projection year for purposes of determining downwind receptors of concern and

associated interstate contributions. That EPA projected no downwind receptors of concern in Delaware in 2017—a factual determination Delaware does not contest—defeats Delaware's argument, given this Court's holding that where record data show that downwind receptors would, in a future year, attain the NAAQS absent any upwind-state emission reductions, EPA lacks authority to require any such reductions in that future year.

ARGUMENT

I. The Rule Does Not Impermissibly Under-Control Upwind States' Emissions, and Delaware and Environmental Petitioners' Arguments that It Does Are Meritless.

EPA's statements in the rulemaking record and its brief amply demonstrate the fallacy of Delaware and Environmental Petitioners' argument that EPA unlawfully established emission budgets in the CSAPR Update Rule that are insufficiently stringent under section 110(a)(2)(D)(i)(I) of the CAA.

A. No Basis Exists for Delaware and Environmental Petitioners' Claim that EPA Failed To Comply with the Requirement that the Agency Harmonize Its Interstate-Transport Rule with Applicable NAAQS Attainment Dates.

Delaware and Environmental Petitioners rely heavily on their interpretation of the Court's opinion in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008), which addressed challenges to the Clean Air Interstate Rule ("CAIR"). But their argument that the Rule runs afoul of *North Carolina* ignores the decisive difference between the compliance timetable EPA set in CAIR and the

CSAPR Update Rule's May 1, 2017 compliance deadline. The Court held in *North Carolina* that EPA had not adequately justified CAIR's Phase Two compliance deadline of 2015 because "EPA [had] not ma[d]e *any* effort to harmonize CAIR's Phase Two deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas." *Id.* at 912 (emphasis added). In contrast, in the CSAPR Update Rule, EPA expressly established the May 1, 2017 compliance deadline so as to provide for emission reductions in advance of the July 20, 2018 attainment deadline for areas designated nonattainment for the 2008 ozone NAAQS. 81 Fed. Reg. at 74,507, JA___. Thus, the CSAPR Update Rule reflects reasonable harmonization—indeed, alignment—of the Rule's compliance deadline with relevant downwind areas' attainment deadlines.

Furthermore, as EPA's brief explains (EPA Br. 37), Delaware and Environmental Petitioners' apparent argument that the Rule should have required emission reductions to be achieved in advance of marginal nonattainment areas' July 2015 attainment deadline, or the July 2016 extended attainment deadline for several of those areas, *see* Delaware/Envtl. Pet. Br. 24-26, 29, was waived. In any event, Delaware and Environmental Petitioners do not attempt to show how the Rule could have required reductions in advance of those 2015 and 2016 attainment dates.

For the CSAPR Update Rule's requirements to have been designed to address even the July 2016 extended attainment date for marginal areas would have required that emission-reduction requirements take effect by May 1, 2015, for the 2015 ozone

season (*i.e.*, the last full ozone season before the July 2016 attainment date). Yet EPA did not even propose the Rule's EGU emission-reduction requirements until well after that ozone season concluded on September 30, 2015. *See* 81 Fed. Reg. at 74,507 (noting that the Rule "further limits ozone season (May 1 *through September 30*) NO_x emissions from [EGUs]") (emphasis added), JA___; 80 Fed. Reg. 75,706, 75,764 (Dec. 3, 2015), JA___, ___(EPA's proposed version of rule was signed on November 16, 2015, *i.e.*, a month and a half after the end of the 2015 ozone season). And, as discussed below, no basis exists for concluding that EPA had a legally adequate basis for proposing its rule appreciably before it did so.

It was not until late April 2014 that a central question of statutory interpretation—whether EPA even had *authority* to promulgate the type of federal implementation plans ("FIPs") used to impose the CSAPR Update Rule's emission-budget requirements—was resolved in the affirmative, with issuance of the Supreme Court's decision in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).[3] *See* 81 Fed. Reg. at 74,523, JA___. Moreover, it was not until late July 2015 that this Court issued its opinion on remand in *EME Homer II*. This Court's remand decision addressed: (a) remaining challenges to EPA's interpretation of, and exercise of

[3] *Compare EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 28-37 (D.C. Cir. 2012) ("*EME Homer I*") (holding that EPA's FIP approach in CSAPR was legally precluded), *rev'd & remanded*, 134 S. Ct. 1584 (2014), *on remand*, 795 F.3d 118 (D.C. Cir. 2015) ("*EME Homer II*") *with EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. at 1600-02 (reversing that holding).

authority under, CAA section 110(a)(2)(D)(i)(I) to promulgate CSAPR;[4] and (b) the many "as-applied" challenges to state emission budgets under CSAPR, including eleven states' ozone-season NOx emission budgets.[5] The Court's mandate in *EME Homer II* issued on September 29, 2015,[6] barely a month and a half before EPA signed the proposed CSAPR Update Rule. EPA could not reasonably have undertaken its rulemaking appreciably sooner than it did,[7] and in any event could not have initiated it—let alone completed it—in advance of the 2015 ozone season.[8]

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[4] *See EME Homer II*, 795 F.3d at 132-38. These included, for example, challenges to EPA's interpretation and application of the "interfere with maintenance" prong of section 110(a)(2)(D)(i)(I) of the Act. Because these challenges were not presented in the form of "as-applied" challenges to CSAPR, however, the Court declined to address them on the merits. *See id.* at 136-37.

[5] *Id.* at 127-32, 138. In *EME Homer II*, this Court held that those budgets were invalid because they were based on EPA over-control; EPA's establishment of those budgets constituted "clear transgressions of the statutory boundaries as set forth by the Supreme Court in *EME Homer*." *Id.* at 130.

[6] Mandate, *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015) (No. 11-1302) (Sept. 29, 2015).

[7] In the CSAPR Update rulemaking, EPA addressed, *inter alia*, this Court's remand in *EME Homer II* of the eleven states' CSAPR ozone-season NOx emission budgets. 80 Fed. Reg. at 75,716-17 (proposed version of the Rule), JA___-___; 81 Fed. Reg. at 74,523-25 (final Rule), JA___-___.

[8] In any event, both of Delaware's nonattainment areas for the 2008 ozone NAAQS attained the NAAQS by their applicable attainment deadlines. Delaware and Environmental Petitioners state that, as of the date of their filing of their opening brief (September 18, 2017), the Philadelphia nonattainment area, which includes New Castle County, Delaware, "remain[ed] in marginal nonattainment, and subject to an extended attainment deadline of July 20, 2016." Delaware/Envtl. Pet. Br. 26 n.9. (EPA extended the Philadelphia area's attainment deadline by one year, from July 20, 2015, to July 20, 2016, pursuant to CAA section 181(a)(5), 42 U.S.C. § 7511(a)(5). 81 Fed. Reg. 26,697, 26,698 & Table 2, 26,700-01 & Table 4 (May 4, 2016).) As of the

B. It Was Permissible and Consistent with This Court's Precedents for EPA, in Promulgating the Rule, To Consider the Costs and Cost-Effectiveness of Emission Reductions that Could Feasibly Be Achieved by May 1, 2017.

There is no merit to Delaware and Environmental Petitioners' argument that EPA acted unlawfully by establishing ozone-season emission budgets, applicable beginning May 1, 2017, that—according to Delaware and Environmental Petitioners—do not necessarily require the full amount of emission reductions needed to meet section 110(a)(2)(D)(i)(I) obligations with respect to the 2008 ozone NAAQS.

Delaware and Environmental Petitioners' argument is fatally flawed because it disregards the essential fact that the Rule's emission budgets—like the emission budgets established by EPA's previous interstate-transport rules, the NOx SIP [State Implementation Plan] Call, CAIR, and CSAPR—are based in part on EPA's evaluation of emission-control costs and its assessment of which emission controls are feasible and cost-effective within the period allowed for compliance. EPA's decision to use control costs and cost-effectiveness in establishing statewide emission budgets in interstate-transport rulemakings was affirmed in *Michigan v. EPA*, 213 F.3d

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date of the filing of those parties' opening brief, however, EPA had published a proposed finding that the Philadelphia nonattainment area, including New Castle County, Delaware, had attained the 2008 ozone NAAQS by its July 2016 attainment deadline. 82 Fed. Reg. 18,268 (Apr. 18, 2017). And shortly after the brief-filing date, EPA published its final determination that that area attained the NAAQS by its July 2016 deadline. 82 Fed. Reg. 50,814 (Nov. 2, 2017); *see* EPA Br. 46 n.12. In addition, on May 4, 2016, EPA published a final rule determining that Delaware's only other nonattainment area for the 2008 ozone NAAQS—Seaford (Sussex County)—attained the NAAQS by its original attainment deadline of July 20, 2015. 81 Fed. Reg. at 26,698 & Table 1, 26,700-01 & Table 4; *see* EPA Br. 46 n.12.

663, 674-79 (D.C. Cir. 2000); expressly left undisturbed in *North Carolina*, 531 F.3d at 917; and upheld by the Supreme Court in *EME Homer*, 134 S. Ct. at 1604-10. Consequently, EPA's fundamental determination to use emission-control costs as a key factor in determining emission budgets in interstate-transport rulemakings under section 110(a)(2)(D)(i)(I) is beyond judicial challenge.

A necessary element of any evaluation of emission-control costs is an assessment of what controls can feasibly be implemented in a cost-effective way *within a given period of time*. Put another way, a determination of a feasible deadline by which emission sources may be required to meet a given set of emission-reduction obligations is inescapably part of any regulatory determination as to whether the prescribed emission reductions can be accomplished in a cost-effective manner. For instance, sources may be able to implement a certain amount of emission reductions in a cost-effective way within ten years but could not implement the same reductions in a cost-effective way (or perhaps at all) if given only, say, five years. Likewise, reductions that may be cost-effective in five years may not be cost-effective if sources are given only three years—much less, as in the CSAPR Update Rule, a period of only four, six, or eight months.[9]

[9] EPA signed the final CSAPR Update Rule on September 7, 2016, *see* 81 Fed. Reg. at 74,586, JA___, *i.e.*, less than eight months before the Rule's May 1, 2017 compliance deadline. The Rule's publication date (October 26, 2016) was barely six months before the compliance deadline. And the Rule's effective date of December 27, 2016, *see id.* at 74,504, JA___, was only four months before the compliance deadline.

Thus, having determined it was appropriate to require significantly-contributing upwind states to achieve emission reductions by the beginning of the 2017 ozone season, EPA properly—indeed, *necessarily*—focused its analysis of available, achievable, cost-effective emission reductions on those reductions that could feasibly be implemented before that date. *See, e.g.,* 81 Fed. Reg. at 74,508, 74,540, 74,552, JA___, ___, ___; EPA, EGU NO_x Mitigation Strategies Final Rule Technical Support Document 9-13, EPA-HQ-OAR-2015-0500-0554 (presenting EPA's evaluation, as part of its emission-control cost-effectiveness assessment, of "the implementation time required for each compliance option to assess the feasibility of achieving reductions during the 2017 ozone season"), JA___-___.

For example, EPA determined that "[t]he amount of time to retrofit [EGUs] with new [selective catalytic reduction ("SCR") controls] exceeds the implementation timeframes considered in this final rule. It would therefore not be feasible to retrofit new SCR to achieve EGU NO_x reductions for the 2017, or even 2018, ozone season." 81 Fed. Reg. at 74,541, JA___; *see also id.* at 74,543 n.137 ("new SCRs were not considered a feasible control on the compliance timeframe for this rule"), JA___. Likewise, "[t]he amount of time to retrofit [EGUs] with new [selective non-catalytic reduction ("SNCR") controls] exceeds the implementation timeframes considered in this final rule," and thus "[i]t would … not be feasible to retrofit new SNCR to achieve EGU NO_x reductions for the 2017, or even 2018, ozone season." *Id.* at

74,542, JA___; *see also id.* at 74,543 n.138 ("new SNCRs were not considered a feasible control on the compliance timeframe for this rule"), JA___.

EPA in its rulemaking, therefore, considered those emission reductions that it determined, based on its technical analyses, could cost-effectively be implemented by the 2017 ozone season. This approach was an integral component of EPA's "significant contribution" determination for the Rule. Delaware and Environmental Petitioners' arguments are unavailing, both because (as discussed above) EPA's authority to consider costs and cost-effectiveness in structuring its significant-contribution determinations has been judicially affirmed, and because those parties do not show that EPA failed to consider available, feasible emission-control strategies that could cost-effectively be implemented in the short time between the Rule's promulgation and the beginning of the 2017 ozone season. *See* EPA Br. 38-41.[10] Although those petitioners may wish that EPA had imposed more stringent emission budgets, their preference does not override the fact that EPA acted properly in limiting the emission reductions it quantified in setting emission budgets to those

[10] As EPA's brief explains, there is no basis for Delaware and Environmental Petitioners' only specific objections to EPA's emission-control feasibility determinations, *i.e.*, that EPA should have assumed (a) even lower NOx emission rates for SCR-equipped EGUs and (b) broader availability of re-dispatching of electricity generation within the highly-compressed period before the Rule's May 1, 2017 compliance deadline. EPA Br. 38-41.

reductions it determined were feasible and cost-effective to implement by May 1, 2017.[11]

C. In the Rule Before the Court, EPA Did Not Make Any Determination that the Rule's Emission Budgets Reflect Only a Partial Remedy.

Finally, it is important to emphasize that EPA in its rulemaking did not make a determination that the emission budgets established by the Rule's FIPs are in fact insufficiently stringent to fully address the covered upwind states' emission-reduction obligations under section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS. EPA included in the Rule a definitive determination that its budget for Tennessee

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[11] This is true irrespective of what point—during the statutory period for promulgation of interstate-transport FIPs for the 2008 ozone NAAQS under CAA section 110(c)(1)—EPA promulgated the FIPs established by the Rule. *Cf.* Delaware/Envtl. Pet. Br. 27-28; *see* EPA Br. 34-35 & n.9 (showing that "this Court has held on several occasions that agencies have the authority to tackle problems in an incremental fashion" (citing *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989)). Moreover, as EPA points out; "there is no CAA statutory mandate to have Good Neighbor emission reductions fully in place before the earliest attainment dates, as [Delaware and Environmental] Petitioners contend." EPA Br. 35 n.9. And, although it is conceivable that EPA might have determined that a greater amount of emission reductions would have been feasible and cost-effective had the Rule's compliance deadline been later than May 1, 2017, Delaware and Environmental Petitioners do not contend that EPA should have set a compliance deadline later than that date.

Further, as EPA demonstrates, *see id.* at 31, no basis exists for Delaware and Environmental Petitioners' argument (*see* Delaware/Envtl. Pet. Br. 31-40) that the "as expeditiously as practicable" language of CAA section 181(a)(1), 42 U.S.C. § 7511(a)(1), supports their claim that the Rule's emission budgets and other provisions (such as its allowance-banking provisions, *see infra* Argument II, *contra* Delaware/Envtl. Pet. Br. 40) are contrary to law on the grounds that they are insufficiently stringent.

fully discharges that state's interstate-transport obligation for the 2008 NAAQS. 81 Fed. Reg. at 74,521 n.84, 74,540, JA___, ___. But EPA neither made nor articulated any such final determination—one way or the other—with respect to any of the other upwind states.[12] While EPA concluded that the Rule's emission-reduction requirements "are necessary to assist downwind states in attaining and maintaining the 2008 ozone NAAQS," the Agency also stated that those requirements "*may* not be sufficient to fully address these states' good neighbor obligations." *Id.* at 74,521 (emphasis added), JA___; *id.* at 74,522 (the Rule's emission reductions "*may* not be all that is needed") (emphasis added), JA___; *see also* 80 Fed. Reg. at 75,714 (the Rule as proposed "*may* not be sufficient to fully address these states' good neighbor obligations") (emphasis added), JA___. EPA explained that further analysis would be required to make a determination on this issue for all upwind states, apart from Tennessee:

> Generally, a final determination of *whether* the EGU NO_x reductions quantified in this rule represent *a full or partial* elimination of a state's good neighbor obligation for the 2008 NAAQS is subject to an evaluation of the contribution to interstate transport from non-EGUs and further EGU reductions that are achievable after 2017.

[12] Those states included Delaware, which EPA determined interferes with maintenance of the 2008 ozone NAAQS in Philadelphia County, Pennsylvania. 81 Fed. Reg. at 74,537 Table V.E-1, 74,538 Table V.E-3, JA___, ___. EPA did not impose an emission budget on Delaware in the Rule because "EPA's assessment of EGU NO_x reduction potential" in Delaware did not show that any NOx emission reductions at EGUs in Delaware were available "in 2017 at any [EPA-]evaluated cost threshold." *Id.* at 74,553, JA___.

81 Fed. Reg. at 74,522 (emphases added), JA___. In other words, as EPA observes in its brief, "EPA cannot conclude that the CSAPR Update emission reductions do (or do not) satisfy upwind states' Good Neighbor obligations without additional analysis." EPA Br. 36. Thus, for example, "additional analysis with more recent data may demonstrate … that upwind states have eliminated all significant contributions."[13] *Id.* Accordingly, the underlying premise of Delaware and Environmental Petitioners' argument—*i.e.*, that the Rule's emission-reduction requirements fall short of a full remedy under section 110(a)(2)(D)(i)(I)—is conjectural and unsupported by EPA's analyses and determinations in the Rule before the Court.

[13] EPA's approach in the CSAPR Update Rule in this regard is, therefore, consistent with the approach EPA took in 2011 in CSAPR. *See, e.g.*, 76 Fed. Reg. 80,760, 80,764 (Dec. 27, 2011) (EPA explaining its approach in its original CSAPR rulemakings: "EPA intends to conduct further analysis … to address *any remaining* significant contribution to nonattainment and interference with maintenance with respect to the 1997 ozone NAAQS for any state … identified in the final [CSAPR rulemakings] for which EPA was unable to fully quantify the emissions that must be prohibited to satisfy the requirements of section 110(a)(2)(D)(i)(I) with respect to the 1997 ozone NAAQS.") (emphasis added); 81 Fed. Reg. at 74,507 (determining that, whereas "the original CSAPR rulemakings" established ozone-season NOx emission budgets for eleven states "that were not *necessarily* sufficient" to fully address those states' section 110(a)(2)(D)(i)(I) obligations with respect to the 1997 ozone NAAQS, EPA's modeling conducted for the CSAPR Update Rule showed that, in fact, "with implementation of the original CSAPR [ozone-season NOx] emission budgets, emissions from ten of these [eleven] states no longer significantly contribute to downwind nonattainment or interference with maintenance for the 1997 ozone NAAQS" and the eleventh state (Texas) met its section 110(a)(2)(D)(i)(I) obligations "even without implementation of the original CSAPR [ozone-season NOx] emission budget" for that state) (emphasis added), JA___.

II. The Rule's Provisions Permitting EGUs To Use a Strictly Limited Fraction of Their Banked CSAPR Allowances Are Lawful and Reasonable.

As it did in previously promulgated emission-allowance programs addressing interstate-transport concerns under CAA section 110(a)(2)(D)(i)(I), EPA in the CSAPR Update Rule authorized use of emission allowance "banking" as a method of providing an incentive for early, additional emission reductions—emission reductions *below* levels established by applicable emission budgets—and economically efficient compliance strategies that help further lower ozone levels. As EPA emphasized in promulgating the Rule, "[b]anking of allowances for later use … creates incentives to make early emission reductions, which often result in improved air quality earlier than otherwise required." 81 Fed. Reg. at 74,561, JA___. This observation has been borne out by experience: "EPA has seen early reductions and banking in implementing other [CAA] trading programs over the past 20 years, such as the Acid Rain Program[14] and the NO_x SIP Call." *Id.*; *see also, e.g., Michigan*, 213 F.3d at 686 (noting that the NOx SIP Call rule provided for allowance banking); *North Carolina*, 531 F.3d at 902, 912 (same for the Acid Rain Program and CAIR). Furthermore, the CAA itself expressly authorizes inclusion of market-based economic incentive programs, of which emission allowance banking typically is part, in plans required to implement the Act's requirements. CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A) (providing that the "emission limitations and other control measures, means, or techniques" that CAA

[14] *See* CAA Title IV (CAA §§ 401-416), 42 U.S.C. §§ 7651-7651*o*.

implementation plans are to establish may include "economic incentives such as … marketable permits"); *see also, e.g.*, 40 C.F.R. § 51.308(e)(2), (2)(vi) (authorizing emissions trading to implement CAA visibility-protection requirements); *id.* § 51.308(e)(2)(vi)(K) (reflecting that such authorized trading programs may "allow[] banking of [emission] allowances").

In the CSAPR Update Rule, EPA decided to limit EGUs' ability to use banked allowances to comply with the Rule by including the same features that, in CSAPR as promulgated by the Agency in 2011, significantly limit the ability to use banked allowances for CSAPR compliance: variability limits, assurance levels, and associated compliance penalties.[15] 81 Fed. Reg. at 74,566-67, JA___-___. Even beyond that, in its CSAPR Update rulemaking, EPA raised the question whether it should impose *additional* restrictions on EGU owners' ability to use for compliance those CSAPR ozone-season NOx allowances that they had lawfully banked as a result of their early, greater-than-required emission reductions during the first two ozone seasons (2015 and 2016) in which CSAPR was operative. 80 Fed. Reg. at 75,746-47, JA___-___. A number of commenters, including Respondent-Intervenor Utility Air Regulatory

[15] Despite the use of the word "banking," the allowance-banking feature of CSAPR (including the CSAPR Update Rule) does *not* include accrual or payment of any "interest" (*e.g.*, in the form of additional allowances paid over time). That is, banking allowances yields zero "interest." In addition, in CSAPR (including the CSAPR Update Rule), although banking of allowances is permitted to the extent individual EGUs achieve early, extra emission reductions, the *converse* of allowance banking—*i.e.*, "borrowing" allowances from future years for compliance use in the current year—is not permitted.

Group ("UARG"), argued that EPA should not impose any such additional restrictions. UARG Comments 54-57, EPA-HQ-OAR-2015-0500-0253, JA___-___; *see* 81 Fed. Reg. at 74,560, JA___. For example, UARG commented that

> [a]llowing unrestricted use of banked allowances would … reward and encourage states that met their emission budgets under CSAPR through emission reductions and that built a bank of allowances through early emission-reduction action. In addition, EPA should make the transition [to the CSAPR Update Rule] as seamless as possible to avoid damage to market reliance and efficiency and the loss of trust that results from changing allowance trading rules. Indeed, imposing new [allowance] trading ratios [and thereby limiting use of banked CSAPR allowances] in a trading program that is already established, as EPA proposes to do here, is akin to devaluing currency and is likely to disrupt the environmental markets.

UARG Comments 56-57, JA___-___.[16] At the other end of the spectrum, some other commenters argued that EPA should prohibit altogether *any* use of lawfully

[16] Quoting Matthew Polesetsky, *Will a Market in Air Pollution Clean the Nation's Dirtiest Air? A Study of the South Coast Air Quality Management District's Regional Clean Air Incentives Market*, 22 ECOLOGY L. Q. 359, 374-75 (1995), UARG's comments noted: "'[P]ollution credit [or emission-allowance] markets operate on the assumption that polluters will develop rational responses to the incentives that the market creates. Sources that find it extremely costly to reduce their emissions have an interest in negotiating with sources that can reduce emissions relatively inexpensively. This process of pollution credit transfer requires planning. Planning, in turn, requires the ability to predict the future with some degree of certainty. If market participants believe that regulators will whimsically change the rules of the market, firms lose the ability to plan for the future. In the worst case scenario, market participants may fear that regulators will confiscate the credits that the participants generate.'" UARG Comments 57 n.35, JA___.

banked CSAPR ozone-season NOx allowances.[17] *See* 81 Fed. Reg. at 74,561, JA___; Delaware/Envtl. Pet. Br. 38.

EPA's final determination on this issue was to impose a highly-restrictive "surrender" (or "conversion") ratio of approximately 3.5-to-1 on the banked allowances—meaning that for every three and a half lawfully banked CSAPR ozone-season NOx allowances, only one allowance would be permitted to be used for compliance. 81 Fed. Reg. at 74,560, JA___; EPA Br. 43. EPA explained its rationale for the Rule's drastic "devalu[ation]" (EPA Br. 44) of banked CSAPR allowances:

> By instituting the one-time conversion of banked 2015 and 2016 allowances [at EPA's projected 3.5-to-1 ratio], the EPA is limiting the use of such allowances for purposes of assuring that emission reductions necessary to address interstate transport with respect to the 2008 ozone standard are achieved.

81 Fed. Reg. at 74,560, JA___.

Under the approach EPA adopted in the Rule, fewer than 100,000 of the EPA-estimated 350,000 banked allowances would be permitted to be used. *See id.* at 74,558, 74,559, JA___, ___; *id.* at 74,509, 74,555, 74,560 (estimating that only about 99,700 banked CSAPR allowances would be permitted to be used due to the Rule's imposition of its limitation on the number of banked CSAPR allowances available for compliance with the Rule), JA___, ___, ___. Thus, the remaining approximately 250,000 allowances, or about an estimated 71 percent of the total projected banked

[17] As discussed below, however, that extreme position was not taken by Delaware in its comments in EPA's rulemaking.

allowances that EGUs had been allocated and that, pursuant to CSAPR's rules, they had been authorized to retain due to their own early, extra emission reductions—emission reductions that went beyond CSAPR's requirements—would, in effect, be confiscated.

But Delaware and Environmental Petitioners argue here that the Rule's restrictions still did not go nearly far enough: They take the position in this litigation that EPA's decision to allow *any* use of *any* banked CSAPR ozone-season NOx allowances—even in the strictly limited, greatly diminished numbers permitted by the Rule—was "unlawful[] and arbitrary[]." Delaware/Envtl. Pet. Br. 36. For the reasons EPA gives, *see* EPA Br. 41-44, and those discussed below, there is no basis for their argument.

First, as EPA points out, *see id.* at 43, the Agency's references in the rulemaking to what Delaware and Environmental Petitioners here label a "massive buildup" and an "enormous pool" of banked allowances, Delaware/Envtl. Pet. Br. 37, 38, were to the *entire* projected amount of 2015- and 2016-vintage banked ozone-season NOx allowances (about 350,000 allowances)—not, as Delaware and Environmental Petitioners imply, to the far smaller number of banked allowances the Rule permits the allowances' owners to actually use. *See* 81 Fed. Reg. at 74,558, JA___.

Delaware and Environmental Petitioners likewise take out of context EPA's statement in the Rule preamble that, in the Agency's view, "th[e] anticipated total of banked allowances"—*i.e.*, the EPA-estimated aggregate total of 350,000 banked 2015

and 2016 allowances—"reflects the fact that the seasonal NO_x emissions budgets established in CSAPR are to a significant extent not acting to constrain actual NO_x emission levels during the ozone season." *Id.*, *quoted in* Delaware/Envtl. Pet. Br. 37. That Rule-preamble passage in fact refers to EPA's view that the *pre-existing* ozone-season NOx emission budgets *under CSAPR* were no longer effectively constraining emissions—*not* any judgment that *allowing use of a very limited number of banked CSAPR allowances* would frustrate the objective of constraining emissions in 2017 and subsequent years *under the CSAPR Update Rule*. Thus, Delaware and Environmental Petitioners lack any support for their contention that an EPA statement that the *pre-Update* CSAPR emission budgets were "to a significant extent not acting to constrain" actual NOx emissions, *see* Delaware/Envtl. Pet. Br. 37, "means that the *2016* Transport Rule [*i.e.*, the CSAPR Update Rule] would provide no actual emission benefits" and was "a complete failure of EPA's statutory mandate," *id.* (emphasis added). To the contrary, EPA reasonably and properly concluded that the Rule's strictly limited authorization of use of a *fraction* of the banked allowances was conducive to achieving ozone reductions through an economically efficient program that retains at least a measure of market-based incentives. *See* 81 Fed. Reg. at 74,557-60, JA___-___; EPA Br. 44.

In fact, EPA determined that, had it adopted Delaware and Environmental Petitioners' litigation position that EPA should have confiscated all banked allowances—*i.e.*, that the Rule should have effected a "complete[] devalu[ation]" (EPA

Br. 44) of banked allowances—the result might well have been environmentally counterproductive. EPA noted that banked "allowances should be allowed to retain value so as to provide an incentive [to EGUs] to operate [NOx emission] controls during the 2016 ozone season instead of simply using additional allowances" to cover a higher level of (less-controlled) emissions. EPA, Response to Comments ("RTC") 197, EPA-HQ-OAR-2015-0500-0572, JA___. As noted above, EPA issued the final Rule on September 7, 2016, three and a half weeks before the 2016 ozone season came to a close. Thus, if EGU owners had learned on September 7 that—due to complete devaluation of all banked allowances—any 2016 (and any banked 2015) allowances they held would effectively become valueless as soon as the 2016 ozone season concluded 23 days later, some might have chosen to reduce or stop operation of emission controls, or otherwise allow higher emission levels, and rely on the soon-to-become-worthless allowances to cover emissions before the ozone season ended. The result would have been higher emissions—the opposite of what Delaware and Environmental Petitioners claim they seek. *See* EPA Br. 44. This scenario illustrates EPA's premise: that, in designing and implementing any emission allowance program, it is essential to provide a measure of confidence that good-faith investments in extra or early emission reductions will not be rendered worthless by abrupt and drastic changes in program rules.[18]

[18] Along these lines, EPA rightly notes that "[h]ad EPA completely devalued the banked CSAPR allowances, units might … cease making earlier reductions going

Indeed, Delaware's rulemaking comments, while urging adoption of a different allowance-surrender ratio than EPA promulgated, stated that, in Delaware's opinion, EPA "*should*" permit use of banked CSAPR ozone-season NOx allowances (subject to surrender-ratio limits as recommended in the comments), citing reasons akin to those EPA gave for its decision. *See* Comments of Delaware Department of Natural Resources & Environmental Control on EPA's Proposed Rule 6-7 (Feb. 1, 2016) (emphasis added), EPA-HQ-OAR-2015-0500-0344, JA___-___. The comments stated that "[i]t is Delaware's opinion that the EPA should permit the use of banked 2015 and 2016 ozone season allowances for 2017 and subsequent ozone season compliance" in the CSAPR Update Rule. *Id.* at 7, JA___. Elaborating on its position, Delaware explained that it

> agrees that it may be appropriate to allow unused, banked 2015 and 2016 ozone season compliance allowances for budget compliance in 2017 and subsequent ozone seasons. Permitting the use of these banked allowances for subsequent ozone season compliance provides some level of incentive for subject sources to operate at NOx emission levels lower than their budget amounts in the earlier ozone seasons, helping to reduce the impact on downwind areas during the current phase of the CSAPR program. The use of the banked allowances also provides the subject sources some additional flexibility in completing appropriate activities that are being implemented for compliance with NOx mass emission budgets in the 2017 and subsequent ozone seasons.

Id. at 6, JA___.

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forward due to lost confidence in future use of banked allowances." EPA Br. 44. Delaware and Environmental Petitioners' arguments disregard EPA's valid concern.

Furthermore, there is no merit to Delaware and Environmental Petitioners' argument in this Court that use of any banked allowances must be barred because CSAPR addresses the 1997 ozone NAAQS whereas the CSAPR Update Rule addresses the 2008 ozone NAAQS. No statutory or other legal bar exists to permitting the use, under CSAPR, of banked allowances in implementing an "update" of one part of that rule. *See* EPA Br. 43-44. To be sure, there are differences in some respects between CSAPR as originally promulgated in 2011 and the CSAPR Update Rule, but the latter is—in all respects relevant to the challenge to EPA's decision regarding banked allowances—essentially a continuation of the former. Thus, the CSAPR Update Rule "provide[s] updated CSAPR NO_X ozone season emission budgets," 81 Fed. Reg. at 74,504, JA___, and continues CSAPR's ozone-season NOx program past the 2016 ozone season. *See* RTC 116 (noting that the CSAPR Update Rule "is an update to an already existing market-based program where a liquid market for allowances has been, and will continue to be[,] available to ensure the continued operation of [EGUs]"), JA___; *see also, e.g.,* 81 Fed. Reg. at 74,568 (noting that EGUs in covered states "monitor and report NO_x emissions under the CSAPR NO_X ozone season trading program and will continue to do so without change under the CSAPR ozone update for the 2008 NAAQS"), JA___.

Certainly nothing in the CSAPR Update Rule's design precludes or makes unworkable the use of banked CSAPR ozone-season NOx allowances. In any event, even assuming *arguendo* that Delaware and Environmental Petitioners' objections

would have had some merit had EPA authorized *unrestricted* use of banked CSAPR allowances, the Rule's severe restrictions on the number of such allowances EGUs may use—in conjunction with the Rule's variability limits, assurance levels, and associated compliance penalties further restricting use of banked allowances—show that EPA in the Rule more than adequately accounted for the fact that it addresses a more demanding NAAQS.

Moreover, when read in context, EPA's statement that banked CSAPR allowances "are not inherently interchangeable with emission reductions needed to address interstate emission transport" for the 2008 ozone NAAQS, 81 Fed. Reg. at 74,559, JA___, *quoted in* Delaware/Envtl. Pet. Br. 40, plainly means that EPA concluded that some adjustment to the number of banked allowances was appropriate—not that any bar exists to allowing use of some portion of the banked allowances. Immediately after the above-quoted statement, EPA stated: "*However*, provided that it can do so without jeopardizing the good neighbor objectives of the CSAPR Update rule, the EPA believes that *permitting some allowances banked under the original CSAPR to be used to meet compliance with the CSAPR Update can facilitate compliance with the requirements of the latter*." 81 Fed. Reg. at 74,559 (emphases added), JA___. Again, Delaware and Environmental Petitioners take EPA's statements out of context.

In sum, for the reasons discussed herein and those presented by EPA,[19] the Court should reject Delaware and Environmental Petitioners' challenge to EPA's decision to permit, subject to restrictive limitations, use of a fraction of lawfully banked CSAPR allowances.

III. EPA Properly Determined that No Basis Exists To Impose Emission-Reduction Obligations on Upwind States Specifically To Address Ozone Air Quality in Delaware—a State with No Projected Nonattainment or Maintenance Ozone Receptors.

Delaware does not contest EPA's conclusion that that state had no projected nonattainment or maintenance problem areas in 2017 for the 2008 ozone NAAQS. Indeed, Delaware's rulemaking comments acknowledged that "[b]ecause all Delaware receptors have both a 2017 projected average and a 2017 projected maximum design value below the level of the 2008 ozone NAAQS[,] no area of Delaware is projected to have attainment or maintenance problems in 2017." Comments of Delaware Department of Natural Resources & Environmental Control on EPA Notice of Data Availability 2 (Oct. 22, 2015), EPA-HQ-OAR-2015-0500-0028, JA___; *see* RTC 15, JA___. Delaware[20] nonetheless argues that EPA should have imposed emission-reduction requirements on upwind states expressly to address ozone levels in

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[19] *See also, e.g.*, EPA Br. 31 (rebutting Delaware and Environmental Petitioners' argument that CAA section 181(a)(1) is at odds with EPA's determination that the Rule's emission budgets and other Rule provisions are sufficiently stringent to satisfy the statute); *supra* note 11.

[20] Only Delaware raises this issue. *See* Delaware/Envtl. Pet. Br. 2, 41 n.11, 41-50, 50-51.

Delaware, apparently on the grounds that the two areas that include Delaware counties and that were designated nonattainment for the 2008 ozone NAAQS originally had a NAAQS attainment deadline (July 2015) that predated EPA's 2017 projection year in the Rule.[21]

This brief does not repeat EPA's arguments refuting Delaware's assertions, *see* EPA Br. 45-50, but offers the following by way of emphasizing certain points.

Responding to Delaware's rulemaking comments on this issue, EPA explained that it would not have been reasonable for the Agency to have focused its evaluation on a year earlier than 2017 for purposes of determining state-to-state linkages and upwind states' emission-reduction obligations under the Rule. *See* RTC 17, JA___. Thus, EPA said, the Agency

> is requiring emissions reductions beginning with the 2017 ozone season, which is *the first ozone season after this rule is finalized*. Thus, the EPA could not in this final rule require emissions reductions by any sooner date in order to assist downwind states with meeting the Moderate area attainment date for the 2008 ozone NAAQS. Because the EPA could not require … retroactive emissions reduction …, the EPA's analysis year is coordinated with the first compliance year for the CSAPR Update and with the upcoming downwind attainment deadlines.

Id. (emphasis added); *see also supra* Argument I.

[21] As noted above, both of Delaware's counties that are located in nonattainment areas in fact reached attainment of the 2008 ozone NAAQS by their CAA attainment deadlines—one (Sussex County) by its original attainment deadline of July 20, 2015, and the other (New Castle County) by its attainment deadline of July 20, 2016. *See supra* note 8; EPA Br. 46 n.12. Both of Delaware's nonattainment-area counties reached attainment without any upwind-state emission reductions under the CSAPR Update Rule, which did not take effect until *after* these areas had already achieved attainment air quality by their applicable attainment deadlines.

In addition, EPA made clear that, if it had chosen the approach urged by Delaware, it would have risked violating the statutory limits on its authority as construed by the Supreme Court:

> [I]n *EPA v. EME Homer City Generation, L.P.*, the Supreme Court held that "EPA cannot require a State to reduce the 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." 134 S. Ct. 1584, 1608 (2014). Thus, in order to determine what emissions reductions may be required in the 2017 compliance year to address attainment and maintenance of the 2008 ozone NAAQS, it was necessary for the EPA to first evaluate air quality in 2017 without the implementation of the CSAPR Update budgets. *Had the EPA based its evaluation of downwind air quality on some prior year, whether 2011, 2013, or 2015, and thereby ignored subsequent changes in emissions activity* in both upwind and downwind states*, the EPA might have over-estimated the amount of EGU emission reductions required to address air quality in downwind states and might have over-controlled in violation of the Supreme Court's holding.* Commenters do not explain how EPA could comply with the mandate to avoid unnecessary over-control while relying on old data that doesn't account for emission reductions that have occurred in the interim.

RTC 17-18 (emphases added), JA___-___; *see also* EPA Br. 47-48.

As EPA's response to Delaware's comments indicates, the Agency's decision to reject that state's position is further strengthened by this Court's grant of petitions for review with respect to as-applied challenges to several states' CSAPR ozone-season NOx budgets. Specifically, this Court's opinion in *EME Homer II* makes clear that not only did EPA have no obligation to adopt the approach advocated by Delaware in its comments, the Agency was precluded from doing so. The Court held that, in light of the information in the record,

> the downwind locations to which 10 of those 11 upwind States … were linked would comply with the[] NAAQS in 2014 even with no good neighbor obligation on the upwind States. … The conclusion is therefore simple. The 2014 ozone-season NOx emissions budgets for those upwind States are invalid.

EME Homer II, 795 F.3d at 130 (citations to record materials omitted). In other words, as EPA aptly summarizes the Court's holding, "where record data shows that downwind receptors would comply in the future with the [NAAQS] absent any emission reductions, EPA does not have authority to impose reductions in that future year." EPA Br. 48 (citing *EME Homer II*, 795 F.3d at 129-30). So, too, here.

In short, for reasons explained by EPA in the record and in its brief, and for the reasons discussed above, the Court should reject Delaware's challenge.

CONCLUSION

For the foregoing reasons, as well as reasons presented in EPA's brief, the petitions for review of Delaware, Sierra Club, and Appalachian Mountain Club should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(f) and (g) and Circuit Rule 32(e)(1), I hereby certify that this brief contains 7,622 words, excluding exempted parts, according to the count of Microsoft Word 2010, and that it therefore is within the word limit of 8,400 words established by the Court's Order of September 6, 2017 (ECF No. 1691655). I further certify that the foregoing brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point proportionally spaced Garamond typeface.

/s/ Norman W. Fichthorn
Norman W. Fichthorn

Dated: February 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February 2018, the foregoing Joint Brief of Industry Respondent-Intervenors was served electronically on all registered counsel through the Court's CM/ECF system.

/s/Norman W. Fichthorn
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