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' OPENING BRIEF

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[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.]

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

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

(A) Parties, Intervenors, and Amici

Petitioners[1]

AEP Texas North Co.
Alabama Power Co.
American Coal Co.
American Energy Corp.
Appalachian Power Co.
ARIPPA
Big Brown Lignite Company, LLC
Big Brown Power Company, LLC
City of Ames, Iowa
City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light and Power
Columbus Southern Power Co.
Consolidated Edison Company of New York
CPI USA North Carolina LLC
Dairyland Power Cooperative
DTE Stoneman, LLC
East Kentucky Power Cooperative, Inc.
EME Homer City Generation, LP
Entergy Corp.
Environmental Committee of the Florida Electric Power Coordinating Group
Environmental Energy Alliance of New York, LLC

1. The State and Local Petitioners that join this brief appear in bold.

GenOn Energy, Inc.
Georgia Power Co.
Gulf Power Co.
Indiana Michigan Power Co.
International Brotherhood of Electrical Workers, AFL-CIO
Kansas City Board of Public Utilities
Kansas Gas and Electric Co.
Kenamerica Resources, Inc.
Kentucky Power Co.
Lafayette Utilities System
Louisiana Chemical Association
Louisiana Department of Environmental Quality
Louisiana Public Service Commission
Luminant Big Brown Mining Company, LLC
Luminant Energy Company, LLC
Luminant Generation Company, LLC
Luminant Holding Company, LLC
Luminant Mining Company, LLC
Midwest Food Processors Association
Midwest Ozone Group
Mississippi Power Co.
Mississippi Public Service Commission
Municipal Electric Authority of Georgia
Murray Energy Corp.
National Mining Association
National Rural Electric Cooperative Association
Northern States Power Co.
Oak Grove Management Company, LLC
Ohio Power Co.
Ohio Valley Coal Co.
OhioAmerica Energy, Inc.
Peabody Energy Corp.
Public Service Company of Oklahoma
Public Utility Commission of Texas
Railroad Commission of Texas

Sandow Power Company, LLC
South Mississippi Electric Power Association
Southern Company Services, Inc.
Southern Power Co.
Southwestern Electric Power Co.
Southwestern Public Service Co.
State of Alabama
State of Florida
State of Georgia
State of Indiana
State of Kansas
State of Louisiana
State of Michigan
State of Nebraska
State of Ohio
State of Oklahoma
State of South Carolina
State of Texas
State of Virginia
State of Wisconsin
Sunbury Generation LP
Sunflower Electric Power Corp.
Texas Commission on Environmental Quality
Texas General Land Office
United Mine Workers of America
UtahAmerica Energy, Inc.
Utility Air Regulatory Group
Westar Energy, Inc.
Western Farmers Electric Cooperative
Wisconsin Cast Metals Association
Wisconsin Electric Power Co.
Wisconsin Manufacturers and Commerce
Wisconsin Paper Council, Inc.
Wisconsin Public Service Corp.

Intervenors for Petitioners

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State of New York (Nos. 11-1388 and 11-1395 only)

Amici for Petitioners

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Respondents

United States Environmental Protection Agency
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Intervenors for Respondents

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

(B) Rulings Under Review

All petitions for review challenge EPA's final rule entitled "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 Fed. Reg. 48,208 (August 8, 2011).

(C) Related Cases

All of the petitions for review consolidated under Case No. 11-1302 (Nos. 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, and 11-1395) are related.

Case Nos. 12-1023 and 12-1026 seek review of EPA's imposition of CSAPR FIPs on Oklahoma and five other States based on supplemental rulemaking and therefore are related.

Case No. 12-1019, which consolidates Case Nos. 11-1329 and 11-1333, seeks review of EPA's disapproval of the interstate-transport portions of Kansas's SIP submission in response to the 2006 24-hour $PM_{2.5}$ NAAQS. Case No. 11-1427 seeks review of EPA's disapproval of the interstate-transport portions of Georgia's SIP submission in response to the 2006 24-hour $PM_{2.5}$ NAAQS. Each of these cases is related because EPA claims that these disapprovals authorize it to impose CSAPR FIPs on Georgia and Kansas.

The consolidated cases on review have not previously been reviewed by this Court or any other court.

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TABLE OF AUTHORITIES

Cases

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

Administrative Procedure Act

Clean Air Act

Other Statutes

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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))
CAMx	Comprehensive Air Quality Model with Extensions
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
FIP	Federal implementation plan
IPM	Integrated Planning Model
JA	Joint Appendix
NAAQS	National ambient air quality standard(s)
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)
O_3	Ozone
$PM_{2.5}$	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)
SA	Standing addendum
SIP	State implementation plan
SO_2	Sulfur dioxide
VOC	Volatile organic compound

INTRODUCTION

Whether measured by its intrusion into State sovereignty or its disregard of the statutory language it purports to implement, CSAPR is conspicuously flawed. The first three flaws addressed here—CSAPR's issuance of FIPs without allowing States to submit adequate SIPs, its collective regulation of upwind States' emissions without regard to what the text of CAA section 110(a)(2)(D)(i)(I) requires, and its failure to follow the Court's command in *North Carolina v. EPA*, 531 F.3d 896, 909-10 (D.C. Cir. 2008), to give independent significance to the statutory phrase "interfere with maintenance"—require the entire rule to be vacated. The final flaw—EPA's failure to provide adequate notice and a meaningful opportunity to comment before CSAPR was promulgated—need be reached only if the rule survives the other challenges presented in the petitioners' opening briefs.

STATEMENT OF JURISDICTION

EPA promulgated CSAPR on August 8, 2011 under 42 U.S.C. § 7601(a). The State and Local Petitioners timely filed petitions for review on or before October 7, 2011, invoking the Court's jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

1. The CAA gives States primary responsibility to develop SIPs to meet EPA-defined air-quality objectives. EPA may issue a FIP only if a State fails to submit an approvable SIP containing all required elements. Did EPA exceed its FIP authority in CSAPR by imposing FIPs that mandate source-specific emissions reductions to address section-110(a)(2)(D)(i)(I) obligations that were not defined when States were required to make SIP submissions?

2. CAA section 110(a)(2)(D)(i)(I) compels a State-by-State approach to curtailing emissions that "contribute significantly" to downwind nonattainment of NAAQS. It does not authorize regulation of multiple States' collective downwind contributions, nor does it permit EPA to disregard whether individual States' mandated reductions are necessary to eliminate "significant" contributions. Does CSAPR violate section 110(a)(2)(D)(i)(I)?

3. *North Carolina* required EPA to give independent effect to section 110(a)(2)(D)(i)(I)'s distinct phrases "contribute significantly to nonattainment" and "interfere with maintenance." In CSAPR, did EPA ignore this holding, imposing the same control requirement for "nonattainment" and "maintenance" areas?

4. EPA was required to provide all interested parties adequate notice and a meaningful opportunity to comment on the key elements of CSAPR before the rule's

promulgation. Did EPA violate this requirement, preventing petitioners from providing comments that would have significantly changed the final rule?

STATUTES AND REGULATIONS

The Statutory Addendum reproduces 42 U.S.C. §§ 7410, 7505a, and 7607.

STATEMENT OF THE CASE AND FACTS

This case concerns the interstate transport of emissions that are transformed, over time and distance, into $PM_{2.5}$ and ozone. Relatively simple atmospheric dispersion modeling can be used to relate local emissions of SO_2 and NO_X to local ground-level concentrations of those pollutants. But relating those emissions to the formation of $PM_{2.5}$ and ozone is much more complex. SO_2 and NO_X emissions can be transported great distances, transforming into particles that contribute to $PM_{2.5}$ concentrations hundreds of miles downwind. Similarly, NO_X emitted in an upwind State can interact with sunlight and VOCs to form ozone that is transported to downwind States. *See generally* EPA-454/B-07-002, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze at 4-5 (Apr. 2007) ("Guidance on the Use of Models") (JA02751-52) (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

Over the past 15 years, EPA has attempted to develop a framework through complex legislative rulemaking to address SO_2 and NO_X emissions in upwind States that significantly contribute to, or interfere with maintenance of, $PM_{2.5}$ or ozone

concentrations in downwind States. This case involves the latest chapter in this cross-state air pollution program.

I. STATUTORY FRAMEWORK

A. The CAA's Cooperative Federalism

The CAA makes "air pollution prevention . . . the primary responsibility of States and local governments." 42 U.S.C. §§ 7401(a)(3), 7407(a). As the Court has explained,

> EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through [SIPs] and timetables of compliance. . . . The [CAA] is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states . . . .

Virginia v. EPA, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (citation omitted). So although EPA sets air-quality standards, the States determine how best to meet them.

After it promulgates a NAAQS, EPA designates areas as "nonattainment," "attainment," or "unclassifiable," 42 U.S.C. § 7407(c), (d), and those designations inform the types of provisions SIPs must contain. *See, e.g.*, *id.* § 7502(c) (describing plan provisions required for States with "nonattainment" areas). States then have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on a reasonable compliance schedule. 42 U.S.C. § 7410(a)(1), (2)(A). EPA then reviews those submissions for technical completeness and compliance with CAA requirements. *Id.* § 7410(k)(1)-(4).

Principles of cooperative federalism continue to limit EPA's role thereafter. If EPA concludes that the SIP it previously approved is "substantially inadequate to attain or maintain the relevant [NAAQS]" or otherwise fails to "comply with any requirement of [the CAA]," the agency "*shall* require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (emphasis added). EPA may promulgate a FIP only if it finds a SIP inadequate—that is, only if a State "has failed to make a required submission" or EPA disapproves such a submission. *Id.* § 7410(c).

B. CAA Section 110(a)(2)(D)(i)(I)

CSAPR attempts to implement CAA section 110(a)(2)(D)(i)(I), which requires SIPs to

> contain adequate provisions—
> (i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will—
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

Id. § 7410(a)(2)(D)(i)(I).

The statute, however, does not define "significant contribution" or "interference" either generally or with respect to specific NAAQS. In the case of the ozone and $PM_{2.5}$ NAAQS, EPA has chosen to define these terms through complex rulemaking procedures, the outcome of which cannot be known until a final rule is promulgated.

Until EPA adopts such a rule, the most a State can reasonably submit to address interstate transport of $PM_{2.5}$ or ozone precursors are "infrastructure" provisions, which commit the State to adopt SIP revisions if EPA subsequently finds, through specific rulemaking, that sources within the State significantly contribute to nonattainment in another State. *See* Memorandum from Director Sally L. Shaver, Air Quality Strategies and Standards Division, Re-issue of the Early Planning Guidance for the Revised Ozone and Particulate Matter (PM) NAAQS (June 12, 1998) at 3 (JA03239).

C. Notice-and-Comment Requirements

Here, CAA section 307(d) required EPA to provide adequate notice and a meaningful opportunity to comment. More specific than the APA's general notice-and-comment provisions (5 U.S.C. § 553(b), (c)), section 307(d) requires that a notice of proposed rulemaking be published in the Federal Register with a "statement of its basis and purpose" that summarizes: "(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3); *see Union Oil Co. v. EPA*, 821 F.2d 678, 681-82 (D.C. Cir. 1987).

II. EPA'S EFFORTS TO IMPLEMENT CAA SECTION 110(a)(2)(D)(i)(I)

The NO_X SIP Call, CAIR, and the Court's decisions addressing challenges to those rules are discussed in detail in the opening brief of Industry/Labor Petitioners.

The following discussion highlights the aspects of those rules and decisions most relevant to the issues presented by the State and Local Petitioners.

A. EPA's NO_X SIP Call and the Court's Decision in *Michigan*

In the 1998 NO_X SIP Call, EPA used air-quality data to identify States whose contributions to ozone in downwind nonattainment areas exceeded a *de minimis* air-quality threshold. 63 Fed. Reg. 57,356, 57,398 (Oct. 27, 1998). It then construed section 110(a)(2)(D)(i)(I)'s concept of "significance" as dependent, in part, on individual States' costs of reducing those emissions. *Id.* at 57,376-79. Reductions that a State could not make cost-effectively were deemed insignificant—and, as such, were not required to be made. *Id.* at 57,385. EPA defended its prerogative to define "significance" by likening it to the promulgation of NAAQS, submitting that it was specifying only "the overall level of air pollutants allowed to be emitted in a State," not source-specific control requirements. *Id.* at 57,369.

As the name suggests, EPA did not promulgate the NO_X SIP Call as a series of FIPs. Rather, it allowed "significantly contributing" States to submit SIPs identifying the particular mix of controls appropriate to abate their respective contributions. *Id.* at 57,367, 57,369-70. On judicial review, the Court vacated the rule in part. *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000) (per curiam). After confirming that the CAA gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs, the Court held that the NO_X SIP Call, which "merely provide[d]

the levels to be achieved by state-determined compliance mechanisms," was in keeping with EPA's statutory role. *Id.* at 671, 687; *see also id.* at 687-88 (concluding that EPA had given States "real choice" regarding how to comply with its requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels").

The Court also approved EPA's use of cost to help define "significant contribution." Specifically, it held that EPA could use cost to reduce the emissions-reduction obligations of certain States. *Id.* at 675-79. But the Court did not suggest that EPA could force other States to make cuts deeper than necessary to reduce their contributions below the rule's *de minimis* air-quality threshold.

B. CAIR and the Court's Decision in *North Carolina*

EPA subsequently promulgated CAIR, which targeted upwind States that EPA identified as significantly contributing to monitored downwind nonattainment of the 1997 $PM_{2.5}$ and ozone NAAQS. 70 Fed. Reg. 25,162 (May 12, 2005). The rule did not impose any independent obligations to satisfy section 110(a)(2)(D)(i)(I)'s "interfere with maintenance" language. Instead, it provided that States would fully satisfy their section-110(a)(2)(D)(i)(I) obligations by adopting SIPs that implemented the required reductions, which were derived by considering impacts only on areas actually in nonattainment. *Id.* at 25,193 & n.45.

And like the NO_X SIP Call, CAIR did not initially issue FIPs; it merely required States to revise their SIPs. *Id.* at 25,162. Although EPA proposed and ultimately finalized FIPs, those FIPs "in no way preclude[d] a State from developing its own SIP. . . ." 71 Fed. Reg. at 25,328, 25,339 (Apr. 28, 2006). EPA explained that it had "considered the timing of each element of the FIP process to make sure to preserve each State's freedom to develop and implement SIPs." *Id.* at 25,340.

The Court's review of CAIR's validity focused on EPA's interpretation of the phrase "contribute significantly" in section 110(a)(2)(D)(i)(I). *North Carolina*, 531 F.3d at 904. After recognizing its general approval of EPA's cost-based approach in *Michigan*, the Court noted that "the flow of logic only goes so far. It stops at the point where EPA is no longer effectuating its statutory mandate. . . . CAIR must include some assurance that it achieves something measurable towards the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance in 'any other State.'" *Id.* at 908.

CAIR failed in that respect. Rather than "us[ing] cost in the manner *Michigan* approved," CAIR neglected to draw the significant-contribution line in any meaningful way—and, for that reason, failed to implement section 110(a)(2)(D)(i)(I). *Id.* at 917-18. Noting that EPA justified CAIR based on notions of fairness, the Court commented that, while

> EPA's redistributional instinct may be laudatory, . . . section 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind

> state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution. While CAIR should achieve something measurable towards that goal, it may not require some states to exceed the mark.

Id. at 921; *see also id.* at 919-20 (noting that EPA cannot validly "make one state's significant contribution depend on another state's cost of eliminating emissions"). The Court also held that the rule was flawed for failing to give independent effect to section 110(a)(2)(D)(i)(I)'s distinct phrases "contribute significantly" and "interfere with maintenance." *Id.* at 909-10, 929.

The Court initially vacated CAIR and remanded the matter to EPA. *Id.* at 930. On rehearing, however, the Court granted EPA's request for remand without vacatur, preserving CAIR's environmental benefits while EPA worked to promulgate a new rule under section 110(a)(2)(D)(i)(I). *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) ("*North Carolina II*").

C. CSAPR and the Present Litigation

1. The Proposed Rule

In 2010, EPA published the Proposed Rule, which announced the agency's intent to issue FIPs, rather than call for SIPs, that would "limit the interstate transport of emissions of [NO_X and SO_2] within 32 states in the eastern United States that affect the ability of downwind states to attain and maintain compliance with the 1997 and 2006 [$PM_{2.5}$ NAAQS] and the 1997 ozone NAAQS." 75 Fed. Reg. at 45,210 (Aug. 2, 2010).

The Proposed Rule included some States—Kansas, Nebraska, and Oklahoma—that were not subject to CAIR and, for that reason, had not developed CAIR SIPs.

The Proposed Rule is also notable in that it did not identify any significant contribution of emissions from Texas with respect to either the 2006 24-hour $PM_{2.5}$ NAAQS or the 1997 annual $PM_{2.5}$ NAAQS. *Id.* at 45,215-16. Rather, it announced an intent to require Texas to reduce only its ozone-season NO_X emissions, *id.* at 45,215, and it therefore proposed not to include Texas in the annual programs and provided no emissions budgets for Texas for either annual NO_X or annual SO_2. *See* 76 Fed. Reg. at 48,208, 48,212, 48,214 (Aug. 8, 2011) (describing the significance of State-specific emissions budgets and noting their absence, in the Proposed Rule, as to Texas).

2. CSAPR

EPA published CSAPR in August 2011. Four aspects of the rule are relevant to the issues presented here.

First, rather than issuing a SIP Call, EPA imposed CSAPR as a series of FIPs that set emissions budgets, enabling EPA to allocate allowances to sources within the covered States. *Id.* at 48,208, 48,219-20. While CSAPR provides that "[e]ach state has the option of replacing these [FIPs] with [SIPs] to achieve the required amount of emission reductions from sources selected by the state," *id.* at 48,209, it concedes that States would not be permitted to do this for the 2012 control year. *Id.* at 48,328. The rule permits States to make allowance allocations beginning in 2013—one year into the

program. *Id.* at 48,212 n.8. But even then, a State may do so only through "a SIP revision that is narrower in scope than the other SIP revisions states can use to replace the FIPs." *Id.* The rule does not allow a full SIP to replace a CSAPR FIP until the 2014 control year. *Id.* at 48,327.

Second, similar to the NO_X SIP Call and CAIR, CSAPR employs a two-phased approach to defining a State's significant contribution for purposes of section 110(a)(2)(D)(i)(I). In the first phase, EPA looked at States' modeled maximum $PM_{2.5}$ and ozone contributions at downwind air-quality monitors projected to be in nonattainment or to have maintenance problems and identified a *de minimis* threshold for determining whether a particular State would be subject to the rule. *See generally id.* at 48,238-46. For CSAPR, that threshold is 1% of the three relevant NAAQS—0.15 $\mu g/m^3$ for annual $PM_{2.5}$, 0.35 $\mu g/m^3$ for 24-hour $PM_{2.5}$, and 0.8 ppb for 8-hour ozone. *Id.* at 48,236. If a State's modeled maximum downwind contribution fell below the 1% threshold, it was considered insignificant, and the State was excluded from CSAPR's reach. *Id.* at 48,246.

The second phase of EPA's analysis involved only those States that remained—that is, States whose modeled maximum downwind contributions exceeded the 1% threshold. In this second phase of its analysis, EPA set aside the 1% threshold. It focused instead on the amount of emissions each State covered by the rule could cost-effectively eliminate, seeking to determine the combined emissions reductions in all of the relevant States—that is, all contributing upwind States (and, in some cases, relevant

downwind States)—that would collectively resolve all $PM_{2.5}$ and ozone issues at EPA-selected downwind monitors. *See id.* at 48,248-49, 48,252.

To determine each State's required emissions reductions, EPA first developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. *Id.* at 48,248. It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality. *Id.* at 48,249.

Next, EPA identified "significant cost thresholds"—that is, "point[s] along the cost curves where noticeable change occurred in downwind air quality. . . ." *Id.* Through this process, EPA considered controls "cost-effective" if they could reduce annual and seasonal NO_X emissions at a rate of $500/ton and SO_2 emissions at a rate of either $500/ton (for "Group 2" States in all years and for "Group 1" States in 2012 and 2013) or $2,300/ton (for "Group 1" States beginning in 2014). *Id.* at 48,252, 48,256-57, 48,259; *see id.* at 48,257 (defining "Group 1" and "Group 2" States). Finally, EPA used this information to generate state "budgets" reflecting how much each State could emit after implementing cost-effective controls. *Id.* at 48,259-65.

Thus, under EPA's methodology, each State's "significant" contribution is untethered to how far above or below the 1% line the State's actual, CSAPR-controlled emissions fall. Rather, "significance" is measured by how much each State can cost-

effectively eliminate relative to other States—such that, collectively, EPA achieves its goal of improving downwind air quality.

Third, CSAPR attempted to follow *North Carolina*'s command to give independent meaning to "interfere with maintenance" in section 110(a)(2)(D)(i)(I). But the only difference between its "significant contribution" and "interference" methodologies involved the identification of downwind air-quality monitors. EPA projected three 2012 design values for each monitor, corresponding to each three-year period in 2003-2007. EPA then compared these projected values to the relevant NAAQS. If the average of the three values exceeded the NAAQS, EPA labeled the monitor "nonattainment." If only the maximum value exceeded the NAAQS, EPA labeled the monitor "maintenance." *Id.* at 48,233-36. CSAPR's emissions-reduction requirement, however, is the same for both nonattainment and maintenance. *Id.* at 48,236. For each, EPA used modeling to identify States whose maximum downwind contribution exceeded 1% of the relevant NAAQS, then imposed emissions budgets reflecting the amount these States could emit after imposing cost-effective controls. *Id.* at 48,246-64.

Fourth, CSAPR differed from the Proposed Rule in several critical ways. It "linked" States to different nonattainment and maintenance monitors, *compare, e.g.*, 75 Fed. Reg. 45,257-70 (Tables IV.C–14-21) *with* 76 Fed. Reg. 48,241-44, 48,246 (Tables V.D–2-3, 5-6, 8-9), reduced individual States' emissions budgets by as much as 50%, *compare, e.g.*, 75 Fed. Reg. 45,291 (Tables IV.E.–1-2) *with* 76 Fed. Reg. 48,269-70 (Tables

VI.F–1-3), and established, for the first time, annual SO_2 and NO_X emissions budgets for Texas. 76 Fed. Reg. at 48,269 (Tables VI.F–1-2).[2]

SUMMARY OF THE ARGUMENT

In CSAPR, EPA departed not only from its past approach to implementing section 110(a)(2)(D)(i)(I), but also from the text of that provision and controlling precedent. The rule is fatally flawed for each of those reasons and also because it was promulgated in violation of the CAA's stringent notice-and-comment requirements.

Unlike EPA's previous efforts to implement section 110(a)(2)(D)(i)(I), CSAPR bypassed the SIP process, issuing FIPs that mandated how States must satisfy CSAPR's requirements. This approach violates the CAA's cooperative federalism, which confirms that States bear the primary responsibility for addressing air-quality problems and allows EPA to manage the details of a State's compliance plan only if, and after, the State has demonstrated an inability to do so itself. CSAPR's FIP-first approach thus violates the fundamental structure of the CAA.

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2. After the close of business on February 7, 2012, EPA notified petitioners' counsel that it had just released two sets of revisions addressing some of CSAPR's technical flaws. *See* CSAPR Revisions Part I, 77 Fed. Reg. 10,324 (Feb. 21, 2012) ("Final Technical Corrections"); CSAPR Revisions Part II, 77 Fed. Reg. 10,342 (Feb. 21, 2012) ("Direct Final Rule"). Although both rules purport to be final actions, the Direct Final Rule was accompanied by a parallel rulemaking allowing for comment; the rule will be withdrawn and re-proposed normally if, as anticipated, EPA receives "significant adverse comments." 77 Fed. Reg. at 10,342. None of these revisions alter CSAPR's fundamental methodology.

CSAPR is also invalid for a reason CAIR was invalid. Like its predecessor, CSAPR regulates upwind States' contributions to nonattainment of NAAQS in downwind States on a collective basis and disregards the definition of "significance" required by section 110(a)(2)(D)(i)(I) and *North Carolina*.

Additionally, CSAPR neglects the Court's instruction in *North Carolina* to give independent effect and meaning to the distinct phrases "contribute significantly to nonattainment" and "interfere with maintenance" in section 110(a)(2)(D)(i)(I). This failure overlooks a basic difference between the CAA's treatment of "attainment" and "nonattainment" areas, creates a conflict between CAA sections 110(a)(2)(D)(i) and 175A, and frustrates the statute's core requirement that States take primary responsibility for ensuring air quality within their borders.

Finally, EPA violated both the APA's and the CAA's more exacting notice-and-comment requirements, promulgating a final rule that was far from a "logical outgrowth" of the Proposed Rule. Although this statutory violation is perhaps clearest with respect to Texas—which did not have notice that it would be included in CSAPR's annual SO_2 and NO_X programs and, unlike any other State covered by the rule, was not provided emissions budgets at the proposal stage—it affected many of the other State and Local Petitioners as well, surprising them with new data and modeling that resulted in significantly harsher requirements. Had EPA provided adequate notice, it would have received comments on these errors that would surely have altered the final rule.

STANDING

The Court has recognized that

> [i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident . . . . [I]f the complainant is "an object of the action . . . at issue"—as is the case usually in review of a rulemaking . . . —there should be "little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it."

Sierra Club v. EPA, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Such is the case here. As jurisdictions covered by CSAPR, the petitioning States are objects of the challenged action. CSAPR injures them, *see infra* at 20-55; *see also, e.g.*, Lloyd Decl. ¶¶ 6-10 (SA A); Hildebrand Decl. ¶¶ 5-16 (SA B); Cook Decl. ¶¶ 8-13 (SA C), so a judgment vacating the rule would provide redress.

Moreover, in *Massachusetts v. EPA*, the Supreme Court explained that "a litigant . . . vested with a procedural right . . . has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." 549 U.S. 497, 518 (2007). The "procedural right" to which this passage refers is the right embodied in 42 U.S.C. § 7607(b)(1), *see id.* at 517—the same provision authorizing these petitions for review—and vacatur of CSAPR will necessarily "prompt [EPA] to reconsider [its] decision." *Id.* at 518.

Although EPA previously claimed that the harm at issue flows only to other parties, the Supreme Court noted in *Massachusetts* that States are "entitled to special

solicitude in our standing analysis" and can suffer injuries by virtue of their status as landowners, even though the harm is widely shared. *Id.* at 520, 522. At a basic—and again, self-evident—level, the petitioners' operations, like those of other energy consumers, depend on affordable and reliable electricity. When an EPA rule, such as CSAPR, makes electricity more expensive, that result directly affects government coffers. And when the computers shut down and the lights go out at agencies' offices, those agencies unquestionably suffer concrete injuries in fact. Because there is evidence that CSAPR threatens just that result (in the form of rolling blackouts, *see, e.g.*, Lasher Decl. ¶¶ 33-34, 45 (SA D)), standing exists on this basis as well. The local petitioners are also directly affected by CSAPR because they own and operate EGUs regulated under the rule. *See* Trower Aff. ¶¶ 6-12, 18-26 (SA E); Becker Aff. ¶¶ 4-6, 13 (SA F).

Additionally, States have standing to challenge EPA rules that make their regulatory tasks, such as devising adequate SIPs and planning for utility continuity, more difficult. *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1227-28 (D.C. Cir. 2007); *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). CSAPR is such a rule. *See, e.g.*, Lloyd Decl. ¶¶ 6-10 (SA A); Hildebrand Decl. ¶¶ 8-15 (SA B). Indeed, CSAPR's issuance of FIPs directly injures the petitioning States by overriding their statutory right to control air pollution through SIPs. *See Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001) (noting that intrusion on a State's sovereign rights is irreparable injury).

Finally, the decline in tax revenue that CSAPR will cause, *see* Hill Decl. ¶¶ 7-8 (SA G), Dehart Decl. ¶¶ 6-10 (SA H), Robinson Decl. ¶¶ 9-10, 12 (SA I), is yet another cognizable injury. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006); *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011). Even reductions in local-tax revenue inflict direct economic harm on States, such as Texas, that are statutorily required to cover shortfalls in education funding resulting from insufficient local-tax revenue. *See* TEX. EDUC. CODE § 42.302.

STANDARD OF REVIEW

The Court should reverse any aspect of CSAPR it finds to be (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (2) "in excess of [EPA's] statutory jurisdiction, authority, or limitations, or short of statutory right"; or (3) "without observance of procedure required by law," if all necessary requirements for showing procedural error have been met. 42 U.S.C. § 7607(d)(9); *see North Carolina*, 531 F.3d at 906. Importantly, where a statute "speaks to the direct question at issue, [courts] afford no deference to the agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'" *Id.* at 906 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

ARGUMENT

I. EPA LACKED AUTHORITY TO IMPOSE FIPS ON THE CSAPR STATES.

The CAA requires States to address section 110(a)(2)(D)(i)(I) in SIP revisions submitted in response to new NAAQS. 42 U.S.C. § 7410(a)(2)(H). But with respect to ozone or $PM_{2.5}$ NAAQS, EPA has concluded that it will be responsible for quantifying emissions reductions necessary to satisfy section 110(a)(2)(D)(i). *See* 63 Fed. Reg. at 57,369. As a result, a State does not learn until the conclusion of complex EPA rulemaking whether its sources' emissions contribute to ozone or $PM_{2.5}$ in any downwind State or whether EPA will consider any contribution over a *de minimis* threshold "significant." A necessary consequence of this approach is that no State can adopt controls to eliminate such emissions (or fill the "gap") until EPA quantifies the State's reduction obligation.

CSAPR uses a State's inability to predict how EPA will define its significant contribution in some future legislative rule as a justification to supplant the State's authority to determine the means of achieving EPA-defined air-quality ends. In other words, EPA has promulgated a rule that simultaneously defines the State's significant contribution and imposes a FIP to abate it. That is not how the CAA works. CSAPR's FIPs are unlawful.

A. EPA Cannot Simultaneously Define Emissions-Reduction Obligations Under Section 110(a)(2)(D)(i) and Impose FIPs.

1. States are not required to submit SIPs that achieve reductions mandated by a not-yet-promulgated rule.

Section 110(a)(2)(D)(i)(I) does not require specific SO_2 and NO_X reductions with respect to downwind ozone and $PM_{2.5}$. Instead, EPA has taken it upon itself to engage in complex legislative rulemaking that relates upwind emissions with downwind ozone and $PM_{2.5}$ and defines each State's reduction obligation. In that rulemaking, EPA relies upon a regional air-pollutant model—CAMx—to evaluate the interstate transport of SO_2 and NO_X and estimate the contribution that upwind emissions from one State have on downwind $PM_{2.5}$ or ozone monitors in another State.

EPA's model relies on myriad input assumptions, many of which require subjective judgment, and even minute changes in one of those assumptions can alter the end result. *See* EPA Primary Response to Comments on the Proposed Transport Rule, EPA-HQ-OAR-2009-0491-4513 (Aug. 2, 2010) ("Primary Response to Comments") at 470 (JA01779). So even if a State attempted to use EPA's method to predict interstate ambient impacts from in-state emissions, it is highly unlikely that the State's analysis would coincide with EPA's final analysis.

And even if a State could predict with certainty the results of EPA's modeling (which it cannot), it would still face a second fundamental problem. As the Court has recognized, the CAA does not define what constitutes a "significant contribution" to

nonattainment or what it means to "interfere with maintenance" of NAAQS, such as those for $PM_{2.5}$ and ozone. *See Michigan*, 213 F.3d at 674. EPA instead makes these determinations based on a complicated array of factors and policy judgments, including a judgment as to what constitutes cost-effective controls for sources within the States. *See id.* at 674-79. Thus, like EPA's air-quality analysis, its ultimate "significant contribution" determination is the product of subjective judgments. *See id.* at 674.

This exercise occurs in the context of legislative rulemaking. Legislative rules are agency pronouncements that "have the force and effect of law" and that prescribe binding policy for the future. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); *U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005). Until EPA promulgates a legislative rule that quantifies emissions of $PM_{2.5}$ and ozone precursors prohibited by section 110(a)(2)(D)(i)(I), the State should have no obligation to develop a SIP addressing those emissions. *See* 42 U.S.C. § 7410(a)(1).

2. After a rule defines a State's "contribution" or "interference," EPA must issue a section 110(k)(5) SIP call.

A State cannot know whether, or to what degree, it is contributing significantly to downwind nonattainment as to $PM_{2.5}$ or ozone NAAQS until EPA makes that determination in a final legislative rule. But the statute does not deprive the State of its "initial and primary responsibility for deciding what emissions reductions will be required from which sources." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001). To the contrary, when EPA concludes through legislative rulemaking that a State is making a

quantified "significant" contribution to nonattainment, it is concluding that the State's existing SIP is "substantially inadequate." 42 U.S.C. § 7410(k)(5). Under section 110(k)(5), EPA "shall require the State to revise the [SIP] as necessary" to address its significant contribution and to establish a schedule for emissions sources within the State to meet their reduction requirements. *Id.* EPA has used this process in the past, *e.g.*, 63 Fed. Reg. at 57,447, and was required to do so here.

3. A FIP cannot impose requirements beyond what a SIP revision was required to contain.

Under section 110(c)(1), FIPs may be proposed and promulgated only when a State has failed to do its job—either by not making a required SIP submission at all, or by making a required submission that is unapprovable. Because FIPs merely fill gaps created by States' failure to submit acceptable SIPs, they may address only what the State was required to include in its SIP. In the context of section 110(a)(2)(D)(i)(I), no State is obliged to submit a SIP revision addressing emissions that might *subsequently* be defined in an EPA rule to represent "significant contributions." That feat would require clairvoyance. Instead, after defining, through legislative rulemaking, "significant contribution" reductions for a State, EPA must issue a SIP Call under section 110(k)(5)—and, in so doing, give the State a chance to submit an acceptable SIP revision. Only if a State fails to make that submission or EPA disapproves it can EPA impose specific emissions-control or other measures through a FIP. *See* 42 U.S.C. § 7410(c)(1).

B. EPA Lacked Authority to Impose FIPs on the CSAPR States.

In CSAPR, EPA purports to derive its FIP authority from two actions: (1) the retroactive disapproval of SIPs submitted and approved under CAIR and (2) EPA's finding that 21 States failed to submit acceptable section-110(a)(2)(D)(i)(I) SIPs addressing the 2006 24-hour $PM_{2.5}$ NAAQS based on yet-to-be promulgated requirements. 76 Fed. Reg. at 48,219-22; Technical Support Document for the Transport Rule, Status of CAA 110(a)(2)(D)(i)(I) SIPs, Final Rule TSD (July 2011) ("SIPs TSD") (JA03167-78). Both justifications fail. Nothing in the CAA authorizes EPA's retroactive application of CSAPR to judge past SIP approvals or to find that States were required to submit SIPs that would meet non-final CSAPR emissions-reduction obligations.

1. EPA cannot retroactively disapprove SIPs that addressed "significant contributions" defined in CAIR.

Twenty-four of the CSAPR States were subject to CAIR. *See* 76 Fed. Reg. at 48,213 (Table III-1). Many of those States submitted SIP revisions that supplanted CAIR FIPs and addressed their contributions to downwind nonattainment of the 1997 ozone or $PM_{2.5}$ NAAQS. *E.g.*, Approval and Promulgation of Implementation Plans; Alabama; Clean Air Interstate Rule, 72 Fed. Reg. 55,659 (Oct. 1, 2007); *see generally* SIPs TSD (JA03167-78).

The Court later remanded CAIR, leaving it in place until EPA could develop, through another legislative rule, a proper definition of each CAIR State's significant contribution. *North Carolina II*, 550 F.3d at 1177-78. Until that new rule was promulgated, the States had no obligation to submit SIPs addressing unknown significant contributions. Once EPA made significant-contribution determinations on remand, each affected State should have been given a chance to revise its SIP to address mandated state-wide reductions and provide sources a reasonable time for compliance. *See* 42 U.S.C. § 7410(k)(5).

EPA ignored that obligation. In CSAPR, EPA skips straight to FIPs for these States by retroactively disapproving the already-approved CAIR SIPs under section 110(k)(6), relying on a rule promulgated long after CAIR SIPs were approved.

Section 110(k)(6) is entitled "Corrections" and provides that

> [w]henever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was *in error*, the Administrator may *in the same manner as the approval*, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(emphases added). Section 110(k)(6) thus allows EPA to make "corrections" to SIP approvals or disapprovals in the case of "error" without requiring the State to make

another submission. But it does not grant license to apply legislative rules retroactively or to interpret section 110(k)(6) to render other portions of section 110 meaningless.

a. Section 110(k)(6) does not authorize EPA to apply legislative rules retroactively.

EPA's approvals of the CAIR SIPs were not "in error." Those SIPs contained exactly the provisions EPA said were necessary to address each State's "significant contribution" under CAIR. *North Carolina* did not upset those approvals. To the contrary, and at EPA's request, the Court remanded CAIR "without vacatur" so that the rule would "remain in effect" until EPA could promulgate a new rule. *North Carolina II*, 550 F.3d at 1178. Importantly, EPA continued to approve CAIR SIPs after that decision. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009). It did so because CAIR was the operative legislative rule defining "significant contribution" SIP requirements related to the 1997 ozone and $PM_{2.5}$ NAAQS. 76 Fed. Reg. at 48,211.

EPA's approvals of the CAIR SIPs between 2007 and 2009 can be deemed "in error" only if EPA judges them by a rule that did not exist at the time. But absent a clear congressional directive, legislative rules cannot be applied retroactively. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 422 (D.C. Cir. 1994) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). EPA's use of CSAPR to evaluate CAIR SIP submissions is a textbook example of the forbidden use of a legislative rule to "alter[] the past legal consequences of past actions," *see Bowen*, 488 U.S. at 219 (Scalia, J., concurring) (emphasis omitted), and not what section 110(k)(6) was enacted to address.

b. EPA's reading of section 110(k)(6) is inconsistent with the broader Act and contravenes congressional intent.

EPA interprets section 110(k)(6) as allowing it to "revise certain prior actions, including action to approve SIPs, . . . without any further submission from a state." 76 Fed. Reg. at 48,217. That view, however, contravenes basic rules of statutory interpretation.

EPA's reading deprives section 110(k)(5)'s mandatory SIP-Call requirement of all meaning. *See Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior*, 134 F.3d 1095, 1107-08 (D.C. Cir. 1998) (An interpretation that "essentially deprives one provision of its meaning and effect so that another provision can be read as broadly as its language will permit, is inconsistent with the Congress's intent."). When a post-approval event, such as a Court decision or the promulgation of a new rule, renders a previously approved SIP inadequate, section 110(k)(5) requires EPA to issue a SIP Call giving States a reasonable opportunity to cure the inadequacy. *See* 42 U.S.C. § 7410(k)(5). And CSAPR repeatedly states that the CAIR SIPs "*were not adequate* to satisfy . . . the statutory mandate of section 110(a)(2)(D)(i)(I)." 76 Fed. Reg. at 48,219 (emphasis added). Section 110(k)(5) has thus been triggered, and EPA "shall require" CAIR States to revise their SIPs according to a SIP Call. 42 U.S.C. § 7410(k)(5). But if, as EPA argues, it can avoid section 110(k)(5) by deeming the prior approval to be an "error" that can be corrected under section 110(k)(6), section 110(k)(5) is superfluous, and its mandatory language has no effect.

CSAPR's use of section 110(k)(6) here is also contrary to well-established Circuit precedent. EPA's interpretation allows the agency to punish States, and fundamentally alter the CAA's cooperative federalism, based on EPA's own errors. Under that interpretation, EPA can unlock its section-110(c) FIP power by botching an original rule (*i.e.*, CAIR), approving SIPs that comply with that rule, and then using section 110(k)(6) to retroactively disapprove those SIPs. But States cannot be penalized for EPA's mistakes. *See Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1136-37 (D.C. Cir. 1994) (per curiam) (rejecting an argument that States that reasonably relied on EPA's extension of a SIP-submission deadline that the Court later concluded was unlawful should be subject to statutory sanctions for failing to make timely submissions). The Court should reject EPA's interpretation, which radically alters the CAA's federal-State balance of power. Congress does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. It would not restructure the fundamental allocation of responsibility between States and EPA through a ministerial provision allowing for correction of "errors."

c. EPA has not acted "in the same manner" as it did in its original approvals.

Even if EPA's reading of section 110(k)(6) were correct, the retroactive SIP disapprovals still would be improper because EPA is not acting "in the same manner," 42 U.S.C. § 7410(k)(6), as it acted originally. EPA promulgated its SIP approvals through notice-and-comment rulemaking; it is not "correcting" those approvals through

the same process. *See* 76 Fed. Reg. at 48,221 ("EPA is taking this final action without prior opportunity for notice and comment. . . .").

Any "correction" of SIP approvals must be done through notice-and-comment rulemaking. *See* 42 U.S.C. § 7410(k)(6). EPA tries to excuse this deviation by invoking the good-cause exception, 5 U.S.C. § 553(b)(B), claiming that it "has no discretion" in light of *North Carolina*'s "conclusion that compliance with CAIR does not satisfy the requirements of CAA section 110(a)(2)(D)(i)(I)." 76 Fed. Reg. at 48,221-22. But the Court's substantive conclusion in *North Carolina* says nothing about the manner by which EPA must modify the SIPs after a new rule is promulgated.

2. CSAPR FIPs cannot be based on the absence or disapproval of pre-CSAPR SIPs addressing the 2006 $PM_{2.5}$ NAAQS.

EPA concluded that 21 of the CSAPR States had failed to submit SIPs that adequately addressed interstate transport with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. SIPs TSD (JA03167-78). Two of these States—Kansas and Nebraska—were not subject to CAIR and are subject to CSAPR only by virtue of their contributions to nonattainment or interference with maintenance of the 2006 $PM_{2.5}$ NAAQs. 76 Fed. Reg. at 48,219 n.11. Even so, Kansas and many other of these 21 States submitted SIP revisions attempting to address section 110(a)(2)(D)(i)(I) based on information then available. *See* 76 Fed. Reg. 43,143, 43,143 (July 20, 2011). But shortly before promulgating CSAPR, EPA disapproved these submissions because they failed to abate

emissions that EPA would later prohibit in CSAPR. *E.g.*, *id.* (disapproving Kansas's submission); *see generally* SIPs TSD (JA03171).

Kansas's experience illustrates how EPA applied CSAPR retroactively to justify promulgating a CSAPR FIP. Kansas submitted its SIP revision (Kansas Plan for Implementation, Maintenance and Enforcement of the National Ambient Air Quality Standards–2006 24-hour $PM_{2.5}$ NAAQS (April 2010) (JA03391-458)) in response to EPA's 2006 24-hour $PM_{2.5}$ NAAQS before EPA either (1) adopted any rule identifying Kansas as making downwind contributions to the 24-hour $PM_{2.5}$ NAAQS in excess of a *de minimis* threshold or (2) identified any Kansas emissions as "contributing significantly" to nonattainment, or interfering with maintenance, with respect to that standard at a downwind monitor.

Ignoring comments on its proposed disapproval reflecting that Kansas's emissions "do not significantly interfere with attainment or maintenance [of the NAAQS] in downwind states," EPA disapproved the interstate transport portions of Kansas's SIP, relying on "information in the *preliminary* modeling for EPA's Transport Rule"—a proposed rule that had not been finalized and therefore could impose no obligation on Kansas or any other State. 76 Fed. Reg. at 43,144 (emphasis added). This would be akin to EPA's disapproval of a SIP that, although it assured attainment of *existing* NAAQS, would not assure attainment of a *proposed* NAAQS. That is contrary to basic principles

of administrative law and violates the cooperative federalism that Congress incorporated into the CAA.

Finally, even if EPA could justify disapproving the Kansas SIP and others like it for reasons having nothing to do with CSAPR, it could not impose CSAPR FIPs as a means of correcting that deficiency. Nor could it impose the CSAPR FIPs on States that failed to submit SIPs. Again, a FIP can cure a deficiency only in a *required* submission, and States were not required to include SIP provisions to eliminate "significant contributions" not yet defined by EPA legislative rule.[3]

II. CSAPR VIOLATES THE CAA BY REGULATING UPWIND STATES' EMISSIONS COLLECTIVELY AND WITHOUT REGARD TO THEIR SIGNIFICANCE.

A. Section 110(a)(2)(D)(i)(I)'s Grant of Authority Is Narrow and Specific.

EPA "is 'a creature of statute,' and has 'only those authorities conferred upon it by Congress'; 'if there is no statute conferring authority, a federal agency has none.'" *North Carolina*, 531 F.3d at 922 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). In both *Michigan* and *North Carolina*, the Court focused on the language of

3. EPA's proposed disapproval of Oklahoma's 2007 submission of a modified SIP to address section 110(a)(2)(D) as to the 1997 ozone NAAQS, *see* 76 Fed. Reg. 64,065 (Oct. 17, 2011), is deficient for the same reason. EPA cannot disapprove a 2007 submission on the ground that the submission did not impose emissions reductions mandated by a 2011 legislative rule. EPA's final rule imposing a FIP on Oklahoma, *see* 76 Fed. Reg. 80,760 (Dec. 27, 2011), is the subject of separate petitions to review (Nos. 12-1023 and 12-1026) that have not been consolidated with this case. Although EPA has issued a FIP for the State, it has not taken final action on Oklahoma's SIP. *See* 76 Fed. Reg. 81,838 (Dec. 29, 2011).

section 110(a)(2)(D)(i)(I), which grants EPA authority to ensure only that each State "prohibit[s] . . . any source or other type of emissions activity within the State from emitting any air pollutant *in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State* with respect to [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added); *see North Carolina*, 531 F.3d at 902, 908, 910; *Michigan*, 213 F.3d at 669, 671, 674, 677; *accord id.* at 695 (Sentelle, J., dissenting).

In light of this statutory text, the Court explained that "EPA is not exercising its section 110(a)(2)(D)(i)(I) duty unless it is promulgating a rule that achieves something measurable toward the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance 'in any other State.'" *North Carolina*, 531 F.3d at 907. Accordingly, section 110(a)(2)(D)(i)(I) requires EPA not only to determine the amounts of air pollutants that "contribute significantly" to nonattainment in downwind States, but to do so with respect to each individual State covered by the rule. *See id.* at 906-07 (explaining that EPA failed to implement section 110(a)(2)(D)(i)(I) in CAIR because it "did not purport to measure each State's significant contribution to specific downwind nonattainment areas and eliminate them in an isolated, state-by-state manner").

B. CSAPR's Collective, Cost-Based Approach Exceeds EPA's Statutory Authority.

CSAPR generally began on the right path, looking at States individually and excluding any State whose emissions fell below a *de minimis* air-quality threshold—and,

for that reason, could not be said to "contribute significantly" to downwind nonattainment. 76 Fed. Reg. at 48,238-46. But in the next phase of its analysis, EPA veered off course, shifting CSAPR's focus from the "significance" of *specific* upwind States' contributions to downwind nonattainment to the *collective* effect of required reductions on the downwind States' ability to attain NAAQS. *Id.* at 48,248-49, 48,252. That approach is invalid for the same reasons CAIR was invalid: it fails to regulate in a State-by-State manner and improperly eschews section 110(a)(2)(D)(i)(I)'s core concept of "significance."

As already noted, the initial phase of CSAPR's analysis set the *de minimis* air-quality threshold, for purposes of determining presumptive "significance" under section 110(a)(2)(D)(i)(I), at 1% of the three relevant NAAQS. *Id.* at 48,239, 48,244. The rule explains that "states whose contributions are below these [1%-of-the-NAAQS] thresholds *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* at 48,236 (emphasis added).

The petitioning States do not concede that this initial line was drawn in the right place to exclude all insignificant contributions; the 1% threshold is so low as to make accurate calculation of actual emissions contributions difficult, if not impossible. *See* Guidance on the Use of Models at 105 (JA02753). But putting that problem aside, EPA's definition of a *de minimis* threshold was consistent with the statute in that it reflected a level below which one State could not possibly be said to "contribute

significantly" to another. 42 U.S.C. § 7410(a)(2)(D)(i)(I). And importantly, that threshold was given real effect. EPA used it to exclude from CSAPR every State whose modeled maximum downwind emissions contributions fell below 1% of the relevant NAAQS. 76 Fed. Reg. at 48,246-48.

In the next phase of its analysis, however, EPA abandoned any reference to the 1% threshold and individual States' contributions to downwind air quality. Instead, it focused only on the cost of reducing emissions and the resulting improvement in downwind air quality by the collective reductions of all contributing upwind States (plus any CSAPR reductions required of the downwind State itself). *Id.* at 48,248-49. To the extent this phase-two inquiry led EPA to deem "insignificant" any emissions that exceed 1% of the NAAQS but could not be cost-effectively controlled within a particular State, CSAPR's approach comported with *Michigan*—in which the Court explained that, after requiring a State to reduce its significant contribution to the fullest extent possible using highly cost-effective controls, EPA may permissibly deem any remaining contribution insignificant. 213 F.3d at 675-79; *accord North Carolina*, 531 F.3d at 917-18. *Michigan*, in other words, gave EPA a ratchet to *loosen* a State's emissions-reduction requirement, if keeping that requirement tightened to the *de minimis* 1% line would cause the State to incur excessive costs.

But CSAPR's phase-two approach did not accomplish what *Michigan* authorized. In abandoning all reference to individual States' specific contributions to downwind

nonattainment, it enabled EPA to reverse the ratchet's direction, requiring application of cost-effective controls that could drive a State's emissions below the point that, under phase one, would have excluded the State from any regulation whatsoever. In other words, CSAPR's phase-two approach enabled EPA to regulate in the *de minimis* range that the rule initially—and appropriately—put off-limits, and it did so based on a collective, rather than State-specific, analysis of upwind contributions to downwind nonattainment. EPA never went back to see what each individual State was contributing after cost-effective reductions. It instead focused on the "combined reductions available from upwind contributing states," 76 Fed. Reg. at 48,252—and, in so doing, failed to implement the "state-by-state" approach that section 110(a)(2)(D)(i)(I) requires. *North Carolina*, 531 F.3d at 907.

C. CSAPR Disregards—and Violates—the Court's Analysis of Section 110(a)(2)(D)(i)(I) in *North Carolina*.

CSAPR's collective approach, which enables over-regulation of States that can cost-effectively control emissions at levels below the 1% line, directly conflicts with *North Carolina*. Under section 110(a)(2)(D)(i)(I), "[e]ach state must eliminate its own significant contribution to downwind pollution. While [an EPA rule] should achieve something measurable towards that goal, it may not require some states to exceed the mark." *Id.* at 921.

An illustration involving two States, one contributing 0.50 $\mu g/m^3$ and another 0.25 $\mu g/m^3$ to downwind $PM_{2.5}$, brings the problem into focus. Under the approach

approved in *North Carolina*, EPA would determine that any contribution equal to or greater than 0.15 μg/m^3 (1% of the 1997 annual $PM_{2.5}$ NAAQS) qualifies as potentially "significant." For that reason, both States would be included in the rule and potentially required to reduce their contributions to just below 0.15 μg/m^3. *See id.* at 907 (instructing EPA to "measure each state's significant contribution to specific downwind nonattainment areas and eliminate them in an isolated, state-by-state manner").

But if EPA also determined that no State should be required to spend more than $2,500 per ton on these reductions, and if the first State's installation of control measures averaging $1,000 per ton successfully reduced its contribution to just below 0.15 μg/m^3, EPA would have no authority under section 110(a)(2)(D)(i)(I) to require further cuts. And if the second State's installation of control measures at the $2,500-per-ton level yielded a reduction to only 0.20 μg/m^3, EPA could use its *Michigan* ratchet to deem the remaining 0.05 μg/m^3 contribution "insignificant"—and, for that reason, require no further reductions. *See id.* at 917 (explaining that EPA could, "'after [a state's] reduction of all [it] could . . . cost-effectively eliminate[],' consider 'any remaining "contribution"' insignificant" (quoting *Michigan*, 213 F.3d at 677, 679 (alterations in original)).

CSAPR, however, would require *each* of these States to install control measures up to $2,500 per ton. *See* 76 Fed. Reg. at 48,248. For the second State, the result would be the same as noted above. But the first State would be forced to make all reductions available at an additional $1,500 per ton—regardless of whether that expenditure yielded

any meaningful air-quality improvement. And because, at the end of the day, CSAPR (like CAIR) "did not draw the [significant-contribution] line at all," *North Carolina*, 531 F.3d at 918, the first State would be unable to convince EPA that the rule required it to reduce more than its "significant" contribution.

At the stay stage, EPA acknowledged its abandonment of the 1% *de minimis* threshold after the first phase of CSAPR's analysis, calling that threshold "merely an analytical tool" used to make the initial determination of whether to include a State in the rule—and, as such, a concept that had no bearing on the second, cost-centric phase of its analysis. EPA's Consol. Opp. to Stay Motions at 37, Case No. 11-1302, Doc. No. 1345210; *see* 76 Fed. Reg. at 48,246-48. But once again, that approach contravenes *North Carolina*: "Whereas *Michigan* permits EPA to draw the 'significant contribution' line based on the cost of reducing that 'contribution,' . . . . 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. Although such an approach might reflect EPA's "redistributional instinct," an agency's policy preferences cannot trump a statute. *Id.* at 921.

III. CSAPR IMPROPERLY FAILS TO GIVE INDEPENDENT EFFECT TO "CONTRIBUTE SIGNIFICANTLY" AND "INTERFERE WITH MAINTENANCE."

In CAIR, EPA required reductions to protect downwind areas in nonattainment from an upwind State's "significant contribution," but it did not address emissions from an upwind State that would "interfere with maintenance" in a downwind area in attainment. Noting that "[a]ll the policy reasons in the world cannot justify reading a

substantive provision out of a statute," the Court in *North Carolina* required EPA to implement the "interfere with maintenance" language in section 110(a)(2)(D)(i)(I) in a manner distinct from its implementation of the provision's "contribute significantly" language. *Id.* at 909-10, 930. EPA responded in CSAPR by merely extending application of the "significant contribution" standard for nonattainment areas to those attainment areas containing "maintenance" monitors. That approach is inconsistent with *North Carolina* and is fundamentally at odds with both the CAA's cooperative federalism and the distinction the CAA draws between areas that are and are not attaining NAAQS.

Apart from its selection of monitors, EPA's methodology for calculating "interference" reductions is the same as its approach to calculating "significant contribution" reductions. Accordingly, if the Court rejects EPA's methodology for "significant contribution," it should reject its methodology for interference as well.

But more fundamentally, by applying the "significant contribution" regulatory standard for nonattainment areas to attainment areas that are governed by the "interfere with maintenance" standard, EPA disregards the fundamental difference between the CAA's approach to emissions controls in areas that are in attainment and its approach in areas that are exceeding standards. Emissions requirements that apply where standards are not being met reflect the understanding that the air-quality status quo is unacceptable—the CAA requires States to make progress toward attainment by including provisions in their SIPs that require sources to reduce emissions. *See* 42 U.S.C.

§ 7410(a)(2)(D)(i)(I). Among other things, such provisions must "provide for the implementation of all *reasonably available control measures* as expeditiously as practicable" and "include *enforceable emission limitations*, and such other control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary . . . to provide for attainment." *Id.* § 7502(c)(1) & (c)(6) (emphases added).

In areas that have attained standards, by contrast, the air-quality status quo is acceptable. So the affirmative emissions-reduction obligations for areas in nonattainment are not required for areas historically in attainment. An approach to section 110(a)(2)(D) that acknowledges this distinction would recognize that the reduction obligation for "significant contribution" to "nonattainment" is fundamentally different from the control obligation required to avoid "interference with maintenance."

By ignoring this distinction, CSAPR creates a conflict between CAA sections 110(a)(2)(D)(i) and 175A. Section 175A governs areas recently achieving attainment and, among other things, requires (i) a demonstration that the areas will remain in attainment for the next ten years, and (ii) contingency provisions that are triggered if the area actually violates the relevant standard in the future. *See id.* § 7505a(d); 57 Fed. Reg. 13,498 (Apr. 16, 1992) (describing requirements of section-175A maintenance plans); Memo from Director John Calcagni, Air Quality Management Division, Procedures for Processing Requests to Redesignate Areas to Attainment (Sept. 4, 1992) ("Calcagni Memo") (describing modeling and other methods used to demonstrate maintenance for

ten years after redesignation) (JA03210-22). CSAPR ignores EPA's own conclusions that redesignated areas will maintain standards and imposes reductions as to former nonattainment areas regardless of whether the emissions to be abated actually interfere with the contingency "triggers" for those areas.

EPA's treatment of Allegan County, Michigan illustrates both of these problems. In 2010, EPA re-designated Allegan County from nonattainment to attainment for the 1997 ozone NAAQS. 75 Fed. Reg. 42,018 (July 20, 2010). In doing so, EPA approved Michigan's section-175A maintenance plan for the area, which projects the area will remain in attainment through 2021 by a healthy margin based solely on local sources' emissions reductions and without considering any reductions mandated by CAIR. *Id.* at 42,026-28. The plan does not identify interstate contributions to ozone as impeding the maintenance of standards at the site, and none of the contingency measures address NO_X reductions, let alone reductions from upwind sources. *See id.* In other words, both Michigan and EPA agree that local measures will allow Allegan County to remain in attainment and that, in the event the area exceeds standards, local measures will allow it to come back into compliance.

CSAPR ignores these conclusions. Contrary to Michigan's EPA-approved maintenance plan, EPA concludes not only that upwind NO_X emissions will interfere with Michigan's maintenance of the ozone NAAQS, but that nine upwind States must reduce NO_X emissions to the same degree that would be necessary if Allegan County

were actually in nonattainment. *See* 76 Fed. Reg. at 48,246. Likewise, EPA concludes in CSAPR that the best method to avoid ozone nonattainment is through reduction of interstate NO_X emissions, not reduction of local VOC emissions (such as those identified in Michigan's maintenance plan). *See id.* at 48,222.

EPA's methodology is also at odds with the CAA's mandate that each State take "primary responsibility" for maintaining air-quality standards within its own borders. 42 U.S.C. § 7407(a). EPA's methodology for implementing section 110(a)(2)(D)(i) imposes, in the name of maintenance, steep emissions reductions on upwind States when the maintenance plan for the downwind attainment area demands nothing. This is not how the CAA works. Indeed, EPA itself has recognized that "applying controls on upwind sources in these circumstances not only could be environmentally unnecessary, but could even create a perverse incentive for downwind states to increase local emissions." 71 Fed. Reg. at 25,337.

In short, EPA has failed to adopt a methodology for the "interfere with maintenance" requirement that gives the term independent meaning and is harmonious with the CAA's "maintenance" requirements as defined by EPA. *See Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) (noting that statutes are to be read as a whole). To give "interfere with maintenance" independent effect and meaning, EPA was required to determine what each attainment area in a "downwind" State was required to do for NAAQS "maintenance." *See, e.g.*, Calcagni

Memo (describing maintenance-plan requirements for areas re-designated to attainment) (JA03210-22). Only with that information could EPA determine whether the "maintenance" program for a downwind attainment area was being "interfered with" as a result of "upwind" state emissions. To establish this linkage, EPA would have been required to ask two questions: (1) what is the "maintenance" obligation of a "downwind" State for a targeted area; and (2) whether an "upwind" State's emissions "interfere" with that specific obligation. EPA failed to ask these questions, much less answer them. Instead, it promulgated a rule establishing the same unlawful control requirement for "nonattainment" and "maintenance" areas.

IV. EPA FAILED TO PROVIDE ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO COMMENT BEFORE PROMULGATING CSAPR.

A. EPA Was Required To Provide Detailed Notice and an Opportunity for Meaningful Comment on CSAPR's Key Elements.

CAA section 307(d)'s requirements are even "more stringent" than the APA's well-established notice-and-comment provisions. *See Union Oil*, 821 F.2d at 681-82. When EPA publishes a proposed rule, it must provide a "detailed explanation of its reasoning." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983). It must also disclose the pertinent "factual data" and "methodology" underlying the proposed rule at the time of its issuance and update the docket as new information becomes available. 42 U.S.C. § 7607(d)(3), (4)(B)(i). These requirements are fundamental to sound administrative decision-making and judicial review. *See Int'l Union,*

United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

A chance to provide "meaningful" comment requires that interested parties be made aware of what, specifically, they are asked to comment on. *See Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002); *Small Refiner*, 705 F.2d at 518-19, 548. Thus, proposed and final rules may differ "only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citing *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (per curiam)). The "logical outgrowth" test requires that parties "'should have anticipated' that the change [in the final rule] was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003) (per curiam)); *see also Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991). The final rule cannot be "surprisingly distant" from EPA's proposal. *Envtl. Integrity Project*, 425 F.3d at 996. Rather, "a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Id.* at 998.

When an agency relies on scientific studies or data to support a final rule, it "commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Solite Corp. v. EPA*,

952 F.2d 473, 484 (D.C. Cir. 1991) (per curiam) (internal quotation marks omitted); *see also Kennecott Corp. v. EPA*, 684 F.2d 1007, 1017-20 (D.C. Cir. 1982); *Sierra Club v. Costle*, 657 F.2d 298, 334, 397-98 (D.C. Cir. 1981). For these reasons, post-comment publication of the key methodology underlying a rule does not provide adequate notice where that methodology was an integral part of the agency's justification for the rule. *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201-02 (D.C. Cir. 2007); *see Weyerhaeuser v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978).

B. EPA's Reliance on New Data and Models in CSAPR Denied Interested Parties Adequate Notice and Opportunity to Comment.

EPA made substantial, undisclosed revisions to CSAPR's substance and methodology as applied to jurisdictions covered by the rule. EPA changed "both steps of its significant contribution analysis" by altering: (1) its "modeling platforms and modeling inputs" used to identify States making significant contributions; and (2) "its analysis for identifying any emissions within such states that constitute the state's significant contribution." 76 Fed. Reg. at 48,213. The Office of Management and Budget emphasized that these changes made CSAPR "*substantially different* . . . than originally proposed," noting the "sheer magnitude of change to the budgets of all of the states." Summary of Interagency Working Comments on Draft Language under EO

12866 Interagency Review, EPA-HQ-OAR-2009-0491-4133 at 11 (posted July 11, 2011) (JA03493).[4]

Because of the proprietary, black-box nature of the IPM, even after taking into account every disclosed change in the data, assumptions, and methodology underlying that model, interested parties were unable to either forecast or replicate EPA's modeling in CSAPR and could not accurately predict their budgets. Decl. of Vincent R. Meiller at ¶¶ 3-8, 10, Case No. 11-1338, Doc. No. 1338311 (Exh. I) (JA03736-40); Decl. of James H. Smith at ¶¶ 4-5, Case No. 11-1338, Doc. No. 1338311 (Exh. H) (JA03744-45). In fact, working with hindsight, a modeling expert determined that using the "corrected and updated" emissions-projection data that EPA adopted in CSAPR with the methodology the agency proposed in its notice does not result in one State making a significant contribution for $PM_{2.5}$ at all—exactly the opposite of what EPA concluded. Decl. of Ralph E. Morris at ¶¶ 3, 17-20, Case No. 11-1315, Doc. No. 1336040 (Exh. 11) (JA03698-99, JA03703).

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4. EPA released two rules on February 7, 2012 designed to correct errors in state budgets. To the extent these rules correct problems raised during the *initial* comment period, they are further evidence of EPA's haphazard approach to notice-and-comment rulemaking. EPA's notice was deficient on a more basic level, however, and these superficial changes do not cure EPA's failure to allow interested parties to comment on the significant methodological changes between the Proposed Rule and CSAPR. In any event, because these recently released revisions address only some of CSAPR's many technical flaws (such as whether a particular EGU has an operational scrubber, *e.g.*, 77 Fed. Reg. at 10,325), and not the rule's underlying methodology, they do not alter the argument presented here.

After the rule was proposed, EPA issued three "notices of data availability" (two after the close of the initial comment period), which vaguely described EPA's intention to update inputs, assumptions, and methodology underlying CSAPR. Comment Revision NODA, 75 Fed. Reg. 53,613 (September 1, 2010); Emissions Inventory NODA, 75 Fed. Reg. 66,055 (October 27, 2010); Allocations, Assurance, & Allowance NODA, 76 Fed. Reg. 1,109 (January 7, 2011). EPA ignored requests to allow comment on the whole rule in light of these revisions, *e.g.*, Cmt. of Thomas W. Easterly, Commissioner, Indiana Department of Environmental Management, Doc. I.D. No. EPA-HQ-OAR-2009-0491-2645 (JA00587-89), and the full impact of the changes did not become apparent until CSAPR was finalized. The States were therefore left to "divine [EPA's] unspoken thoughts." *Int'l Union*, 407 F.3d at 1260 (internal quotation marks omitted).

And when EPA issued CSAPR, its modeling results were dramatically more stringent—and far from a "logical outgrowth" of the Proposed Rule. *See id.* at 1259-61 (invalidating, under the "logical outgrowth" test, more stringent and unanticipated air-velocity standards imposed under a final rule). For instance, CSAPR's NO_X budget resulted in an "approximately 33 percent reduction in base case EGU NO_X emissions." 76 Fed. Reg. at 48,251.

EPA attempted to attribute this change to a vaguely articulated "combination of modeling updates, including lower natural gas prices, reduced electricity demand,

newly-modeled consent decrees and state rules, and updated NO_X rates to reflect 2009 emissions data." *Id.*; *see also* 77 Fed. Reg. 10,324; 77 Fed. Reg. 10,342 (identifying several additional updates). But this statement conflicts with actual conditions within the petitioning States. For example, Nebraska's budget was dramatically reduced even though, contrary to EPA's explanation, it had experienced a 25.4% rise in natural-gas prices, steady energy demand, and had no new state rules or enforceable consent decrees lowering NO_X emission rates. *See* Aff. of Mike Linder, Director of the Nebraska Department of Environmental Quality, Case No. 11-1340, Doc. No. 1331348 (Exh. I) (JA03642-54).

Similar stories describe what happened to several other States, whose budget reductions between the Proposed Rule and CSAPR are presented below:

2012 SO_2 Budgets

State	SO_2 2012 (Proposal)	SO_2 2012 (Final)	SO_2 2012 (Change)
Georgia	233,260	158,527	-32%
Indiana	400,378	285,424	-29%
Kansas	57,275	41,528	-27%
Michigan	251,337	229,303	-9%
Nebraska	71,598	65,052	-9%

Ohio	464,964	310,230	-33%
S. Carolina	116,483	88,620	-24%
Texas	N/A	243,954	N/A
Wisconsin	96,439	79,480	-18%

2014 SO_2 Budgets

State	**SO_2 2014 (Proposal)**	**SO_2 2014 (Final)**	**SO_2 2014 (Change)**
Indiana	201,412	161,111	-20%
Kansas	57,275	41,528	-27%
Michigan	155,675	143,995	-8%
Nebraska	71,598	65,052	-9%
Ohio	178,307	137,077	-23%
S. Carolina	116,483	88,620	-24%
Texas	N/A	243,954	N/A
Virginia	40,785	35,057	-14%
Wisconsin	66,683	40,126	-40%

Annual NO_X Budgets

State	Annual NO_X (Proposal)	Annual NO_X 2014 (Final)	Annual NO_X (Change)
Georgia	73,801	40,540	-45%
Kansas	51,321	25,560	-50%
Michigan	64,932	57,812	-11%
Nebraska	43,228	26,440	-39%
Ohio	97,313	87,493	-10%
Texas	N/A	133,595	N/A
Wisconsin	44,846	30,398	-32%

Ozone-Season NO_X Budgets

State	O_3-Season NO_X (Proposal)	O_3-Season NO_X (Final)	O_3-Season NO_X (Change)
Florida	56,939	27,825	-51%
Georgia	32,144	18,279	-43%
Indiana	49,987	46,175	-8%
Louisiana	21,220	13,432	-37%
Mississippi	16,530	10,160	-39%
Ohio	40,661	37,792	-7%

S. Carolina	15,222	13,909	-9%
Texas	75,574	63,043	-17%

Compare 75 Fed. Reg. 45,291 (Tables IV.E–1-2) *with* 76 Fed. Reg. at 48,269-70 (Tables VI.F–1-3).[5] In addition, the City of Ames's NO_X budget was also substantially reduced—by almost 50% between proposal and finalization. *See* Trower Aff. ¶ 16.

EPA cannot validly make a rule more stringent through drastic, unproposed methodological changes such as those that drove the results noted above. *See Int'l Union*, 407 F.3d at 1259-61. And although EPA has now attempted to correct at least some of its errors, *see* 77 Fed. Reg. 10,324; 77 Fed. Reg. 10,342, it has merely tinkered with its assumptions. It also has not fully disclosed, let alone allowed comment on, the significant methodological changes it effected between CSAPR's proposal and finalization.

EPA's modeling and data changes also shifted the linkages between States and monitors, further denying States a meaningful opportunity to comment. Without notice, EPA chose to introduce a new CAMx model, *see, e.g.*, 76 Fed. Reg. at 48,229-32 , that led to many States' linkages to newly identified downwind nonattainment or maintenance

5. EPA did not propose different annual or ozone-season NO_X budgets for 2012 and 2014, instead providing one budget for "all years." 75 Fed. Reg. at 45,291 (Tables IV.E–2-3). CSAPR, however, provided budgets for the interim years 2012-2013 and "2014 and beyond," representing each State's ultimate emissions-reduction obligation. 76 Fed. Reg. at 48,269-70 (Tables VI.F–2-3). Thus the NO_X tables shown here compare only each State's proposed long-term obligation at proposal and at finalization.

monitors for the first time in CSAPR. Kansas and Texas, for example, are "significantly" linked to entirely different proposed and final monitors. *Compare* 75 Fed. Reg. at 45,257-58 (Table IV.C–14), 45,262, 45,266, 45,268-69 (Tables IV.C–17, –18, –20), 45,270 (Tables IV.C–14, –21), 45,291 (Table IV.E–1) *with* 76 Fed. Reg. at 48,241 (Table V.D–2), 48,241-42, 48,246 (Tables V.D–4, –8, –9).[6]

Interested parties could only have been expected to comment on the monitors linked to their home States in the Proposed Rule—not on those that, under entirely new and changed circumstances and models, *might* be linked. *Small Refiner*, 705 F.2d at 549 (requiring reasonable specificity for the range of alternatives under consideration). Otherwise, States would have had to provide comments on the *entire universe* of air-quality monitors, including those identified in the Proposed Rule as "maintenance" or "nonattainment" (48 monitors for annual $PM_{2.5}$, 140 for 24-hour $PM_{2.5}$, and 27 for ozone), as well as any additional monitors later deemed by EPA to reflect air-quality concerns as a result of the undisclosed "planned input updates." 75 Fed. Reg. at 53,613, 53,614 (Sept. 1, 2010); *see Fertilizer Inst.*, 935 F.2d at 1311 (explaining that

6. One site change, *compare* 75 Fed. Reg. at 45,269 (Dallas, TX) *with* 76 Fed. Reg. at 48,246 (Allegan, MI), was the subject of supplemental comments. 76 Fed. Reg. 40,662 (July 11, 2011). EPA should have sought supplemental comments for all other newly linked sites, as it did for six States found to have new significant linkages to air-pollution monitors. *Id.* at 40,662. Additionally, CSAPR identified a new "significant" linkage to an ozone monitor for Wisconsin. Although that State was given a chance to comment on its inclusion in CSAPR, *see* 76 Reg. Reg. at 48,215, EPA finalized Wisconsin's ozone-season NO_X budget without allowing for comment. *See id.* at 48,307 (Table VIII.A–5).

notice-and-comment rulemaking is not a "guessing game" forcing conjecture on a subject that *might* be addressed).

C. EPA Failed To Provide Notice That Texas Would Be Included in CSAPR's Annual SO_2 and NO_X Programs.

EPA's notice violation is especially pronounced with respect to Texas. EPA proposed to *exclude* Texas from CSAPR's annual SO_2 and NO_X programs based on modeling reflecting that Texas sources do *not* significantly contribute to nonattainment of the $PM_{2.5}$ NAAQS. 75 Fed. Reg. at 45,255-67, 45,282-84. Yet CSAPR *included* Texas as a "significant contributor" to $PM_{2.5}$ based on data from a single downwind monitor. 76 Fed. Reg. at 48,241. CSAPR also established annual SO_2 and NO_X emissions budgets for Texas, imposing major reductions that were not subject to notice and comment.

Once again, these notice violations unlawfully concealed CSAPR's ultimate methodology. With proper notice, Texas stakeholders would have pointed out, for instance, that the single monitor to which the State was "significantly" linked is currently in "attainment" status for the annual $PM_{2.5}$ NAAQS and is heavily influenced by a local steel mill. *See* 76 Fed. Reg. 29,652, 29,652-53 (May 23, 2011); *Natural Res. Def. Council, Inc. v. Jackson*, 650 F.3d 662, 665-66 (7th Cir. 2011) (Easterbrook, C.J.) (observing that "[t]he way to test a model is to compare its projection against real outcomes" and that "[a]n agency that clings to predictions rather than performing readily available tests may run into trouble" (citing *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)). But EPA's approach required Texas to do the impossible—"anticipate every contingency" and

engage in "telepathy." *Portland Cement Ass'n v. EPA*, 2011 U.S. App. LEXIS 24577 (D.C. Cir. Dec. 9, 2011) (per curiam); *see also Envtl. Integrity Project*, 425 F.3d at 998 (rejecting EPA's argument "that it met its notice-and-comment obligations because its final interpretation was also mentioned (albeit negatively) in the Agency's proposal").

As the Court has explained, "'something is not a logical outgrowth of nothing.'" *Envtl. Integrity Project*, 425 F.3d at 996. For that reason, CSAPR could not possibly have been a "logical outgrowth" of the Proposed Rule, which provided proposed annual SO_2 and NO_X emissions budgets for every State that was ultimately included in CSAPR *except* Texas. 75 Fed. Reg. at 45,309. (In similar past rulemakings, EPA has provided proposed emissions budgets for *every* covered State. *Compare* 62 Fed. Reg. 60,318, 60,361 (Nov. 7, 1997) *with* 63 Fed. Reg. 57,356, 57,439 (Oct. 27, 1998); 69 Fed. Reg. 4,566, 4,619-21 (Jan. 30, 2004) *with* 70 Fed. Reg. at 25,230-31.) Again, adequate notice would have led to meaningful comment on EPA's methodological flaws—such as its failure to base Texas's budgets on the State's own"significant contribution." *See supra* Part II.

CSAPR attempted to justify this lack of notice, stating that, "[i]n the proposal[,] EPA also requested comment on whether Texas should be included in [CSAPR] for annual $PM_{2.5}$." 76 Fed. Reg. at 48,214. But EPA later conceded that the sole basis for that request—a concern that changes in coal prices occasioned by CSAPR might lead Texas EGUs to burn coal with higher sulfur content, 75 Fed. Reg. at 45,284—was *irrelevant* to the basis for Texas's ultimate inclusion in the rule. Primary Response to

Comments at 563-64 (JA01872-73). Interested parties are entitled to take EPA at its word "about which particular aspects of its proposal are open for consideration." *Envtl. Integrity Project*, 425 F.3d at 998. Here, EPA breached that basic guarantee.

D. EPA Failed To Provide Notice of Other Important Methodological Changes from the Proposed Rule to CSAPR.

EPA also improperly introduced a new methodology of "emissions leakage" as a basis for determining whether a State has significantly contributed to a downwind monitor. 76 Fed. Reg. at 48,263. When modeled, emissions from Arkansas, Indiana, Louisiana, Maryland, and Mississippi were not found to be contributing significantly under CSAPR's definition because they had no cost-effective reductions available. *Id.* Disregarding that outcome, however, EPA decided on a different result in CSAPR: requiring these States to meet their base-case budgets based on ill-defined "interstate shifts in electricity generation that cause 'emissions leakages.'" *Id.* The concept of "emissions leakages" did not appear in the Proposed Rule, and EPA made no attempt to explain, let alone defend, the use of this methodological change to accomplish its desired result. *See id.*

Further, whereas the Proposed Rule required only one phase of reductions for the NO_X programs and for the Group-2 SO_2 program, CSAPR included two phases for those programs. This change from the proposed methodology does not pass the "logical outgrowth" test. For example, EPA announced for the first time at finalization that Georgia's 2014 SO_2 budget must drop significantly from 2012 to 2014 (even though the

State had been moved out of "Group 1") to prevent "other sources within [Georgia from] increas[ing] their emissions . . . [and] offset[ing] emission reductions planned" under non-CSAPR requirements, "such as state rules." *Id.* at 48,261.

The Court has been clear that switching to a new methodology in a final rule "does not advise interested parties how to direct their comments" and thus does not afford adequate notice. *Envtl. Integrity Project*, 425 F.3d at 998. The relevant state rule, Multipollutant Control for Electric Utility Steam Generating Units, Ga. Comp. R. & Regs r. 391-3-1-.02(2)(sss) (JA01401-05), requires the installation of controls on 22 EGUs. EPA's new methodology treats these reductions as sunk-costs, assigning them $0 for EPA's cost-threshold analysis. 76 Fed. Reg. at 48,261. Had EPA provided notice of this significant methodological change, Georgia would have commented that EPA's new basis for Georgia's 2014 budget penalized the State for its proactive state rule and that the States should retain the ability to decide whether and how to prevent an end-run around emissions reductions that such rules require.[7]

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7. One final note is that section 307 also requires "a response to each of the significant comments, criticisms, and new data submitted . . . during the comment period." 42 U.S.C. § 7607(d)(6)(B). Here, EPA violated that requirement by ignoring comments from several States regarding serious errors in the Proposed Rule. For example, EPA never responded to comments by Georgia, and only partially responded to comments by Wisconsin, pointing out that EPA's modeling wrongly assumed that certain control measures were operational. The resulting impact to Wisconsin's SO_2 trading budgets is approximately 10% in 2012 and more than 25% in 2014, raising serious questions about the feasibility of achieving assurance-level budgets in 2014. *See* Cmt. of James A. Capp, Chief, Air Protection Branch, Georgia Environmental Protection Division, Doc. I.D. No. EPA-HQ-OAR-2009-0491-2647 at 2 (JA00592);

CONCLUSION

The Court should grant the petitions for review and vacate CSAPR. If the Court for any reason remands the matter to EPA, it should keep the current stay of CSAPR in place and allow CAIR to remain in effect in the interim.

Cmt. of William B. Baumann, Wisconsin DNR Acting Air Management Bureau Director, Doc. I.D. No. EPA-HQ-OAR-2009-0491-4824 (JA03957-72).

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that 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 13,373 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' opening brief and the State and Local Petitioners' opening brief do not exceed 28,000 words, 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 16, 2012

/s/ Bill Davis
Bill Davis

CERTIFICATE OF SERVICE

I certify that, on March 16, 2012, I electronically filed the foregoing final Opening Brief, Statutory Addendum, and Addendum in Support of Standing of State and Local Petitioners 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.

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

/s/ Bill Davis
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