

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 16-1406
(and consolidated cases)

United States Court of Appeals
for the District of Columbia Circuit

STATE OF WISCONSIN, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

**INITIAL BRIEF OF THE STATES OF NEW YORK, MARYLAND,
MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, AND VERMONT
IN SUPPORT OF RESPONDENT**

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**CERTIFICATE AS TO PARTIES, RULINGS,
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Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies that:

A. State Intervenor-Respondents (“State Intervenors”) adopt the certificate as to parties and amici in the briefs of State Petitioners, Cedar Falls Utilities and the City of Ames, Iowa, Docket No. 1693484, Petitioners Conservation Groups and the State of Delaware, Docket No. 1693488; and Industry Petitioners, Docket No. 1693490; and

B. The State Intervenors adopt the certificate as to rulings and related cases in the brief of respondent EPA, Docket No. 1713362.

 /s/ Andrew G. Frank
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GLOSSARY

Act	Clean Air Act
EPA	U.S. Environmental Protection Agency
FIP	Federal implementation plan
lb/mmBTU	Pounds per million British thermal units
NAAQS	National ambient air quality standards
SIP	State implementation plan

PRELIMINARY STATEMENT

State respondent-intervenors (“State Intervenors”) have struggled for years to protect their residents from the harms caused by air pollution transported from out-of-state upwind sources. Congress enacted the Clean Air Act’s good-neighbor provision to address this problem. And pursuant to its authority under the good-neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i), the Environmental Protection Agency (“EPA”) promulgated the rule at issue before this Court, the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74504 (Oct. 26, 2016) (the “Update Rule” or “Rule”). That rule imposes important controls on emissions sources in States that are upwind of State Intervenors, and thereby helps State Intervenors to reduce ozone pollution that harms public health and welfare.

The Rule will provide vast health and other benefits to the lives of State Intervenors’ residents because it will reduce upwind emissions, and hence ozone pollution, in those States, and as result it will reduce premature mortality, hospital admissions, and asthma attacks. These benefits vastly outweigh any costs imposed by the Rule on upwind sources: EPA’s conservative estimate of the annual monetary value of the health

and other benefits of the Rule is \$520 million to \$860 million, far exceeding the estimated annual cost of \$68 million. 81 Fed. Reg. at 74575.

State Intervenors submit this brief in opposition to challenges by Wisconsin and other States (“State Petitioners”)¹ and Industry Petitioners that the Rule is too stringent. State Intervenors focus on the following four issues:

Cost-Benefit Analysis. State Petitioners argue that even though the Rule allocates emission reductions where they can be achieved most cost-effectively, and even though the Rule provides total benefits that far outweigh its costs, the Rule must pass a further state-specific cost-benefit test, and it fails to do so. But the Supreme Court and this Court have expressly upheld the methodology used here – which extensively considers costs and benefits – without imposing the nonstatutory, state-specific standard State Petitioners seek.

State Implementation Plans. The State Petitioners challenge EPA’s disapproval of their state implementation plans (“SIPs”), but those separate

¹ The State Intervenors are not responding in this brief to the arguments made by petitioners Delaware and the public health and environmental groups.

SIP disapprovals are not before the Court in this proceeding. In any event, there is no basis in law for State Petitioners' argument that EPA's disapproval impermissibly relied on analysis completed after a statutory deadline for SIP action had passed.

EPA's Consideration of Downwind Controls. Industry Petitioners contend that EPA's emission calculations did not consider emission reductions that downwind States should reasonably make. But EPA's calculations expressly took such reductions into account. Indeed, State Intervenors have taken measures far more stringent and expensive than those the Rule requires of upwind States.

EPA's Application of the Interference-with-Maintenance Provision. Industry Petitioners argue that the Rule results in unlawful "overcontrol" of upwind-state emissions that only interfere with maintenance (rather than substantially contribute to nonattainment) of the 2008 ozone national ambient air quality standards ("NAAQS") in downwind States. Specifically, Industry Petitioners argue that EPA unlawfully required reductions in emissions in such States, but nothing in the Clean Air Act prohibits the EPA from requiring those reductions. Rather, those emission reductions are a reasonable prophylactic remedy for the possibility that shifting

meteorological and economic conditions could lead to nonattainment in the near future.

STATEMENT OF ISSUES

State Intervenors adopt the Statement of Issues in EPA's brief.

STATEMENT OF THE CASE

State Intervenors adopt the Statement of the Case in EPA's brief and add the following statement:

As this Court has remarked, the Clean Air Act's "good neighbor provision requires upwind States to bear responsibility for their fair share of the mess in downwind States." *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 13 (D.C. Cir. 2012), *rev'd and remanded on other grounds*, 134 S. Ct. 1584 (2014). Over the past twenty years, EPA has promulgated, and this Court has reviewed, a number of rules to compel upwind States to meet their good-neighbor obligations. In particular, in August 2011, EPA promulgated the Cross-State Air Pollution Rule (the "Cross-State Rule") to address, among other things, the failure of upwind States to eliminate emissions from within their borders that significantly contribute to downwind States' violations of the 1997 ozone NAAQS, or that interfere

with maintenance of that standard. 76 Fed. Reg. 48208 (Aug. 8, 2011). In 2015, on remand from the Supreme Court, this Court largely upheld the Cross-State Rule. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

Meanwhile, in 2008, EPA revised the ozone NAAQS after review of scientific literature demonstrating the significant harm to human health and welfare that results from ozone pollution. The revised NAAQS reduced the primary and secondary ozone standard from 0.08 parts per million to 0.075 parts per million. 73 Fed. Reg. 16436 (Mar. 27, 2008). As EPA explained, it did not address upwind States' good-neighbor obligations under the revised 2008 ozone NAAQS pending resolution of litigation over the Cross-State Rule. Respondent EPA's Initial Brief ("EPA Br.") at 115.

The Update Rule now partly addresses those obligations. In particular, the Update Rule requires upwind emission reductions of nitrogen oxides ("NO_x") that create ozone during summer ozone seasons, because downwind States need those reductions in order to attain the now almost decade-old 2008 ozone NAAQS. Upwind emissions are largely responsible for the fact that twenty-one counties in the State Intervenor currently do not attain the 2008 standard. See EPA, 8-Hour Ozone (2008)

Designated Area State/Area/County Report, at <https://www3.epa.gov/airquality/greenbook/hbcs.html> (“EPA Ozone Designations”).

Downwind States have already done more than their fair share to reduce their own emissions, imposing emission reductions on their own in-state sources that are far more strict and expensive than the reductions imposed on upwind sources under the Update Rule. For example, States that are members of the Ozone Transport Commission established under the Clean Air Act, 42 U.S.C. § 7511c(a), which includes northern Virginia, Maryland, Pennsylvania, and all States in the northeast, have “implement[ed] strategies to control emissions at costs that are orders of magnitudes greater than the cost to reduce emissions in non-[Ozone Transport Commission] states.” Ozone Transport Comm’n, Comments at 3 (Feb. 1, 2016) [JA ____]. Our States have also imposed additional stringent controls by statute and regulation. For example, the Maryland Healthy Air Act required emission reductions from Maryland power plants that reduced total NO_x emissions in Maryland by approximately 75 percent, at a cost of approximately \$2.6 billion. See Md. Code Ann. Env’t § 2-1001 *et seq.*, Maryland Dep’t of the Env’t, *The Maryland Healthy Air Act*, at http://www.mde.maryland.gov/programs/air/pages/md_haa.aspx; see also

23:25 N.Y. St. Reg. 7, 8 (June 23, 2010) (listing average costs of NO_x emission reductions for a DEC regulation ranging from \$2,617 to \$5,500 per ton in 2010 dollars), *available at* <https://docs.dos.ny.gov/info/register/2010/jun23/pdfs/rules.pdf>.

To provide a concrete example of the results of such efforts, generating units in New York subject to the Cross-State Rule had an ozone-season NO_x emission rate of 0.044 pounds/million British thermal units (“lb/mmBtu”) in 2015 – less than half of the 0.10 lb/mmBtu threshold EPA used as the basis for the Rule. *See* New York State Dep’t of Env’tl. Conservation, Comments at 1 (Feb. 1, 2016) (0.044 lb/mmBtu), [JA ___]; 81 Fed. Reg. at 74543 (0.10 lb/mmBtu). Those low New York emission levels are the result of state standards requiring reductions in some instances at costs of \$5,000 or more per ton of NO_x eliminated, which is over triple the \$1,400-per-ton reduction cost for sources in upwind States under the Update Rule. *See* New York State Dept. of Env’tl. Conservation, Comments, *supra*, Attachment at 3 (\$5,000/ton), [JA ___]; 81 Fed. Reg. at 74543 (\$1,400/ton threshold).

Given the efforts of downwind States, their continued difficulties in satisfying the 2008 ozone NAAQS are in large part the result of upwind

States' failure to sufficiently reduce emissions from their sources. Northeastern States suffer from an ozone plume that originates in States to the west and south and travels east and north toward Maryland, New York, and on to New England. S. Rep. No. 101-228, at 49 (1989). Seventy percent of the ozone in Maryland comes from upwind States, leading eleven Maryland counties to be designated as in nonattainment for the 2008 ozone NAAQS. Maryland Dep't of the Env't, Comments at 7 (Feb. 1, 2016) [JA ___]; EPA Ozone Designations. Similarly, notwithstanding New York's extensive in-state efforts to reduce ozone, ten counties in the State are in nonattainment for the 2008 ozone NAAQS. *See* EPA Ozone Designations. The Rule's emission reductions are thus critical to reducing ozone in the State Intervenor and other downwind States and thereby protecting the health and welfare of people living in those States.

STATUTES AND REGULATIONS

The applicable statutes and regulations are set forth in the addenda to the briefs of State Petitioners, Industry Petitioners, and EPA.

SUMMARY OF ARGUMENT

State Intervenors support the Update Rule and respond here to two issues presented by State Petitioners and two issues presented by Industry Petitioners.

1. State Petitioners argue that EPA violated the law because the Rule's cost-effective allocation of emission reductions does not pass a further state-specific cost-benefit test. But the Supreme Court and this Court have expressly upheld the methodology EPA used to set the Rule's emission reductions here without finding that any additional state-specific cost-benefit analysis was required. And contrary to State Petitioners' suggestion, the methodology that EPA adopted extensively considered costs and benefits—it simply did not do so in the precise way that State Petitioners demand here.

2. State Petitioners challenge EPA's disapproval of their SIPs. But this proceeding is a challenge to the Rule, not to the SIP disapprovals, which are therefore not before this Court. In any event, State Petitioners' objections to the SIP disapprovals are meritless. Contrary to State Petitioners' arguments, EPA was entitled to rely on any available evidence,

including evidence developed after the twelve-month statutory deadline for acting on SIPs, in deciding whether to approve the SIPs.

3. Industry Petitioners contend that EPA's emission calculations did not consider emission reductions that downwind States should reasonably make. But EPA's calculations expressly took such reductions into account. Indeed, State Intervenors have taken measures far more extensive and expensive than those the Rule requires of upwind States.

4. Industry Petitioners argue that the Rule results in unlawful "overcontrol" of upwind state emissions that only interfere with maintenance (rather than significantly contribute to nonattainment) of the 2008 ozone NAAQS in downwind States. Specifically, Industry Petitioners argue that EPA unlawfully required reductions in emissions in such States. But nothing in the Clean Air Act prohibits EPA's actions here. Even if current emission levels in some States may result in attainment at downwind receptors now, EPA reasonably determined that shifting meteorological and economic conditions could lead to nonattainment in the near future. The emission reductions that it imposed in the Rule are a reasonable prophylactic remedy for such an outcome.

STANDARD OF REVIEW

State Intervenors adopt the standard of review set out in EPA's brief.

ARGUMENT

POINT I

EPA'S CONSIDERATION OF COSTS WAS LAWFUL

A. The Law Does Not Require That EPA's Choice of Cost-Effective Emission Controls Also Satisfy Some Further State-Specific Cost-Benefit Test.

EPA extensively analyzed control costs and air quality benefits in promulgating the Update Rule, and concluded that the most cost-effective way of achieving cross-state emission reductions by the 2017 ozone season was to adopt a uniform cost threshold of \$1,400/ton for required emission controls, i.e., to require upwind sources to adopt emission controls that could be implemented at or below a marginal cost of \$1,400 per ton of emissions eliminated. *See generally* EPA Br. at 16-20. EPA then applied this uniform cost threshold to determine state-specific budgets in individual federal implementation plans ("FIPs").

Under this approach, each State's budget is determined not by the total amount of emissions in that State, nor by the overall amount of its emissions that reach downwind States, but on the amount of reductions

that can be achieved in that State cost-effectively, i.e., at \$1,400 per ton or less. A State that already has imposed strict controls will thus face a lessened obligation under the rule, as few cost-effective reductions will remain available at the \$1,400 threshold. By contrast, States within the scope of the Rule that have done relatively little to control emissions will have budgets that require more substantial reductions, reflecting the relatively lower-cost controls that remain available to them. This methodology is essentially the same as the one EPA employed in the Cross-State Rule, which the Supreme Court upheld in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 (2014) (upholding EPA’s decision to “impos[e] uniform cost thresholds on regulated States”).

State Petitioners nonetheless argue that the Update Rule is unlawful because, *after* applying the uniform cost threshold to set emission controls in each individual FIP, EPA did not further demonstrate that the controls imposed in each State resulted in benefits exceeding the costs of compliance in that State. Opening Brief of State Petitioners (“State Pet. Br.”) at 15, 21. That argument goes beyond any reasonable interpretation of the governing statutes or case law. The good-neighbor provision does not dictate any particular method by which EPA must account for costs (if it

must consider costs at all). And EPA's choice of how to use costs in the Rule—to allocate reductions where they can be achieved most cost effectively—is a rational way to incorporate cost principles into the good-neighbor provision's mandate to reduce upwind emissions.

The Supreme Court and this Court have recognized as much in twice upholding EPA's use of the same type of cost threshold that the agency employed here, without requiring any further cost-benefit analysis. *EME Homer City*, 134 S. Ct. at 1606-07 (Cross-State Rule); *Michigan v. EPA*, 213 F.3d 663, 674-79 (D.C. Cir. 2000) (1998 NO_x SIP Call). In *EME Homer City*, the Supreme Court expressly held that the good-neighbor provision did not dictate precisely how EPA must “allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution,” and recognized that EPA's “cost-based allocation” was “a reasonable way of filling the gap left open by Congress.” 134 S. Ct. at 1604, 1607 (quotation marks omitted). Nothing in the Supreme Court's decision suggests that its explicit approval of “EPA's cost-effective allocation of emission reductions among upwind States,” *id.* at 1610, was conditioned on EPA's satisfaction of some further cost-benefit test after making the approved allocation.

Likewise, in *Michigan v. EPA*, this Court *upheld* the manner in which EPA considered costs in the NO_x SIP Call, which involved a cost-threshold approach that is substantially similar to the approach used here.² 213 F.3d at 674-79. Contrary to State Petitioners' suggestion, this Court did *not* hold that the good-neighbor provision required any separate, additional balancing of benefits against costs, much less an entire additional round of state-specific calculations performed after EPA had already allocated emission reductions among upwind States by using a cost-based methodology.

State Petitioners misplace their reliance on the Supreme Court's subsequent decision in *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). That case did not concern the good-neighbor provision at all (or the NO_x SIP Call at issue in this Court's *Michigan* decision), and instead relied on the distinct statutory language of the Clean Air Act's program for regulating hazardous air pollutants. Specifically, the Supreme Court reasoned that

² The language in *Michigan* on which petitioners centrally rely is not a holding of the Court, but rather an explanatory parenthetical in a citation to a law review article that this Court cited as authority to uphold EPA's cost-threshold approach. State Pet. Br. at 10-11, 15 (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 487 (1989)).

statutory language allowing regulation of hazardous air pollutants only if “appropriate” required EPA to consider costs. *Id.* at 2707-08. But no similar language appears in the good-neighbor provision. In any event, the Supreme Court’s *Michigan* decision held only that the distinct statutory provision at issue there “require[d] at least some attention to cost.” *Id.* at 2707. Even if applicable here, that language would not mandate the specific cost-benefit analysis demanded by State Petitioners, and would be satisfied by EPA’s extensive and explicit consideration of costs in the Update Rule. EPA not only paid “some attention to cost,” it crafted a Rule that incorporates cost as a central principle, by allocating emission reductions where they can be obtained at lowest cost.

Finally, State Petitioners’ attempt to derive a substantive cost-benefit standard from the arbitrary-and-capricious standard for judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), and the Clean Air Act, 42 U.S.C. § 7607(d)(9), is meritless. *See* State Pet. Br. at 15-16. The two decisions cited by State Petitioners (at 16) – *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43-44 (1983) and *American Farm Bureau Federation v. EPA*, 559

F.3d 512, 520 (D.C. Cir. 2009) – did not address regulatory costs at all, let alone impose a state-by-state cost-benefit test.³

More fundamentally, the APA’s arbitrary-and-capricious standard depends on the meaning of the substantive statute governing the agency’s actions. *See, e.g., State Farm*, 463 U.S. at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.”); *United States Sugar Corp. v. EPA*, 830 F.3d 579, 608 (D.C. Cir. 2016) (holding that statutory language prevented EPA from taking certain events into account in setting standards), *cert. denied sub nom. American Mun. Power v. EPA*, 137 S. Ct. 2296 (2017). State Petitioners essentially ask this Court to reverse this logic, deriving an independent substantive standard from the APA even when Congress imposed no such requirement under the governing statutes. There is no support for such a position, and in particular, there is no basis to substitute the cost-benefit test that the State Petitioners propose for the

³ In fact, *American Farm Bureau* concerned an EPA rulemaking to set NAAQS in which, by law, no consideration of costs was permissible. *See Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 471 (2001) (holding that the Clean Air Act “unambiguously bars” consideration of costs in setting NAAQS).

NAAQS-based health standard approach that the statute uses. This Court should reject the State Petitioners' attempt to create and impose a requirement that EPA perform a state-by-state cost-benefit analysis not required by the good-neighbor provision. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

B. EPA Reasonably Concluded That the Benefits of the Update Rule Far Exceed Any Costs.

State Petitioners' argument erroneously suggests that EPA entirely ignored costs and benefits in promulgating the Update Rule. In fact, while EPA did not adopt the specific analysis that State Petitioners demand, the agency did consider costs and benefits in two critical ways.

First, EPA did perform a cost-benefit analysis of the Rule, as required by Executive Order. 81 Fed. Reg. at 74581. That analysis showed that the estimated human health and other benefits of the Update Rule vastly exceed the Rule's costs. *Id.* at 74575 (Table VIII.6). Those benefits include dozens fewer premature deaths, hundreds fewer hospital visits, and tens of thousands fewer asthma exacerbations, more commonly known as asthma attacks. *Id.* at 74574 (Table VIII.4). In comparing these benefits against the costs of the Rule, EPA conservatively found estimated *net* benefits of

\$450 million to \$790 million. *Id.* at 74575 (Table VIII.6) (seven percent discount factor); EPA, Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update (“Regulatory Impact Analysis”) at 7-2 (Sept. 2016) [JA_____].⁴

Second, the cost-threshold approach utilized by EPA requires emission reductions only when they can be achieved on a cost-effective basis. Under that approach, the Rule imposes costs on a State’s emission sources that are in proportion to the total benefits that will be attained by the controls.

The State Petitioners complain that, for some States, the Update Rule’s emission reductions are disproportionately small relative to the “significant costs” the Rule imposed on those States. State Pet. Br. at 20. But while State Petitioners quantify the small emission reductions required by the Rule – noting, for example, that the Rule requires only a

⁴ EPA also analyzed the costs and benefits of a more stringent alternative based on a higher cost threshold of \$3,400 per ton of pollutant removal. 81 Fed. Reg. at 74573; Regulatory Impact Analysis at 7-1 [JA_____]. The estimated net benefits of the more stringent alternative were even greater: \$490 million to \$850 million. Regulatory Impact Analysis at 7-2 [JA_____]. Under that more stringent alternative, Wisconsin’s NO_x budget would have been reduced from 7915 tons to 7790 tons. EPA, Ozone Transport Policy Analysis Technical Support Document at 15 (Aug. 2016) [JA_____].

24-ton NO_x reduction from Wisconsin – they are silent on the amount of the “significant costs,” and for good reason: as the record demonstrates, the costs are as proportionately small as the emission reductions.

Specifically, because EPA’s cost-threshold methodology requires emission reductions that can be achieved at a cost of \$1,400 per ton (or less) of emissions eliminated, *see, e.g.*, 81 Fed. Reg. at 74508, Wisconsin’s 24-ton reduction will cost *at most* \$33,600 (24 tons x \$1,400). In fact, the overall cost is almost certainly lower than \$33,600 because, as EPA points out, \$1,400 represents the cost of the *marginal* reduction, while the cost of reductions on *average* will be less. EPA Br. at 112.

By way of comparison, the average ozone-specific benefit from a one-ton reduction under the rule ranges from approximately \$6,000 to \$9,900, suggesting an ozone-specific benefit from the 24-ton Wisconsin reductions of between \$144,000 and \$237,600. *See* Regulatory Impact Analysis at 5-19 (Table 5-2) (\$6,000-\$9,900 range) [JA___]. Although Wisconsin complains that its contribution to downwind ozone is small (State Pet. Br. at 20), Wisconsin does not dispute that it meets the one-percent emission-contribution threshold for a State to be subject to the Rule. Accordingly, the State Petitioners are simply making a policy argument in favor of an

additional threshold test for excluding States that has no basis in the Clean Air Act or any other statute. In any event, as shown above, Wisconsin's costs are small, and the State Petitioners have presented no evidence that the monetized benefits of Wisconsin's reductions are less than those costs.

Congress enacted the good-neighbor rule to ensure that upwind States reduce their contributions to health and environmental harm in downwind States that results from air quality not meeting the NAAQS. The Rule provides emission reduction in the upwind States in a cost-effective and even-handed way, with health and other benefits far exceeding the costs, and the costs estimated at no more than \$1,400 per ton of NO_x removed. State Petitioners have no legal or factual ground to complain that EPA unlawfully ignored costs or otherwise imposed excessive, irrational obligations on them.

POINT II

EPA’S DISAPPROVAL OF STATE PETITIONERS’ SIPS IS NOT BEFORE THE COURT, AND IN ANY EVENT WAS LAWFUL

A. The State Petitioners’ Objections to Their SIP Disapprovals Are Not Before the Court in This Action.

State Petitioners complain that EPA failed to take action on various SIPs within twelve months of submission, as required under the Clean Air Act, 42 U.S.C. § 7410(k)(2). State Pet. Br. at 32-33. They then contend that disapproval of the SIPs after that deadline was unlawful because EPA based the disapprovals on information and analysis that was only available after the deadline had passed – specifically, emission calculations that EPA prepared before issuing FIPs. *Id.* at 31.⁵

These arguments affect only the validity of EPA’s SIP disapprovals, but those disapprovals are not properly before the Court in this proceeding.

⁵ In their Issues Presented (but not their Argument), State Petitioners further assert that EPA “unlawfully imposed FIPs on individual States before EPA acted on” their SIPs. State Pet. Br. at 2. This argument is factually incorrect. In fact, EPA promulgated the FIPs for the 22 States affected by this Rule on September 7, 2016—*after* the latest SIP disapproval occurred in August 2016. *See, e.g.*, 81 Fed. Reg. 58849 (Aug. 26, 2016) (disapproving last SIP for New York).

State Petitioners' petitions and brief identify only EPA's September 2016 promulgation of the FIPs in the Update Rule as the action being challenged, not the SIP disapprovals.⁶ In this proceeding, the Court has no authority to invalidate (nor to uphold) separate agency actions other than the Rule under review. Nor are State Petitioners' objections to the Rule dependent on their entirely separate arguments against the SIP disapprovals. It is thus not necessary to consider State Petitioners' arguments about the SIP disapprovals to resolve the only arguments this Court has jurisdiction to consider.

The Supreme Court's decision in *EME Homer City* is not to the contrary. In that case, the Court rejected EPA's argument that a challenge to the Cross-State Rule should be seen as an untimely collateral attack on certain prior SIP disapprovals, since the petitioners' legal objections to the Rule did "not depend on the validity of the prior SIP disapprovals." See 134 S. Ct. at 1599. Here, by contrast, State Petitioners' arguments *directly*

⁶ See Pet. for Review, *City of Ames, Iowa v. EPA*, No. 16-1438 (Dec. 23, 2016), Doc. No. 1652950; Pet. for Review, *Texas v. EPA*, No. 16-1428 (Dec. 20, 2016), Doc. No. 1652077; Pet. for Review, *Cedar Falls Utils. v. EPA*, No. 17-1066 (originally filed in the 8th Circuit on Dec. 20, 2016), Doc. No. 1663407; Pet. for Review, *Wisconsin v. EPA*, No. 16-1406 (Nov. 23, 2016), Doc. No. 1648132; State Pet. Br. at iii-iv.

attack the validity of certain SIP disapprovals, and for reasons having nothing to do with their separate challenges to the Update Rule. As a result, State Petitioners' SIP arguments would only be cognizable in separate litigation specifically challenging those disapprovals—as one State petitioner, Texas, has already pursued in a petition for review in the Fifth Circuit. State Pet. Br. at 34 n.19.

B. EPA Properly Used Available Information When It Disapproved the SIPs.

If the Court reaches the merits of State Petitioners' challenges to the SIP disapprovals, it should reject those challenges. State Petitioners make three arguments: first, that EPA could not deny a SIP where it had not taken action on that SIP within the statutory twelve-month period; second, that it was unlawful for EPA to rely on emissions modeling prepared after the statutory deadline had passed to disapprove the SIPs; and third, that this EPA approach to disapproving the SIPs interfered with the statutory balance of state and federal power. State Pet. Br. at 29-38. None of these contentions entitles them to relief.

First, EPA's failure to take action on a SIP submission within twelve months, *see* 42 U.S.C. § 7410(k)(2), did not compel the agency to approve a

deficient SIP, as State Petitioners urge. Where a party alleges that an agency has unreasonably delayed or unlawfully withheld action, that party may seek an order compelling the agency to act, *see* 5 U.S.C. § 706(1), but—absent express statutory language not present here—it may not rely on the delay alone to force the agency to reach a particular outcome, nor invalidate the agency’s action merely because it came after a deadline. *See, e.g., Brock v. Pierce County*, 476 U.S. 253, 259-62 (1986); *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). Otherwise, an agency’s mere delay could force it to violate a more important statutory duty—such as its “statutory obligation . . . to maximize achievement of attainment downwind” here, *EME Homer City*, 134 S. Ct. at 1609. *See, e.g., Ralpho v. Bell*, 569 F.2d 607, 626-28 (D.C. Cir. 1977) (upholding agency’s authority after passage of deadline to “bestow[] the benefits of the Act on those for whom it was chiefly intended”). If Congress had intended the deadline here to trigger a default resulting in a particular substantive outcome, it would have done so expressly. *See Flanagan v. Young*, 228 F.2d 466, 471 (D.C. Cir. 1955) (courts should not “lightly infer that Congress intended to deprive” an agency of authority to perform the tasks it is designed to address).

Foreclosing EPA's authority to rule on SIPs would not only frustrate Congress's intent by allowing mere procedural defaults to subvert substantive policy outcomes, but also raise the possibility of collusion by allowing an agency to avoid compliance with its duties simply by delaying taking action. As noted in the Statement of the Case above, EPA delayed taking action on SIPs submitted under the good-neighbor provision pending resolution of legal questions regarding that provision in the Cross-State Rule litigation. EPA Br. at 115.

Second, State Petitioners argue that the Supreme Court's *EME Homer City* decision requires States to submit their SIPs "based on information available at the time," and that this proposition in turn means that EPA "must act on a SIP based on the information available during the statutory review period." State Pet. Br. at 31 (citing 134 S. Ct. at 1600-01). But both the premise and conclusion of this argument are incorrect. While States have the initial obligation to submit SIPs, as *EME Homer City* held, the Clean Air Act expressly contemplates that they may supplement their submissions to "correct[]" a "deficiency" any time before EPA issues a FIP. 42 U.S.C. § 7410(c)(1). And nothing in the statute precludes EPA from considering this additional information—or any other source of

information—in deciding whether to approve a SIP. Indeed, as EPA notes (at 117-18), the agency routinely cooperates with States to consider new analysis prepared after SIP submissions so that an otherwise deficient initial submission can be sufficiently improved to warrant approval.

Third, State Petitioners contend that EPA's use of analysis completed after the statutory deadline for its SIP actions is evidence that the Rule is contrary to the cooperative federalism embodied in the Clean Air Act because EPA had "predetermined outcomes" in mind as part of its plan for "federal takeover of state programs." State Pet. Br. at 34. That theory is inconsistent with the fact that EPA approved at least fourteen States' good-neighbor SIP submissions on belated schedules.⁷ Moreover, State Petitioners' theory that EPA used the emissions modeling it prepared for the FIPs as the means to achieve its purported "takeover" is belied by the fact that, of the 22 States covered by the Rule, EPA rejected 15 of their SIPs

⁷ 82 Fed. Reg. 58116 (Dec. 11, 2017) (Minnesota); 82 Fed. Reg. 46134 (Oct. 4, 2017) (North Carolina); 82 Fed. Reg. 44932 (Sept. 27, 2017) (Delaware); 82 Fed. Reg. 9164 (Feb. 3, 2017) (Nevada); 81 Fed. Reg. 70631 (Oct. 13, 2016) (Maine, New Hampshire, Rhode Island, Vermont); 81 Fed. Reg. 7706 (Feb. 16, 2016) (Colorado, Montana, North Dakota, South Dakota); 80 Fed. Reg. 79266 (Dec. 21, 2015) (Oregon); 80 Fed. Reg. 78981 (Dec. 18, 2015) (Idaho).

as incomplete, not inadequate – determinations that did not rely on any emissions modeling. *See* 81 Fed. Reg. at 74506.

POINT III

EPA PROPERLY EVALUATED DOWNWIND STATE EMISSION CONTROLS

Industry Petitioners argue that the Update Rule overcontrols upwind state emissions because EPA’s emission modeling did not adequately incorporate emission controls in downwind States. Opening Brief of Industry Petitioners (“Industry Br.”) at 22-23. That argument is both legally and factually wrong.

First, Industry Petitioners identify no statutory or other authority requiring EPA to mandate downwind controls before considering reductions of upwind pollution, and there is none. *Cf.* 81 Fed. Reg. at 74516 (noting that “the Clean Air Act makes no reference to considering local measures before upwind measures in planning for attainment and maintenance of a NAAQS”).

Second, Industry Petitioners’ argument is also factually incorrect. Contrary to their assertions, EPA extensively considered downwind States’ controls, and explicitly incorporated “on-the-books state rules” in its

emission modeling for the Rule. 81 Fed. Reg. at 74528; *see also id.* at 74529 (“the 2017 non-EGO point emissions reflect emission reductions due to national and local rules, control programs, plant closures, consent decrees and settlements”); *id.* at 74530 (“[l]ocal control programs such as the California LEV III program are included in the onroad mobile source emissions”). Indeed, Industry Petitioners do not identify *any* downwind State emission control that EPA improperly disregarded.

In addition to incorporating *existing* downwind controls, EPA also assumed that any downwind State with a nonattainment or maintenance area would impose *additional* emission reductions at the same \$1,400-per-ton level as the upwind States covered by the Rule. *Id.* at 74516. That feature of the Rule fully satisfies any concerns about fairness or equitable distribution of compliance costs that Industry Petitioners may be suggesting.

Indeed, the equities weigh heavily against any further delay in imposing emission controls on upwind sources. As discussed above, downwind States have made extraordinary, efforts to control emissions within their borders to reduce ozone pollution and try to attain the NAAQS. Pollutant reduction costs incurred in the State Intervenors have been more

than triple the costs associated with the control requirements imposed by the Rule, and our sources' emission rates are in some cases less than half the level anticipated in upwind States under this Rule. *See* Statement of the Case, *supra*. Nonetheless, our pollution problems persist. For example, well over half of the ozone in Maryland comes from upwind States. EPA considered downwind States' existing controls in promulgating the Rule, and appropriately concluded that upwind sources too should contribute their fair share.

POINT IV

EPA'S IMPLEMENTATION OF THE INTERFERE-WITH-MAINTENANCE REQUIREMENT WAS LAWFUL AND REASONABLE

EPA designates downwind receptors as falling into one of three statuses: attainment, non-attainment, or maintenance. Receptors in attainment are modeled to meet the relevant NAAQS; receptors in nonattainment do not meet the NAAQS either as modeled or as measured; and receptors in maintenance meet the NAAQS either as modeled or measured but by sufficiently small margins that they risk falling into non-attainment. Industry Petitioners contend that EPA has overcontrolled

upwind States that merely interfere with maintenance by a downwind receptor (rather than significantly contribute to any area in nonattainment) because the Supreme Court's decision in *EME Homer City* purportedly forbade EPA from requiring such States "to *reduce* their existing emission levels." Industry Br. at 26 (emphasis in original). Industry petitioners are mistaken.

In *EME Homer City*, the Supreme Court held that under the "interfere with maintenance" prong, EPA may limit emissions only "by just enough to permit an already-attaining State to maintain satisfactory air quality." 134 S. Ct. at 1604 n.18. Here, EPA reasonably determined what is "just enough" to achieve maintenance. Applying a largely similar approach to that upheld in *EME Homer City*, EPA designates a receptor as in maintenance status when average air quality as currently modeled or measured meets the NAAQS, but where modeling shows that the area is at substantial risk of exceeding the NAAQS in the future, because of reasonably likely changes in meteorological conditions. *See, e.g.*, 81 Fed. Reg. at 74518, 74520, 74531. Based on numerical air quality evaluations, the Update Rule imposes emission reductions available at a cost of \$1,400 per ton or less on upwind States linked to the maintenance areas to combat

these reasonably likely future violations of the NAAQS. *Id.* at 74508, 74552. (By contrast, no similar controls are imposed for attainment receptors, which EPA has deemed sufficiently well in compliance with a NAAQS that there is no reasonable likelihood they will fall into non-attainment under current emission levels.)

EPA's additional analysis, which was designed to confirm that the Rule does not result in overcontrol,⁸ further undermines Industry Petitioners' argument. EPA used modeling to account for the Rule's projected ozone-reducing effects, and then evaluated whether—after those effects come into force—each upwind State was still linked to downwind ozone problems. EPA found that all State Petitioners that are currently

⁸ Mindful of the Supreme Court's and this Court's expressed concern about the possibility of overcontrol, EPA evaluated the effect of emission reductions available from linked upwind States at the Rule's \$1,400-per-ton cost-threshold. EPA's analysis showed that even with the Rule's ozone-reducing effects, nonattainment or maintenance problems would be eliminated at only three of the many downwind nonattainment and maintenance areas: Philadelphia, Pennsylvania; Hamilton County, Ohio; and Jefferson County, Kentucky. 81 Fed. Reg. at 74551; *see also id.* at 74533 (Tables V.D-1 and V.D-2 identifying downwind nonattainment and maintenance areas). Tennessee, which is not a petitioner in this action, is the only upwind State linked only to these receptors. *Id.* at 74551. Because Tennessee's obligations with regard to Hamilton County would not be met at a lower cost threshold, however, *id.*, EPA reasonably determined that there is no overcontrol for Tennessee either.

linked only to maintenance receptors will continue to be linked to receptors that remain in maintenance status (i.e., still not in attainment) after accounting for ozone reductions due to the Rule. *Id.* at 74551. In other words, those States will still be contributing to ozone levels in areas that may violate the NAAQS in conditions that EPA has determined are reasonably likely to recur. *Id.* Thus, EPA has determined that the Rule does not result in overcontrol.

Industry Petitioners' position ignores the dynamic nature of ozone generation. Industry Petitioners implicitly assume that a particular past ozone level will unfailingly continue to occur in the future, not acknowledging the reality that ozone levels change from day to day and year to year due to different weather patterns, varying amounts of economic activity, or other factors. But past performance is no guarantee of future results, and no law requires EPA to regulate with blinders on about future uncertainty.

CONCLUSION

The Court should deny the petitions for review.

Dated: February 16, 2018

Respectfully submitted,

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⁹ Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Initial Brief of the States of New York, Maryland, Massachusetts, New Hampshire, Rhode Island, and Vermont in Support of Respondent, dated February 16, 2018, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on September 26, 2017. I certify that this brief contains 6,250 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word count of the brief of the other Intervenor-Respondents, the total does not exceed 12,600 words.

/s/ Andrew G. Frank
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of the States of New York, Maryland, Massachusetts, New Hampshire, Rhode Island, and Vermont in Support of Respondent was filed on February 16, 2018 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

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