

ARGUED APRIL 13, 2012 DECIDED AUGUST 21, 2012

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

EME HOMER CITY GENERATION, L.P.,)	
)	
Petitioner,)	
)	
v.)	No. 11-1302 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	Complex
)	
Respondents.)	

REPLY IN FURTHER SUPPORT OF MOTION TO LIFT STAY

As demonstrated in Respondents’ Motion to Lift the Stay (“EPA Mot.”), the Supreme Court’s decision in *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), makes clear that the extraordinary remedy of a stay pending review is not warranted.

I. The Court Can and Should Exercise Its Authority to Toll the Deadlines

Contrary to Petitioners’ suggestion, *see* Ind. Resp. at 4-9, the Court has equitable authority to return the parties as closely as possible to the status quo that would have existed had the stay not been imposed, including the authority to toll applicable deadlines as necessary to achieve this result. *See* EPA Mot. at 15-17; *see also, e.g., Nken v. Holder*, 556 U.S. 418, 421 (2009) (describing a stay pending review as part of the “traditional equipment for the administration of justice”)

(citation omitted). Indeed, since complex regulatory challenges often take years to be resolved, if the Court did not have such authority, an interim stay pending review could unjustifiably have the same effect as vacatur of the rule, even in a case where the Court ultimately rules in the Agency's *favor* on the merits.

There also is no practical reason for the Court to decline to grant the relief requested by EPA. Without EPA's suggested schedule adjustment, the Rule would have to go into effect with the *original* deadlines -- presumably a result that would be worse for Petitioners, not better. Furthermore, the revised deadlines suggested by EPA are entirely reasonable and feasible, and Petitioners' arguments to the contrary, *see, e.g.*, State Resp. at 10-14, are meritless.¹

¹ For example, while it is true that emission reductions have occurred, much of that reduction is attributable to CAIR, which the Transport Rule will replace, or to decreases in energy prices and demand that may well reverse. EPA Mot. at 10-11. Further, the Rule, with the revisions to the compliance dates requested by EPA, adequately addresses new and retired units and States' ability to submit SIPs to modify the allocation of allowances if they wish. Supplemental Declaration of Reid Harvey ("Harvey Supp. Decl.") ¶¶ 4-11. Industry Petitioners' claim that downwind States have come into compliance, Ind. Resp. at 5-6, fails because it does not take into account the Clean Air Act's requirement that upwind State emissions do not interfere with downwind States' ability to remain in attainment. EPA Br., ECF1361451, at 81-86. Similarly, Industry Petitioners' argument that allowances must be reallocated fails to account for the flexibility of the allowance allocation system, Harvey Supp. Decl. ¶¶ 4-7, nor is there any tangible reason to question the availability of sufficient allowances for sources to comply with the Phase I limitations in 2015. *Id.* ¶¶ 23, 24.

II. Petitioners Have No Likelihood Of Success On The Merits

Because the merits issues that were the primary basis for Petitioners' stay motions have now been decided against Petitioners by the Supreme Court, there is no basis for the extraordinary remedy of a stay to remain in place. While there are issues raised in Petitioners' merits briefs that the Court did not address in its August 21, 2012 Opinion, even if the Court were to rule in Petitioners' favor on those issues, that would warrant at most some adjustment to the Transport Rule, not its wholesale vacatur. Moreover, as demonstrated in EPA's merits brief and discussed briefly below, those issues have no merit. Issues not raised in Petitioners' opening briefs have been waived and are not properly before the Court.

Industry Petitioners' primary argument is that the Transport Rule results in over-control. Ind. Resp. at 10-15. That argument as to the Rule as a whole, however, has been rejected by the Supreme Court. While the Supreme Court noted that its holding did not preclude State-specific claims that the Rule as applied resulted in over-control in a particular State, only State-specific claims that were raised in Petitioners' opening briefs are properly before the Court. EPA Motion to Govern, ECF1500830, at 8-10. Petitioners have not established that the claims they now rely on were properly preserved.

Moreover, the claims lack merit. Much of Industry Petitioners' argument is based on their claim that certain downwind areas were predicted to have air quality

meeting the applicable standards by 2014. Ind. Resp. at 11-13. However, as demonstrated in EPA's merits brief, Petitioners' simplistic argument ignores the complexities of pollutant transport, in particular the multiplicity of connections between downwind and upwind states, and the fact that continued emission reductions are necessary to ensure that areas attaining the standard do not slip into, or revert to, nonattainment. EPA Br. at 81-86. Similarly, Petitioners' claims that EPA did not adequately consider alternative cost levels, Ind. Resp. at 11-13, are contrary to the record. *Id.* at 36-42.

Industry Petitioners' claims that the Transport Rule results in over-control for Texas and South Carolina because EPA is regulating insignificant contributions, Ind. Resp. at 14-15, are based on material omissions and apples-to-oranges comparisons. Harvey Supp. Decl. ¶¶ 12-19. In fact, analysis of the record demonstrates that the emission reductions required by the Rule will not reduce any State's contribution below the 1% screening threshold. *Id.* ¶¶ 16, 19.

Petitioners compare Texas' emissions of sulfate alone to a PM_{2.5} screening threshold that is defined based on the combination of sulfate and nitrate as the basis for their claim that EPA is requiring reductions below the screening threshold. Luminant Vacatur Mot. at 13-15. Petitioners ignore half of the equation, and thus their comparison is meaningless. Harvey Supp. Decl. ¶ 13. When the proper values are compared, it is clear that Texas' contribution under the

Rule does not fall below the 1% threshold. *Id.* ¶ 14. That conclusion is even clearer because Texas' budget was subsequently increased. *Id.* ¶ 15. Furthermore, although Petitioners describe Texas' maximum contribution as only "slightly" above the threshold, it is 20 percent above the threshold (.03 out of .15). *Id.* ¶ 13.

Petitioners present no analysis at all to substantiate their claim for over-control of emissions from South Carolina, simply asserting that South Carolina's maximum contribution was "only 0.1 ppb" above the screening threshold for ozone. *Ind. Resp.* at 15. To the contrary, South Carolina's contribution is more than 20 percent over the ozone screening threshold (0.168 ppb out of 0.8 ppb). *Harvey Supp. Decl.* ¶ 18. Furthermore, data in the record demonstrate that the Rule's required NO_x emission reductions as a percentage of South Carolina's total NO_x emissions (from electric generating units and other sectors) would be far too small to reduce South Carolina's contribution below the threshold. *Id.* ¶¶ 17-18. Industry Petitioners' remaining issues, *Ind. Opp.* at 15-16, are addressed in EPA's merits brief, where EPA demonstrates that they lack merit. *EPA Br.* at 36-42 (cost thresholds), 42-44 ("one-way ratchet" argument), 68-80 (modeling), and 59-67 (use of Integrated Planning Model).

State Petitioners' claim that EPA's approval of CAIR SIPs precludes EPA's promulgation of the Transport Rule FIPs, *State Resp.* at 2-7, is also without merit. *EPA Br.* at 49-53. First, Petitioners' claim has almost no bearing on the required

controls for annual emissions because (1) every State subject to those requirements, except Texas and South Carolina, is also subject to the requirements on account of the 2006 PM_{2.5} NAAQS, which was not addressed by CAIR, (2) EPA did not approve a full CAIR SIP for Texas, and (3) the South Carolina SIP was approved after this Court's decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), which made clear that complying with CAIR did not satisfy the States' interstate transport obligations. EPA Br. at 49-50. Petitioners' claim also has limited impact with regard to the ozone-season controls. *Id.* at 50.

In any event, there is no basis for Petitioners' claim because the determination that approval of the CAIR SIPs did not eliminate EPA's FIP obligation is compelled by the statute and the decision in *North Carolina*. The Clean Air Act requires that EPA must promulgate a FIP within two years of disapproving a SIP submission or making a finding of failure to submit a SIP unless both the State corrects the deficiency and EPA approves the plan or plan revision. 42 U.S.C. § 7410(c)(1). *North Carolina* made clear that the CAIR SIPs did not eliminate the deficiency of the States' failures to address interstate transport. Therefore, EPA's approval of those SIPs could not eliminate EPA's statutory obligation to promulgate FIPs. EPA Br. at 51-53.

Kansas and Georgia's challenges to EPA's disapproval of their SIPs, State Resp. at 7-8, are not before the Court in this case and have no bearing on whether

the Transport Rule is valid. Moreover, their claims are based on a fundamental misstatement of the basis for EPA's actions. EPA did not disapprove Kansas and Georgia's SIPs and approve Delaware's based on whether or not each would be subject to the Transport Rule. Rather, EPA's modeling, which was also used in developing the Transport Rule, demonstrated that Kansas and Georgia made significant contributions to nonattainment or maintenance problems in other States and Delaware did not. Because their submitted SIPs contained no controls on those emissions, and provided no technical demonstration whatsoever to support a claim that Kansas and Georgia are not significantly contributing to downwind nonattainment and maintenance problems, those SIPs were disapproved. State Petitioners' remaining arguments similarly lack merit, or, as discussed above, are not properly before the Court. EPA Br. at 53-58 (EPA properly addressed interference with maintenance), 97-115 (EPA provided adequate notice).

III. The Balance Of Harms Favors Lifting The Stay

As demonstrated in the Motion, lifting the stay is needed to prevent further delay in obtaining the public health benefits of the Rule and doing so would not cause irreparable harm to Petitioners. Nothing in Petitioners' Oppositions undermines that conclusion. Unlike in their original stay motions, Petitioners do not now rely on claims that implementation of the Transport Rule will result in disruption of the supply of electricity. Rather, their claims of harm are based on

the costs of compliance with the Rule. Such costs, however, do not represent irreparable harm, and, in any event, are exaggerated because Petitioners unreasonably assume that no allowances will be available for purchase. Such costs do not justify the continuing stay of a rule promulgated specifically in response to this Court's order that EPA expeditiously remedy the faults it found in CAIR.

Industry Petitioners' only argument that they would be irreparably harmed by the implementation schedule requested by EPA is that Luminant's cost of compliance would be unrecoverable. Ind. Resp. at 16-17. Yet, Petitioners provide no evidence for this assertion. Petitioners rely on the Declaration of Matthew Goering, but that Declaration also makes the bald assertion that the costs are not recoverable, without providing any rationale. Goering Decl. ¶¶ 2, 22. Thus, there is no basis for the Court to credit Petitioners' claim.²

Furthermore, Petitioners' cost estimates are based on the erroneous assumption that there will be no functioning market in allowances. Given the actual number of allowances available and the reality of how allowance markets have functioned in the past, including under the Transport Rule before it was stayed, Luminant's expenditures are likely to be much lower than those claimed by

² Furthermore, even the costs claimed by Petitioners are consistent with Luminant's normal operations. See www.luminant.com/pdf/LUM-by-the-Numbers-Final.pdf (Luminant has spent \$2.8 billion over the last five years in plant improvements, including \$850 million on environmental technology.)

Petitioners. Harvey Supp. Decl. ¶¶ 20-24. State Petitioners' similar claims of insufficient availability of allowances are also based on factual errors concerning the operation of the Rule. *Id.* ¶¶ 25-29.

State Petitioners' claim of harm to state sovereignty, State Resp. at 18-19, is based on an argument that the Supreme Court has decisively rejected, *i.e.*, that EPA must give the States the opportunity to apportion the emission reductions needed to address interstate pollutant transport before EPA can promulgate a FIP. The Supreme Court has made clear that EPA has no such obligation, but rather that the Clean Air Act gives EPA the authority to promulgate a FIP when it has made a finding of failure to submit or disapproved a SIP submission without having to wait for further State processes. *EME Homer City*, 134 S. Ct. 1600-02. Thus, the States have no sovereign interest that is affected by the Transport Rule FIPs.

The States' claim that they will be administratively burdened by lifting the stay, State Resp. at 19-20, is similarly without merit. The Transport Rule FIPs are federal regulations and require no action by the States to become effective. While States may, for their own purposes, want to adopt SIP revisions to replace provisions of the FIP, such action is completely voluntary, and there is no reason States would have to undertake that process before a final decision is reached in this case, unless they voluntarily choose to do so. Harvey Supp. Decl. ¶¶ 8-11.

In contrast to the lack of harm from lifting the stay, the public health benefits of implementing the Transport Rule are substantial. EPA Mot. at 9-13.

Petitioners' only response is to argue that air quality for particulate matter has been improving and some downwind areas now have air quality that meets air quality standards for PM_{2.5}. Ind. Resp. at 18-19; State Resp. at 14-18. Petitioners do not address the status of ozone nonattainment areas, *see* EPA Mot. at 11. Nor do they address the fact that at least some of the reductions seen are the result of factors such as energy prices and reduced economic activity that could readily change in the future. *Id.* at 10. Nor is it the case, as alleged by State Petitioners, that regulations such as CAIR and the Mercury and Air Toxics Rule are adequate to address the ozone and PM_{2.5} problems addressed by the Transport Rule. Harvey Supp. Dec. ¶¶ 30-32. The Transport Rule is needed to ensure that the emission reductions required by downwind areas to achieve and remain in attainment occur in a timely and enforceable fashion.

CONCLUSION

The December 30, 2011 stay of the Transport Rule should be lifted.

DATED: August 22, 2014

Respectfully submitted,

SAM HIRSCH

Acting Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents were served this 22nd day of August, 2014, on all registered counsel, through the Court's CM/ECF system.

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SUPPLEMENTAL DECLARATION OF REID HARVEY

1. I, Reid P. Harvey, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency or supplied to me by EPA employees under my supervision.

2. This declaration is filed in support of EPA’s motion to lift the stay of the Transport Rule (Doc No. 1499505, “EPA Mot.”) and supplements my initial declaration supporting that motion (also Doc. No. 1499505, “Harvey Initial Decl.”). The purpose of this supplemental declaration is to review certain claims made in the responses and declarations filed in opposition to EPA’s motion by State and Local Petitioners (Doc. No. 1505491, “State Resp.” and “Hodanbosi Decl.”) and by Industry and Labor Petitioners (Doc. No. 1505492, “Industry Resp.” and “Goering Decl.”).

I. Claims That EPA’s Motion Would or Should Involve Rule Revisions Beyond EPA’s Requested Tolling of Deadlines.

3. Petitioners suggest in their responses that implementation of the Transport Rule on a delayed basis pursuant to a grant of EPA’s motion would, or should, raise various policy issues that would have to be addressed through new rulemaking. State Resp. at 10-13; Industry Resp. at 7-9. Contrary to Petitioners’ suggestion, if the motion is granted EPA anticipates that the Transport Rule should and could be implemented as currently codified (that is, as revised by the Supplemental Rule

and the First and Second Revisions Rules) except as to the requested tolling of deadlines.¹ EPA Mot. at 14 & n.5; see also Harvey Initial Decl. ¶¶ 27-34. EPA's motion seeks to "restor[e] the parties to the same position each would have been in prior to the December 30, 2011 stay, restor[e] the rule to the position it was in prior to the stay, and provid[e] for the most orderly, least disruptive implementation of the rule going forward." Harvey Initial Decl. ¶ 29. Consistent with these underlying principles of equity and practicality, where a provision of the rule as currently codified includes a date (or year) that had not passed as of the date of the stay, that date (or year) will be adjusted by three years, but the rule's provisions will otherwise not be changed.

4. Several of the policy issues that Petitioners claim would be implicated by a grant of EPA's motion concern the allocation of emission allowances among a state's sources under the Transport Rule's Federal Implementation Plan ("FIP") provisions. Briefly, the rule's FIP allowance allocation provisions operate as follows. First, for each state covered under a particular Transport Rule program, EPA established a trading budget for "existing" units² and either one or two set-asides for "new" units, where the trading budget and set-asides together comprised the state's overall emissions budget for the program.³ Second, EPA used historical heat input and emissions data to allocate each state's trading budgets among the state's individual existing units.⁴ Third, when an existing unit retires, the rule

¹ As EPA has already indicated, if the Court grants the motion the Agency would take any necessary administrative action to amend the existing regulatory text in the Code of Federal Regulations to be consistent with the Court's action. EPA Mot. at 14 n.5; Harvey Initial Decl. ¶¶ 33-34.

² For purposes of the FIP allowance allocation provisions, a unit was considered "existing" or "new" based on whether it was operational as of January 1, 2010. For units operating before this date, EPA possessed at least one full year of heat input and emissions data at the time the allocations of the trading budgets among individual units were developed in the rulemaking. See 76 FR 48208, 48285 n.79 (Aug. 8, 2011).

³ States with Indian country within their borders have two new unit set-asides, one for new units located in Indian country and one for other new units. States without Indian country have a single new unit set-aside. See, e.g., 76 FR at 48388-89 (trading budgets and new unit set-asides for annual NO_x program) (codified as revised at 40 CFR 97.410).

⁴ See 76 FR at 48288-90 (existing unit allowance allocation methodology); 76 FR 25055 (July 18, 2011) (notice of availability of allowance allocations).

provides that the unit will continue to receive its allocations for five compliance years and that its allocations for subsequent compliance years will be directed to its state's new unit set-aside.⁵ Finally, the rule includes procedures under which EPA annually allocates the allowances in each state's new unit set-asides first to the state's new units based on their recent emissions and then, if any allowances remain, to the state's existing units in proportion to their trading budget allocations.⁶ (The first two steps are one-time determinations that were settled in the rulemaking, while the last two steps are procedures that will be applied on a recurring basis as part of the rule's implementation.) Petitioners suggest that delayed implementation of the rule would, or should, reopen issues with respect to the first three of these provisions – that is, the division of a state's overall emissions budget between its trading budget and its new unit set-asides; the allocation of a state's trading budget among its existing units; and the treatment of allocations to retired units. State Resp. at 11-12; see also Industry Resp. at 8. I note that, at most, Petitioners' concerns have potential relevance for the rule's first two compliance years, because under EPA's motion all states would have the opportunity to revise or replace the FIP allowance allocation provisions with their own allowance allocation approaches through State Implementation Plan ("SIP") revisions taking effect in the rule's third compliance year, as discussed in ¶¶ 8-11 below. Nevertheless, whether for one year, two years, or longer, it is reasonable to implement the Transport Rule without reopening these FIP allowance allocation provisions, and EPA does not intend to reopen them.

5. Petitioners suggest that EPA will or should revisit the division of each State's budget between the trading budget for existing units and the set-aside for new units, apparently based on the fact that during the stay some new units have commenced operations. State Resp. at 11; Industry Resp. at 8. The notion that the start-up of "planned" new units – expected events which EPA took into account during the rulemaking for purposes of determining the new unit set-asides – might necessitate changes to those determinations defies logic, and EPA does not intend to make such revisions. Under the FIPs, the function of the new unit set-asides is to provide allowance allocations to units that commenced operations after January 1, 2010 and that were therefore considered ineligible to receive allocations from the trading budgets. The fact that some new units may have started operating during the stay thus does not require allowances to be moved between the new unit

⁵ See, e.g., 76 FR at 48389 (retired unit allowance allocation provisions for annual NO_x program) (codified at 40 CFR 97.411(a)(2)).

⁶ See, e.g., 76 FR at 48391-94 (new unit set-aside allowance allocation provisions for annual NO_x program) (codified at 40 CFR 97.412).

set-aside and the trading budget. If EPA's motion is granted, shortfalls of allowances for allocation to new units will be very unlikely, for two reasons. First, EPA sized the set-asides in the rulemaking to accommodate known "planned" units, likely including most of those that have started operating during the stay, as well as a forecast of additional unknown units. Second, the new unit set-asides will contain at least as many allowances for the 2015 and 2016 compliance years as would have been the case if the rule had been implemented on its original schedule because the generally larger Phase 1 budgets will be in place instead of the Phase 2 budgets.⁷ In the remote event that a shortfall did occur, new units would still be able to comply with the rule by purchasing additional allowances from other sources.

6. State Petitioners suggest that EPA will or should revisit the allocations of the state trading budgets among existing units because more recent heat input and emissions data have become available during the stay. State Resp. at 11-12. If EPA were drafting a new rule from scratch, the Agency would of course consider the most recent data available, but that is not the case here. Petitioners' suggestion is irrelevant to the situation at hand, where EPA seeks to have the stay of an already-final rule lifted while making the minimum changes necessary for implementation. It is unnecessary to revise the allocations of the trading budgets among existing units in order to implement the rule, and EPA does not intend to do so. If EPA's motion is granted, individual existing units generally will be allocated at least as many allowances for the 2015 and 2016 compliance years as would have been the case if the rule had been implemented on its original schedule because the generally larger Phase 1 budgets will be in place instead of the Phase 2 budgets. Any individual unit whose emissions exceed its allowance allocation can comply with the rule by purchasing additional allowances from other sources.

7. State Petitioners also suggest that because of the "passage of three years" EPA will or should revisit the FIP provisions addressing allowance allocations to retired units. State Resp. at 12. Again, while in a new rulemaking EPA would consider the most recent inventory of operating units available, Petitioners' suggestion is irrelevant to the current situation of implementing an already-final rule. The rule's

⁷ In most instances, a state's Phase 1 budget for a particular Transport Rule trading program is larger than the corresponding Phase 2 budget, although in some instances the two budgets are the same. There is no instance where a Phase 1 budget is smaller than the corresponding Phase 2 budget. See Harvey Initial Decl. at Tables 1-4.

retired unit provisions under the FIPs as codified⁸ operate with reference to a date after the date of the stay – specifically, the phrase “after 2011” – which, consistent with EPA’s tolling request, would be revised to “after 2014.” It is unnecessary to further revise these provisions in order to implement the rule, and EPA does not intend to do so. Allowances allocated to and not needed by retired units to cover their own emissions generally would be available for purchase by other covered units, so continued allocation to these units does not create a risk of shortages of allowances for operating units. (Indeed, in the Acid Rain Program, Congress provided for retired units to receive their allowance allocations in perpetuity, and there has never been a shortage of allowances in that program’s history of almost twenty years.) If EPA’s motion is granted, individual existing units, both operating and retired, will be allocated at least as many allowances for the 2015 and 2016 compliance years as would have been the case if the rule had been implemented on its original schedule because the generally larger Phase 1 budgets will be in place instead of the Phase 2 budgets.

8. The remaining issue that Petitioners claim will or should be implicated by a grant of EPA’s motion concerns covered states’ opportunities to submit SIP revisions to replace the FIP allowance allocation provisions. State Resp. at 11; Industry Resp. at 8. The rule as codified provides opportunities for each state to submit SIP revisions to revise the allocations of most allowances starting with allowances for the 2013 compliance year (“2013-vintage allowances”), which will be converted to 2016- and later-vintage allowances if EPA’s motion is granted. If the Court grants EPA’s motion, states will have the same opportunities to submit SIP revisions as they would have had if the rule had not been stayed, with each of the currently codified notification and submission deadlines tolled by three years except deadlines that had already passed as of the date of the stay. The Agency does not intend to revise these provisions except as necessary to update their timing consistent with the Court’s action.⁹

⁸ See, e.g., 76 FR at 48389 (retired unit allowance allocation provisions for annual NO_x program) (codified at 40 CFR 97.411(a)(2)).

⁹ If EPA’s motion is granted, states will not have opportunities to reallocate 2015-vintage allowances. As required by the rule, prior to the stay EPA had already recorded most 2012-vintage allowances in existing sources’ accounts according to the FIP allocations. See, e.g., 76 FR at 48398 (recording deadline for allowances from 2012-vintage annual NO_x trading budgets) (codified at 40 CFR 97.421(a)). Consistent with EPA’s tolling request, these already-recorded 2012-vintage allowances will be converted to 2015-vintage allowances. Likewise, although 2012-vintage ozone-season NO_x allowances for states subject to the Supplemental

9. With respect to the reallocation of most 2016-vintage allowances for existing units (with the exception of ozone-season allowances for existing units in states subject to the Supplemental Rule, which are addressed in ¶ 10 below), under EPA's tolling request states that notified EPA before the stay of their intent to submit revised allocations will be able to do so. The rule as codified includes a deadline of October 17, 2011 – before the stay – for a state covered under the final Transport Rule to notify EPA of the state's intent to submit a SIP revision reallocating its 2013-vintage trading budgets among its existing units (including retired units). Twelve states submitted the required notice, and under the rule as codified those states had a deadline of April 1, 2012 – after the stay – to submit their SIP revisions.¹⁰ If the Court grants EPA's motion, 2013-vintage allowances will be converted to 2016-vintage allowances and the post-stay deadline to submit SIP revisions reallocating these allowances will be tolled, but the pre-stay notification deadline will not be tolled. Thus, the twelve states that met the pre-stay notification deadline will have until April 1, 2015 to submit SIP revisions reallocating their 2016-vintage trading budgets.¹¹

10. With respect to the reallocation of 2016-vintage ozone-season allowances for existing units in the five states subject to the Supplemental Rule, under EPA's tolling request these states all will be able to submit revised allocations. Under the Supplemental Rule, the notification and SIP submission deadlines to reallocate the covered states' 2013-vintage ozone-season NO_x trading budgets as codified were

Rule were not recorded before the stay, the rule as codified does not provide an opportunity for states to reallocate these allowances, so consistent with EPA's tolling request the allowances will be converted to 2015-vintage allowances and will be recorded in existing sources' accounts according to the FIP allocations by March 26, 2015. See 76 FR 80760, 80777 (Dec. 27, 2011) (recording deadline for allowances from five states' ozone-season NO_x trading budgets) (codified at 40 CFR 97.521(a)).

¹⁰ See, e.g., 76 FR at 48354 (SIP revision option for reallocating 2013-vintage annual NO_x allowances) (codified at 40 CFR 52.38(a)(3)).

¹¹ The states that did not meet the pre-stay notification deadline waived their opportunities to reallocate their 2013-vintage trading budgets. Before the stay, as required by the rule, EPA recorded 2013-vintage allowances in these states' existing sources' accounts according to the FIP allocations, and these allowances will be converted to 2016-vintage allowances.

March 6, 2012 and October 1, 2012, respectively.¹² If EPA's motion is granted, the 2013-vintage ozone-season NO_x allowances will be converted to 2016-vintage allowances and the notification and SIP submission deadlines for reallocations of the trading budgets will be tolled to March 6, 2015 and October 1, 2015, respectively.

11. With respect to the reallocation of 2017- and later-vintage allowances, under EPA's tolling request all states will have the opportunity to revise allocations for both existing and new units. Under the rule as codified, starting with 2014-vintage allowances, all covered states have opportunities to submit SIP revisions establishing a methodology for allocating or auctioning allowances to both existing and new units (other than new units in Indian country).¹³ If EPA's motion is granted, these opportunities will begin with 2017-vintage allowances, and states' applicable submission deadlines will be tolled by three years. Thus, SIP revisions establishing the states' preferred allocation or auction methodologies for 2017- and 2018-vintage allowances will be due by December 1, 2015, and submissions of the first allowance allocations or auction results using these methodologies will be due June 1, 2016. States will also have analogous opportunities with later deadlines to submit SIP revisions addressing later-vintage allowances.

II. Claims That the Transport Rule's Budgets Would Require States to Reduce Their Downwind Contributions to Levels Below the 1% Screening Thresholds.

12. Industry Petitioners claim that that if Texas sources reduced their emissions to the level of the state's Transport Rule budgets, the state's contribution of fine particulates ("PM_{2.5}") to the linked Madison, Illinois receptor would fall below the 1% screening threshold that EPA used to determine which states should be further analyzed for potential coverage under the rule. Industry Resp. at 14-15. Industry Petitioners similarly claim that if South Carolina sources reduced their emissions to the level of the state's Transport Rule budgets, the state's ozone contribution to the linked Harris, Texas receptor would fall below the 1% screening threshold. *Id.* The cursory analyses cited by Petitioners contain material errors and omissions, with the consequence that these claims are entirely unsupported. As EPA has noted throughout these proceedings, the Agency did not directly analyze claims of over-control with respect to the 1% screening threshold during the rulemaking

¹² See 76 FR at 80774 (deadline extension for option to reallocate 2013-vintage ozone-season NO_x allowances for five states) (codified at 40 CFR 52.38(b)(3)).

¹³ See, e.g., 76 FR at 48354-55 (SIP revision options for reallocating 2014- and later-vintage annual NO_x allowances) (codified at 40 CFR 52.38(a)(4)-(5)).

because the issue was not raised in comments. However, EPA's post-rulemaking analysis of record data indicates that it is extremely unlikely that the Transport Rule would cause such over-control with respect to any covered state's downwind PM_{2.5} or ozone contributions.¹⁴

13. With respect specifically to the claim of over-control of Texas for PM_{2.5}, Industry Resp. at 15, Petitioners rely primarily on a cross-reference to an argument in a separate Luminant filing in this proceeding (Doc. No. 1504643). Luminant begins that analysis by citing a table of EPA's base case air quality modeling results where Texas's relevant PM_{2.5} contribution to the Madison receptor is identified as 0.18 µg/m³.¹⁵ *Id.* at 13. Next, Luminant correctly notes that data from the Air Quality Assessment Tool, another model used by EPA in the rulemaking, indicate that, in a scenario comparable to the final rule, Texas's sulfate contribution to the Madison receptor would be 0.127 µg/m³. *Id.* at 14. Then, despite an apparent recognition that for purposes of PM_{2.5} contribution analysis EPA considers contributions of not only sulfate but also nitrate, Luminant casually dismisses nitrate contribution altogether¹⁶ and leaps to the incorrect conclusion that Texas's PM_{2.5} contribution to the Madison receptor would necessarily fall below 0.15 µg/m³ based solely on the estimate of sulfate contribution. *Id.* at 14-15. Luminant's decision to simply ignore nitrate contribution in its analysis is insupportable and its analysis therefore provides no basis for concluding that Texas's PM_{2.5} contribution would fall below the screening threshold. A more rigorous evaluation of record data indicates that Texas's combined contribution of sulfate and nitrate would most likely remain above the screening threshold with the original Transport Rule budgets. That conclusion is even more likely under the revised Transport Rule budgets that would be implemented if the stay is lifted.

¹⁴ EPA previously reported its post-rulemaking analysis with respect to PM_{2.5} contributions to the Court in rebuttal of similarly unsupported post-rulemaking claims in Petitioners' 2012 merits briefs. See Brief of Respondents (Doc. No. 1364178) at 33 n.20.

¹⁵ Petitioners characterize Texas's projected contribution to the Madison receptor in the base case as "only slightly above" the PM_{2.5} screening threshold of 0.15 µg/m³. Industry Resp. at 15. In fact, a contribution of 0.18 µg/m³ would be 20% above that threshold.

¹⁶ Luminant attempts to excuse its omission by asserting that "EPA's data demonstrate that NO_x-related contributions to PM_{2.5} formation are a small fraction of SO₂-related contribution." Doc. No. 1504643 at 14 n.11.

14. Record data not cited by Luminant show that in EPA's base case modeling, Texas's $PM_{2.5}$ contribution to the Madison receptor was computed as the sum of a sulfate contribution of $0.160 \mu\text{g}/\text{m}^3$ and a nitrate contribution $0.025 \mu\text{g}/\text{m}^3$, or $0.185 \mu\text{g}/\text{m}^3$.¹⁷ Thus, if Texas's nitrate contribution under the Transport Rule were assumed merely to stay constant, the state's combined sulfate and nitrate contribution would be $0.152 \mu\text{g}/\text{m}^3$ (the sum of $0.127 \mu\text{g}/\text{m}^3$ sulfate plus $0.025 \mu\text{g}/\text{m}^3$ nitrate), which is above the $PM_{2.5}$ screening threshold of $0.15 \mu\text{g}/\text{m}^3$. In fact, this is a conservatively low estimate of Texas's contribution to the Madison receptor under the rule as finalized, because the record indicates that Texas's nitrate contribution would very likely increase, for two reasons. First, the record shows that, in a scenario comparable to the final rule, the nitrate concentration at the Madison receptor is projected to increase by about 15% because of nitrate replacement – an air chemistry phenomenon in which reductions in sulfate formation are partially offset by increases in nitrate formation.¹⁸ Second, the record also suggests that Texas's share of the collective nitrate contribution to the Madison receptor may increase under the rule, because Texas's required NO_x reduction as a percentage of its overall base case NO_x emissions is less than the comparable NO_x reduction percentage under the rule for every other upwind state linked to the Madison receptor as well as the receptor's home state of Illinois.¹⁹ If

¹⁷ Air Quality Assessment Tool spreadsheet, Annual AMMS worksheet, cell AN10 (sulfate), and Annual AMMN worksheet, cell AN10 (nitrate), EPA-HQ-OAR-2009-0491-4458, available in the docket. In the summary table from the final rule cited by Petitioners, $PM_{2.5}$ contributions are shown truncated after two decimal places – i.e., $0.18 \mu\text{g}/\text{m}^3$ – instead of three decimal places – i.e., $0.185 \mu\text{g}/\text{m}^3$.

¹⁸ Nitrate concentration at the Madison receptor was projected to change from $1.404 \mu\text{g}/\text{m}^3$ in the base case to $1.615 \mu\text{g}/\text{m}^3$ in the AQAT calibration scenario, an increase of 15%. Air Quality Assessment Tool spreadsheet, 500CT worksheet, cell BD10 (Madison base case nitrate) and cell BG10 (Madison calibration scenario nitrate), EPA-HQ-OAR-2009-0491-4458, available in the docket. The problem of nitrate replacement was discussed in the rulemaking with specific reference to the Madison receptor (among others) and Texas's contribution to that receptor. See, e.g., 76 FR at 48222-23.

¹⁹ Texas's projected 2012 annual NO_x emissions from electric generating units decreased from 136,124 tons in the base case to 133,406 tons under the rule, a decline of 2,718 tons. 76 TR at 48306, Table VIII.A-4. Texas's projected 2012 total anthropogenic (i.e., all sectors) annual NO_x emissions in the base case were 1,501,170 tons. Emission Inventory Final Rule TSD, Table 7-1, EPA-HQ-OAR-2009-0491-4522, available at

Texas's nitrate contribution to the Madison receptor increased by only the average 15% increase in nitrate concentration at the receptor, its total sulfate plus nitrate contribution would be $0.156 \mu\text{g}/\text{m}^3$ ($0.127 \mu\text{g}/\text{m}^3$ sulfate plus $0.029 \mu\text{g}/\text{m}^3$ nitrate).

15. The analysis in ¶¶ 13-14 above regarding Texas's contribution to the Madison receptor under the Transport Rule reflects Texas's SO_2 budget from the rule as originally promulgated. In the First Revisions Rule, Texas's SO_2 budget was increased by more than 20%.²⁰ Therefore, even if Texas's contribution had been close to the 1% screening threshold at the rule's initial budgets, under the Transport Rule budgets that would be implemented if the stay is lifted, the best data available indicate that Texas's contribution would likely be well above that threshold.

16. Using data in the record, EPA has also analyzed whether any other state covered by the Transport Rule for $\text{PM}_{2.5}$ would be required to reduce its emissions so much that its downwind contributions to all receptors of concern would fall below the 1% screening threshold. The analysis indicates that it is highly unlikely that any covered state's contributions would fall below the 1% threshold for both annual and 24-hour $\text{PM}_{2.5}$ contributions.

17. With respect to the claim that the Transport Rule would over-control South Carolina relative to the ozone contribution screening threshold, Petitioners reference two tables from the record, one listing states' largest base case ozone contributions in excess of the 1% screening threshold and another showing states' emission budgets for the electric generating unit ("EGU") sector under the rule. Industry Resp. at 15. The response does not describe exactly how these tables are supposed to support Petitioners' claim of over-control. However, it appears that Petitioners are attempting to suggest that South Carolina's contribution to the Harris receptor should be viewed as small compared to the reductions in the state's NO_x emissions under the Transport Rule. If that is indeed the intended argument, it is rendered meaningless by Petitioners' failure to account for the portion of South Carolina's downwind ozone contribution arising from the NO_x emissions of

<http://www.epa.gov/airtransport/CSAPR/techinfo.html>. Dividing the 2,718 ton reduction by the total NO_x emissions yields Texas's NO_x reduction percentage under the rule of 0.18%. The analogous NO_x reduction percentages for other upwind states linked to the Madison receptor and for Illinois range from 0.25% to 2.8%.

²⁰ Texas's SO_2 trading budget was increased from 243,954 tons in the Transport Rule as originally finalized to 294,471 tons in the First Revisions Rule. 76 FR at 48466; 77 FR 10324, 10340 (Feb. 21, 2012).

the state's other sectors. In fact, the percentage reduction in the state's total anthropogenic NO_x emissions – from EGUs and other sectors – required by the Transport Rule is quite small compared to the percentage by which the state's ozone contribution to the Harris receptor exceeds the screening threshold.

18. Contrary to Petitioners' vague claim, analysis of the record clearly shows that it would be nearly impossible for the rule to over-control South Carolina relative to the 1% ozone contribution threshold. South Carolina's modeled base case ozone contribution to the Harris receptor was projected as 0.968 ppb,²¹ which is 0.168 ppb²² above the screening threshold of 0.8 ppb – an exceedance of 21%. South Carolina's base case 2012 ozone-season emissions from EGUs were projected to be 15,145 tons,²³ compared to the state's ozone-season NO_x budget (for both Phase 1 and Phase 2) of 13,909 tons.²⁴ The 1,236 ton difference between these amounts is 8% of the state's base case EGU ozone-season NO_x emissions. This reduction percentage is less than half the percentage by which the state's ozone contribution to the Harris receptor exceeds the ozone screening threshold, yet it significantly exaggerates the state's potential reduction in ozone contribution under the rule, because South Carolina's EGUs account for only about 16% of the state's total anthropogenic NO_x emissions used to compute downwind ozone contributions.²⁵ A reduction of 8% in the state's EGU NO_x emissions therefore would likely represent a reduction of only about 1.3% (8% times 16%) of the state's total anthropogenic NO_x emissions. There is no reason whatsoever to expect that a 1.3% reduction in the state's total anthropogenic NO_x emissions under the Transport Rule would cause a reduction of more than 20% in the state's ozone contribution to any downwind receptor, even with the highly conservative

²¹ "Contributions of 8-hour ozone, annual PM_{2.5}, and 24-hour PM_{2.5} from each state to each monitoring site" spreadsheet, CSAPR Ozone Contributions worksheet, cell AM329, EPA-HQ-OAR-2009-0491-4228, available at <http://www.epa.gov/airtransport/CSAPR/techinfo.html>.

²² In the summary table cited by Petitioners, the difference of 0.168 ppb was truncated to one decimal place (i.e., 0.1 ppb).

²³ 76 FR at 48307, Table VIII.A-5.

²⁴ 76 FR at 48270, Table VI.F-3.

²⁵ The quotient of South Carolina's annual NO_x emissions from EGUs (35,395 tons) divided by its annual NO_x emissions from all sectors (216,883 tons) is 16.3%. See Emission Inventory Final Rule TSD, Tables 7-3 and 7-1, EPA-HQ-OAR-2009-0491-4522, available at <http://www.epa.gov/airtransport/CSAPR/techinfo.html>.

assumption that a given percentage reduction in NO_x emissions would cause the same percentage reduction in downwind ozone contribution.

19. Using data in the record, EPA has also analyzed whether any other state covered by the Transport Rule for ozone would be required to reduce its emissions so much that its downwind contributions to all receptors of concern would fall below the 1% screening threshold. The analysis indicates that such a scenario is extremely unlikely.

III. Claims That Implementation of the Transport Rule Would Cause Irreparable Harm to Petitioners Due to Insufficient Availability of Allowances.

20. Petitioners claim that they would suffer irreparable harm if the Court grants EPA's motion and allows the Transport Rule to be implemented with the requested tolling of deadlines. Industry Resp. at 16-17 (relying on Goering Decl.); Goering Decl. at 8-12; Hodanbosi Decl. at 2-3. These claims lack merit. Mr. Goering's analysis of the cost of implementing the Transport Rule to Luminant is based on an unsupported assumption that allowance markets would not function and he therefore ignores substantial expected surpluses of allowances that would mitigate any compliance costs Luminant might otherwise face. Mr. Hodanbosi's analysis is fundamentally flawed due to its reliance on material misunderstandings regarding the rule's provisions.

21. Mr. Goering claims that if the Transport Rule is implemented as requested in EPA's motion, in 2015 Luminant would need to either reduce its SO₂ emissions or acquire allowances (or pursue some combination of these options) in order to cover a projected 60,000-ton gap between its otherwise planned 2015 emissions level of 155,000 tons and its expected SO₂ allowance allocation of approximately 95,000 tons. Goering Decl. at 11. Mr. Goering assumes that Luminant would be unable to purchase that quantity of allowances. Instead, he projects that Luminant would need to reduce emissions at its own units to cover part or all of the gap, and would incur total costs of between \$17 million and \$25 million (for emission reduction costs and/or allowance purchases) depending on the extent to which it was able to rely on purchases rather than emission reductions at its own units.

22. In my earlier declaration, I showed that at 2013 emission levels, the SO₂ Group 2 states collectively would have an annual SO₂ allowance surplus of approximately 200,000 tons relative to their collective SO₂ budgets for both Phase 1 and Phase 2. See Harvey Initial Decl. at Table 2. Such a surplus would represent almost 30% of the SO₂ Group 2 states' collective 2013 emissions of 700,000 tons. *Id.* Because of the large size of the surplus based solely on comparison of collective 2013 emissions to collective Transport Rule budgets, in

my earlier declaration I viewed it as unnecessary to extend that analysis to examine further collective emission reductions below 2013 levels that could be expected by 2015. However, available information indicates that such additional emission reductions are likely and that, as a result, the estimate of a 200,000-ton annual surplus of SO₂ Group 2 allowances in 2015 is conservatively low. For example, unit retirement, gas conversion, or SO₂ emission reduction plans – presumably for reasons other than Transport Rule compliance – have taken place at or been announced by the owners of coal-fired units in Alabama, Georgia, Kansas, Minnesota, and South Carolina. Mr. Goering’s declaration indicates that even Luminant plans to reduce its 2015 SO₂ emissions from 2013 levels whether or not the Transport Rule is implemented.²⁶

23. The existence of an annual allowance surplus conservatively estimated at 200,000 tons strongly suggests that sufficient allowances would be available in the allowance market to enable Luminant to cover its anticipated 60,000 annual gap between planned emissions and allocated allowances entirely through the purchase of surplus allowances allocated to other SO₂ Group 2 sources. Mr. Goering does not dispute the analysis in my earlier declaration showing an annual allowance surplus of approximately 200,000 tons for the program. He nevertheless assumes that the allowance market would not function sufficiently well to allow Luminant to purchase enough allowances to cover its asserted 60,000 ton gap. Goering Decl. at 10-11.

24. Mr. Goering’s assumption of allowance market failure is speculative, unsupported, and contrary to actual experience under every prior emission trading program overseen by EPA’s Clean Air Markets Division. Allowance markets developed rapidly under the Acid Rain Program, the NO_x Budget Trading Program, and the Clean Air Interstate Rule (“CAIR”), and trading had already begun in the Transport Rule’s allowance markets at the time of the stay. Mr. Goering’s statement that “Luminant has no guarantee that any individual company would be willing to sell its allowances at a reasonable price or at all,” Goering Decl. at 10, is scant justification for his professed lack of faith in allowance

²⁶ Luminant’s planned 2015 SO₂ emission level of 155,000 tons is approximately 24,000 tons below Luminant’s 2013 SO₂ emissions, a reduction sufficient to enable the state of Texas to meet its assurance level for SO₂ under Phase 2 of the Transport Rule even if other Texas sources do nothing more than maintain their 2013 emission levels. See 2013 emissions data at <http://ampd.epa.gov/ampd/>; see also Harvey Initial Decl. at Table 2.

markets, given that the same statement could be made about coal markets in which Luminant routinely transacts on a much larger scale.²⁷

25. Mr. Hodanbosi claims that Ohio sources would have difficulty meeting the state's Transport Rule budgets and that actions sources would be forced to take for compliance reasons could even cause reliability issues. Hodanbosi Decl. at 2. However, his analysis and conclusions are tainted by several mistaken assumptions regarding the Transport Rule's provisions.

26. The first mistaken assumption is that "[a] unit's allowances can no longer be sold or traded two years after the unit is shut down." In fact, the Transport Rule contains no such provision. As discussed in ¶ 4 above, under the FIP allowance allocation provisions, when a unit retires it continues to receive its allowance allocations for five compliance years, and the allowances can generally be purchased for use by other units. Starting in the sixth compliance year, the unit's allowance allocations are reallocated to the state's new unit set-aside. From the new unit set-aside, the allowances are reallocated first to the state's new units and then, if allowances remain in the set-aside, to the state's other existing units. Thus, under the FIP allowance allocation provisions, allowances formerly allocated to retired units remain available for use by other units even after the retired units no longer receive the allowances. As discussed in ¶¶ 8-11 above, states also have the option to replace these FIP allowance allocation provisions starting in the 2017 compliance year by means of a SIP revision.²⁸

27. The second mistaken assumption concerns the magnitude of the rule's variability limits. Mr. Hodanbosi asserts that the assurance provisions "allow[] a State to exceed its Phase 2 emission budget by up to 10%." Hodanbosi Decl. at 2. In fact, the variability limits that are added to states' budgets to establish the states'

²⁷ I recognize that Luminant obtains a portion of its coal requirements from its own affiliated mining operations. However, most owners of coal-fired generating units find it unnecessary to own coal mines and instead meet all of their coal requirements through purchases from unaffiliated suppliers.

²⁸ As discussed in ¶ 9 above, a state that met the rule's notice requirements may also submit a SIP revision to replace the FIP allocations of its 2016-vintage trading budgets among its existing and retired units. Ohio met the notice requirements and will have until April 1, 2015 to submit such a SIP revision if EPA's motion is granted.

assurance levels are roughly twice that amount – 18% for the SO₂ and annual NO_x programs and 21% for the ozone-season NO_x program.²⁹

28. The third mistaken assumption concerns the point at which the assurance provisions' requirements to surrender multiple allowances per ton of emissions begin to apply. Mr. Hodanbosi asserts that these requirements apply to “use” of the assurance provisions – in other words, to emission levels greater than the state's budget but less than its assurance level. In fact, the multiple allowance surrender requirements apply only when a state's emissions exceed its assurance level, and only to emissions in excess of the assurance level. The Transport Rule imposes no penalties for “using” the assurance provisions to exceed the state budgets as long as emissions do not exceed the assurance levels.³⁰

29. Mr. Hodanbosi concludes that even with planned unit retirements and gas conversions, the state would face shortfalls of SO₂, annual NO_x, and ozone-season NO_x allowances because of the assumed loss of allowances allocated to retired units, and that the state would then need to rely on the rule's assurance provisions and would face penalties for doing so. These conclusions directly contradict the conclusions I offered with respect to Ohio in my earlier declaration. See Harvey Initial Decl. ¶¶ 40, 44, 47. However, Mr. Hodanbosi's conclusions reflect the mistaken assumptions described in ¶¶ 26-28 above and are not supported once those mistakes are corrected. I stand by the analysis from my earlier declaration with respect to Ohio, which shows that the state could comply with its Phase 1 and Phase 2 annual and ozone-season NO_x obligations, as well as its Phase 1 SO₂ obligations, simply by maintaining its emissions at 2013 levels, and that the state would be able to comply with its Phase 2 SO₂ obligations without any actions beyond those currently planned. See Harvey Initial Decl. at Tables 1, 3, 4.

IV. Claims That Other Regulatory Requirements Ensure That Transported SO₂ and NO_x Emissions Will Not Rise From Current Levels.

30. State Petitioners claim the absence of any public health benefit from implementation of the Transport Rule, including any benefit that would result from prevention of SO₂ and NO_x emission increases, based on an assertion that CAIR and the Mercury and Air Toxics Standards (“MATS”) will ensure further emission reductions. State Resp. at 17. This assertion incorrectly represents the nature of

²⁹ See 76 FR at 48267.

³⁰ See, e.g., 76 FR at 48386-87 (assurance provisions for annual NO_x program) (codified at 40 CFR 97.406(c)(2)).

both CAIR and MATS and therefore does not support the claim that implementation of the Transport Rule would not provide public health benefits.

31. As EPA has noted repeatedly throughout this proceeding, CAIR cannot be a substitute for the Transport Rule. To the contrary, whatever air quality benefits CAIR has produced, it is a rule that this Court has held unlawful and has ordered EPA to replace. The Transport Rule addresses the deficiencies of CAIR as articulated by this Court in *North Carolina* and is a rule whose key interpretations the Supreme Court has declared “permissible, workable, and equitable.”

32. Similarly, MATS is not a substitute for the Transport Rule. MATS regulates a different set of pollutants than the Transport Rule. While at present EPA expects that some actions taken for MATS compliance are likely to cause reductions in SO₂ or NO_x as co-benefits, the co-benefits are not guaranteed. Sources could choose to alter their compliance strategies in the future, reducing or reversing the currently expected co-benefits.

SO DECLARED:



Reid P. Harvey, Director
Clean Air Markets Division

DATED: August 22, 2014