No. 16-1406 (and consolidated cases)

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WISCONSIN, ET AL.,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY AND
E. SCOTT PRUITT, RESPONDENTS

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

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

BRAD D. SCHIMEL
Wisconsin Attorney General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

Counsel for Wisconsin

[additional counsel listed inside]

ADDITIONAL COUNSEL

STEVE MARSHALL
Alabama Attorney General

ROBERT D. TAMBLING
Assistant Attorney General
Office of the Attorney General
State of Alabama
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130
Counsel for Alabama

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Deputy Solicitor General
323 Center Street
Little Rock, Arkansas 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov
Counsel for Arkansas

MICHAEL DEWINE
Ohio Attorney General

ERIC E. MURPHY
State Solicitor

30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
eric.murphy@ohioattorneygeneral.gov
Counsel for Ohio

PETER MICHAEL
Wyoming Attorney General

JAMES KASTE
Deputy Attorney General,
Water and Natural
Resources Division

ERIK PETERSEN
Senior Assistant Attorney
General

2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946
Counsel for Wyoming

HARVEY M. SHELDON
Hinshaw & Culbertson, LLP
222 North LaSalle Street
Chicago, IL 60601
(312) 704-3504
hsheldon@hinshawlaw.com
Counsel for Cedar Falls Utilities

LESLIE SUE RITTS
Ritts Law Group, PLLC
620 Fort Williams Parkway
Alexandria, VA 22304
(703) 823-2292 (office)
(703) 966-3862 (cell)
lritts@rittslawgroup.com
Counsel for City of Ames, Iowa

KEN PAXTON
Texas Attorney General

JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

CRAIG J. PRITZLAFF
Assistant Attorney General
craig.pritzlaff@oag.texas.gov
LINDA B. SECORD
Assistant Attorney General
linda.secord@oag.texas.gov

Office Of The Attorney General Of Texas, Environmental Protection Division
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
(512) 463-2012
Counsel for Texas and the Texas Commission on Environmental Quality

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), State Petitioners[1] state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 16-1406: State of Wisconsin; State of Alabama; State of Arkansas; State of Ohio; State of Wyoming

Nos. 16-1410, 1435: Utility Air Regulatory Group

No. 16-1428: State of Texas and Texas Commission on Environmental Quality

No. 16-1429: Murray Energy Corporation

No. 16-1432: Western Farmers Electric Cooperative

No. 16-1436: Midwest Ozone Group

No. 16-1437: Indiana Energy Association and Indiana Utility Group

No. 16-1438: City of Ames, Iowa

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[1] This brief refers to all Petitioners participating in the brief as "State Petitioners."

No. 16-1439: Luminant Generation Company, LLC; Big Brown Power Company, LLC; Luminant Mining Company, LLC; La Frontera Holdings, LLC; Oak Grove Management Company, LLC; Sandow Power Company, LLC

No. 16-1440: Mississippi Power Company

No. 16-1441: The Ohio Utility Group; AEP Generation Resources Inc.; Buckeye Power, Inc.; The Dayton Power and Light Company; Duke Energy Ohio, Incorporated; Dynegy Commercial Asset Management, LLC; First Energy Solutions; Ohio Valley Electric Corporation

No. 16-1442: Wisconsin Paper Council; Wisconsin Manufacturers and Commerce; Wisconsin Industrial Energy Group; Wisconsin Cast Metals Association

No. 16-1443: Sierra Club and Appalachian Mountain Club

No. 16-1444: Oklahoma Gas and Electric Company

No. 16-1445: Prairie State Generating Company LLC

No. 16-1448: State of Delaware Department of Natural Resources & Environmental Control

No. 17-1066: Cedar Falls Utilities

Respondents:

Respondents are United States Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency.

Intervenors and *Amici Curiae*:

Intervenors for the Respondents: American Lung Association; Appalachian Mountain Club; Commonwealth of Massachusetts; Duke Energy Carolinas, LLC; Duke Energy Progress, LLC; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Utility Air Regulatory Group; Environmental Defense Fund; Murray Energy Corporation; Sierra Club; State of Maryland; State of New Hampshire; State of New York; State of Rhode Island; State of Vermont

Intervenors for the Petitioners (except Nos. 16-1443 & 16-1448): Cedar Falls Utilities

Amicus Curiae for the Respondents: American Thoracic Society

B. Rulings Under Review

Petitioners challenge a final action taken by the United States Environmental Protection Agency on October 26, 2016, published in the

Federal Register at 81 Fed. Reg. 74,504 (October 26, 2016), and titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS."

C. Related Cases

Petitioners are aware of the following related cases currently pending in this Court, which have been consolidated with No. 16-1406: *Utility Air Regulatory Group v. EPA*, No. 16-1410; *Texas v. EPA*, No. 16-1428; *Murray Energy Corporation v. EPA*, No. 16-1429; *Western Farmers Electric Coop. v. EPA*, No. 16-1432; *Utility Air Regulatory Group v. EPA*, No. 16-1435; *Midwest Ozone Group v. EPA*, No. 16-1436; *Indiana Energy Association v. EPA*, No. 16-1437; *City of Ames, Iowa v. EPA*, No. 16-1438; *Luminant Generation Company v. EPA*, No. 16-1439; *Mississippi Power Company v. EPA*, No. 16-1440; *The Ohio Utility Group v. EPA*, No. 16-1441; *Wisconsin Paper Council v. EPA*, No. 16-1442; *Sierra Club v. EPA*, No. 16-1443; *Oklahoma Gas and Electric Co. v. EPA*, 16-1444; *Prairie State Generating Co. v. EPA*, No. 16-1445; *Delaware Department of Natural Resources & Environmental Control v. EPA*, No. 16-1448; *Cedar Falls Utilities v. EPA*, No. 17-1066.

The following cases involved substantially similar issues and parties: *EPA v. EME Homer City Generation, L.P.*, Nos. 12-1182 & 12-

1183 (U.S. April 29, 2014); *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. July 28, 2015).

CORPORATE DISCLOSURE STATEMENT

Non-governmental Petitioner, Cedar Falls Utilities, submits the following statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

"Cedar Falls Utilities" is the common name for the electricity provider owned and operated by the Board of Trustees of the Municipal Electric Utility of the City of Cedar Falls, Iowa, a municipal utility formed pursuant to Chapter 388 of the Iowa Code. Cedar Falls Utilities does issue debt instruments from time to time that are for sale on public markets. There is no stock or other discrete form of security ownership. Cedar Falls Utilities has no parent, subsidiary, or affiliate that is publicly owned.

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TABLE OF AUTHORITIES[2]

Cases

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

Statutes

Regulations

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
CAIR	Clean Air Interstate Rule
CAMx	Comprehensive Air Quality Model with Extensions
CSAPR	Cross-State Air Pollution Rule
DNR	Wisconsin Department of Natural Resources
DV	design value
EGU	electric generating unit
EPA	Environmental Protection Agency
FIP	federal implementation plan
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
NOx	nitrogen oxide
PSC	Wisconsin Public Service Commission
ppb	parts per billion
SIP	state implementation plan
TSD	Technical Support Document
VOC	volatile organic compound

JURISDICTIONAL STATEMENT

This case challenges EPA's final rule entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS." 81 Fed. Reg. 74,504 (October 26, 2016) ("Rule"). Petitioners timely challenged the Rule within 60 days of publication. *See* Nos. 16-1406, 16-1428, 16-1438, 17-1066.[3] This Court has jurisdiction under 42 U.S.C. § 7607(b).

[3] Cedar Falls Utilities originally filed in the Eighth Circuit, but the case was transferred to this Court on February 22, 2017. *See* Petition for Review, *Cedar Falls Utilities v. EPA*, No. 17-1066 (Feb. 27, 2017).

ISSUES PRESENTED

1. Whether EPA violated the Clean Air Act and the Administrative Procedure Act ("APA") when it imposed federal implementation plans ("FIPs") on individual States without analyzing whether each FIP's substantial costs are rationally related to the benefits of any downwind State's attainment or maintenance.

2. Whether EPA violated the Clean Air Act by identifying "maintenance" receptors without reference to monitored data.

3. Whether EPA arbitrarily modeled ozone levels at coastal monitors.

4. Whether EPA unlawfully imposed FIPs on individual States before EPA acted on state implementation plans ("SIPs"), which some States already submitted to implement Section 7410(a)(2)(D)(i)(I).

5. Whether EPA arbitrarily and unlawfully included biogenic sources of ozone with manmade activities in determining the significance of upwind States.

6. Whether EPA violated the Administrative Procedure Act when it failed to notify western States of its intent to use CSAPR modeling in the West.

7. Whether EPA continues to engage in an unlawful, bait-and-switch approach to interstate transport issues.

STATUTES AND REGULATIONS

The applicable statutes, 42 U.S.C. §§ 7407 and 7410, appear in the Addendum to this brief. This brief does not rely upon any existing regulations.

INTRODUCTION

The Good Neighbor Provision requires each State to submit a SIP that "contain[s] adequate provisions" "prohibiting . . . any source or other type of emissions activity" that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State." 42 U.S.C. § 7410(a)(2)(D). In the Rule, EPA has once again failed to carry out its obligations under that provision in a rational, nonarbitrary rulemaking. EPA has imposed FIPs on States even where EPA's own data conclusively demonstrates that a FIP will not lead to any meaningful reductions in interstate pollution, while failing to properly evaluate SIPs that it never timely acted upon. The Rule often ignores monitored data in favor of incomplete and contradictory modeling results while adopting an irrational approach to critical coastal monitors. And the Rule continues EPA's bait-and-switch approach to transport rulemaking. In sum, the Rule should be vacated.

STATEMENT OF THE CASE

A. The Clean Air Act requires EPA to issue, and periodically update, National Ambient Air Quality Standards (NAAQS) for certain air pollutants. 42 U.S.C. §§ 7408(a)(1), 7409. After EPA establishes a

NAAQS for a pollutant, EPA divides the country into "air quality control region[s]" and designates each region as either "attainment," "nonattainment," or "unclassifiable." *See id.* § 7407(d). States have the "primary responsibility for ensuring" that the NAAQS "will be achieved and maintained within each air quality control region in [the] State." *Id.* § 7407(a). To fulfill this role, States must develop a SIP to "provide[ ] for implementation, maintenance, and enforcement" of a NAAQS within three years of its promulgation. *Id.* § 7410(a)(1).

A major complication of this state-by-state regime is that wind carries air pollutants from one State to another. The "Good Neighbor Provision" requires States' SIPs to "contain adequate provisions" "prohibiting . . . any source or other type of emissions activity" that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State." *Id.* § 7410(a)(2)(D). If a State does not submit a SIP, or if EPA disapproves it, EPA must issue a FIP. *Id.* § 7410(c).

B. The Rule imposes FIPs on 22 States, claiming to "partially" address their obligations under the Good Neighbor Provision with respect to the 2008 ozone NAAQS. 81 Fed. Reg. at 74,506. For 15 of these States,

EPA had previously issued an order "finding that [they] failed to make complete submissions" with respect to the requirements of the Good Neighbor Provision. *See* 81 Fed. Reg. at 74,506. For the seven States that had submitted SIPs to address the Good Neighbor Provision, however, EPA "disapprov[ed] their good neighbor SIP[s]" well after the statutory deadline for doing so, and only after proposing the Rule. 81 Fed. Reg. at 74,506; *infra* Part IV.

The Rule is now EPA's fourth attempt to implement the Good Neighbor Provision, and each round led to substantial litigation. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008); *EME Homer City Generation, L.P. v. EPA* ("*EME Homer I*"), 696 F.3d 7 (D.C. Cir. 2012); *EPA v. EME Homer City Generation, L.P.* ("*EME Homer II*"), 134 S. Ct. 1584 (2014); *EME Homer City Generation, L.P. v. EPA* ("*EME Homer III*"), 795 F.3d 118 (D.C. Cir. 2015).

C. As in its previous iteration for the 1997 Ozone NAAQS (CSAPR I), EPA established an emissions "budget" for each relevant State, which roughly represents "the maximum amount of each pollutant that a State's power plants may collectively emit in a given year." *EME Homer*

I, 696 F.3d at 18; 81 Fed. Reg. at 74,506–07. EPA also created an "interstate trading program," allowing "covered sources to comply" by purchasing "allowances" from other sources. *EME Homer I*, 696 F.3d at 18; 81 Fed. Reg. at 74,521.

EPA followed a four-step process to identify which upwind States and emission sources "significantly contribute to nonattainment" or "interfere with maintenance" in a downwind State and to establish budgets, 81 Fed. Reg. at 74,517–21, and then issued FIPs for those States, thereby imposing significant regulatory requirements.

First, EPA "[i]dentif[ied] downwind [ozone] receptors that are expected to have problems attaining or maintaining [the 2008 ozone NAAQS]." 81 Fed. Reg. at 74,517. EPA used a combination of monitored data and modeling to identify "nonattainment" receptors, finding six such receptors. 81 Fed. Reg. at 74,531, 74,533. To identify "maintenance" receptors, however, EPA used only modeling, and found 13. 81 Fed. Reg. at 74,531–33. Many comments urged EPA to also use monitored data to identify maintenance receptors, but it declined to do so. *See infra* Part II. Other comments argued that EPA's modeling overstated ozone at

coastal monitors in particular, but EPA rejected these comments as well. *See infra* Part III.

Second, after EPA identified problematic downwind receptors, it "determin[ed] which upwind states contribute . . . [sufficient] amounts" to those downwind receptors to be considered "significant" contributors. 81 Fed. Reg. at 74,517. To do this, EPA produced a "source apportionment" model, which it claimed estimated the total anthropogenic contribution from each upwind State to each problematic downwind receptor, and "linked" States above a certain threshold (1% of the NAAQS, or .75 parts per billion (ppb)) as "significant" contributors. 81 Fed. Reg. at 74,518, 74,536–39; Air Quality Modeling Technical Support Document ("TSD"), at 15–30 (Aug. 2016), EPA-HQ-OAR-2015-0500-0575 (JA__).

Third, "for states linked to downwind air quality problems," EPA attempted to "identify[ ] upwind emissions that significantly contribute to nonattainment or interfere with maintenance." 81 Fed. Reg. at 74,517. For this part of the analysis, EPA tested various "uniform levels of control stringency, represented by cost" (essentially, for various known emission control methods, the cost per ton of emissions the method would reduce),

modeled the anticipated emissions reductions at each cost-level, and used a "multi-factor test" based on "cost, NOx [nitrogen oxide] reduction potential, and downwind air quality impacts" to select a cost-level. 81 Fed. Reg. 74,519. EPA ultimately selected $1,400/ton. 81 Fed. Reg. 74,508.

EPA claimed that it then also analyzed, on a state-by-state basis, whether requiring emission controls at or below $1,400/ton would result in too many emissions reductions from any upwind State, contrary to the Supreme Court's holding that EPA could not reduce a State's total emissions below the 1% threshold EPA had used earlier to screen out States. *EME Homer II*, 134 S. Ct. at 1608; 81 Fed. Reg. at 74,519. However, EPA did not analyze, on a state-by-state basis, whether its uniform selected cost-level would result in *too few* emissions reductions from any upwind State, even though multiple comments argued that for some States, the Rule did not result in any meaningful change to any problematic downwind receptor. *See infra* pp. 18–19. Rather, EPA relied solely on the "cumulative impact[s]" of emissions reductions from all States from the use of its uniform methodology. EPA Response to Comments, at 456–57, EPA-HQ-OAR-2015-0500-0572 (JA__). As a

result, EPA issued FIPs for States even where its own modeling predicts near-zero "improvements"—a few ten-thousandths of a percent—at the only monitor to which those States are linked. *Infra* pp. 20–23.

Finally, EPA used the $1,400/ton cost-level it selected to set an emissions budget for each State and distributed corresponding emissions "allowance[s]" for use in its "emission allowance trading program." 81 Fed. Reg. at 74,517. To set each budget, EPA started with the State's actual emissions in 2015, adjusted them for known, planned changes through 2017, and then applied the predicted reductions (computed as a percentage change between two models) from power plants implementing all possible emissions controls under $1,400/ton. 81 Fed. Reg. at 74,547.

STANDARD OF REVIEW

An agency rule must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9)(A), (C); *accord* 5 U.S.C. § 706(2)(A), (C).

SUMMARY OF ARGUMENT

I. EPA violated the statutory requirement that the agency analyze, on a state-by-state basis, whether the benefits of imposing each FIP are

"commensurate with [its] costs." *Michigan*, 213 F.3d at 679 (citation omitted); *accord Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). EPA failed to address this issue despite multiple comments, resulting in a rule that often imposes significant costs with near-zero benefits.

II. EPA unlawfully and arbitrarily ignored real-world data when identifying maintenance receptors.

III. EPA selected a modeling approach that significantly overstated ozone at coastal monitors. Rather than relying on the estimated ozone in the immediate vicinity of a coastal monitor, EPA relied on the highest predicted ozone in the nine grid cells (a 3x3 grid) surrounding the coastal monitor (each of which is approximately 56 square miles). For coastal monitors, many of these grid cells were entirely over water, contrary to this Court's holding in *Michigan* that EPA cannot regulate States based solely on their downwind contributions to the air "over [ ] Lake Michigan" without showing an "onshore" effect. 213 F.3d at 681. This flaw was significant because some States, including Wisconsin and Iowa, are linked only to coastal monitors. *Infra* p. 30.

IV. EPA also violated the Clean Air Act's 12-month timeline for acting on SIPs that States submitted to comply with the Good Neighbor

Provision. 42 U.S.C. § 7410(k)(2). EPA ignored that deadline (and the timely submitted SIPs) until it could develop sufficient information to justify denying the SIP submissions and imposing a FIP. In *EME Homer II*, the Supreme Court held that States must submit SIPs within the statutory deadline based only on the information available at the time. 134 S. Ct. at 1600–01. Under that same logic, EPA needed to act on the States' SIPs based only on the information available within the 12-month statutory review period. EPA can use information developed outside the 12-month review period to require States to *revise* their SIPs, 42 U.S.C. § 7410(k)(5)–(6), however, the revision process (as opposed to the unlawful process EPA used here) allows States to revise their SIPs before having a FIP imposed, *see* 42 U.S.C. § 7410(c)(1), (k)(5).

V. The Good Neighbor Provision requires States to limit only anthropogenic sources of ozone, not biogenic sources. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I); *Michigan*, 213 F.3d at 677. However, in determining which States contribute "significantly" to problematic downwind receptors, EPA overestimated anthropogenic effects by improperly counting ozone caused in part by biogenic sources in its modeling. This flaw was especially significant for States like Iowa, whose maximum

downwind contribution was only .06 ppb above the .75 ppb threshold for significance that EPA employed.

VI. EPA violated the APA by failing to provide notice to western States that its modeling for the Rule would be used as the basis for other adverse rulemakings against western States. 5 U.S.C. § 553(b).

VII. In the litigation over the 2015 Ozone NAAQS, *Murray Energy Corp. v. EPA*, No. 15-1385, States argued that the new NAAQS are unachievable for some States in part due to interstate-transport issues. While EPA assured States that the Good Neighbor Provision already resolved interstate issues, in this Rule the agency conceded that the interstate-emission issue is not resolved. EPA must stop this bait-and-switch approach, and must provide specific and comprehensive allowances for downwind States, such that they are held harmless for any uncontrolled interstate air pollution.

STANDING

The Rule imposes emissions budgets on Petitioner States Wisconsin, Alabama, Arkansas, Ohio, and Texas, and on Iowa, in which Petitioners City of Ames and Cedar Falls Utilities are located (and each owns units given budgets). 81 Fed. Reg. at 74,506. Emissions budgets

"cause[ ] injury to the states as states," "sufficient to confer standing." *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *see also Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (noting the "special solicitude [owed to States] in [ ] standing analysis").

ARGUMENT

I. EPA's Methodology Is Unlawful Because It Imposes FIPs Upon States Without Considering Whether Their Substantial Costs Are Rationally Related To Any Downwind State's Attainment Or Maintenance

A. The Good Neighbor Provision requires States to "prohibit[ ]" emissions that "contribute *significantly* to nonattainment" or "*interfere* with maintenance" in a downwind State. 42 U.S.C. § 7410(a)(2)(D)(i) (emphases added). If a State fails to comply with this obligation, EPA may impose a FIP requiring the same result. 42 U.S.C. § 7410(c). Both this statutory text and general principles of administrative law mandate the conclusion that EPA cannot impose a FIP on a State without rationally analyzing whether that particular FIP's costs are justified by its alleged benefits to downwind States' attainment and maintenance with regard to those States' NAAQS obligations.

In *Michigan*, 213 F.3d 663, this Court upheld EPA's view that the word "significantly" in the Good Neighbor Provision incorporates cost considerations; that is, whether a State contributes "significantly to nonattainment" (or, in parallel, "interfere[s] with maintenance"), is a function of not only the absolute amount of contributions of a State to downwind nonattainment, but also the amount of such contribution that can be eliminated in a manner that satisfies a rational, well-considered cost-benefit analysis. The *Michigan* court explained that "nothing in the text, structure, or history of [the Good Neighbor Provision] bars EPA from considering cost," *id.* at 679, and also endorsed the general "interpretive principle" that "reviewing courts will read statutes as authorizing regulations with benefits at least roughly commensurate with their costs," *id.* (citation omitted). "Without consideration of cost," it would be difficult, if not impossible, to "describe the intellectual process by which EPA would determine 'significance.'" *See id.* at 678.

That the Clean Air Act and the APA require EPA to consider the costs and benefits of any transport FIP also follows from general principles of administrative law, the same ones that this Court cited in *Michigan*. In particular, "an agency rule [will be found to] be arbitrary

and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *accord Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009). As a general matter, one important aspect of the problem is whether regulation will do "significantly more harm than good." *See Michigan*, 135 S. Ct. at 2707. A regulation that "impose[s]" substantial "economic costs in return for a few dollars in health or environmental benefits" "is [not] even rational." *Id.*

Applying these controlling principles to the statutory regime at issue here yields the necessary conclusion that EPA cannot impose a transport FIP upon a State unless EPA, after careful, rational analysis, concludes that the FIP's requirements "prohibit[ ]" either "significant[ ]" "contribut[ions]" to "nonattainment" or "interfere[nce] with maintenance," after taking the FIP's costs and benefits into account. 42 U.S.C. § 7410(a)(2)(D)(i); *see generally Michigan*, 213 F.3d at 677–79; *Michigan*, 135 S. Ct. at 2707.

Notably, the Supreme Court's decision in *EME Homer II*, 134 S. Ct. 1584, deals with an entirely different issue. There, as in the Rule here,

EPA screened out States that contributed less than 1% of the NAAQS to any downwind State as insignificant contributors. The Court held that, having set a 1% threshold for significance, EPA could not then require a State included in the Rule to reduce its total emissions below that 1% threshold. *Id.* at 1608–09. The issue in the present case does not relate to the 1% initial screening threshold, but whether the *actual* regulatory requirements that EPA imposed in specific FIPs are rationally related to the statutory goal of "prohibiting" either "significant[ ]" "contribut[ions]" to "nonattainment" or "interfere[nce] with maintenance," when taking each FIP's costs and benefits into account. 42 U.S.C. § 7410(a)(2)(D)(i).

B. EPA's methodology in this Rule was to issue a FIP for a State whenever such issuance was dictated by the agency's uniform selected cost-level, *without ever analyzing whether*—in fact—such a FIP would "prohibit[ ]" either "significant[ ]" "contribut[ions]" to "nonattainment" or "interfere[nce] with maintenance," after taking costs and benefits into account. The Rule is thus unlawful and should be vacated.

During the rulemaking, numerous comments explained to EPA that imposing transport FIPs upon States without subjecting the FIP-issuance decision to any cost-benefit analysis was unlawful. Observing

that EPA models show near-zero improvements from emission reductions in States such as Alabama, EPA "[i]mpos[ed] high cost on upwind states for *de minimis* benefit" because EPA "failed to take into account the impact of the [anticipated] reductions on ozone levels at the downwind monitors." Southern Company Comment at 3–5 (JA__); *id.* at 29–30 (JA__). For Wisconsin, EPA's "modeling data" at the proposal stage "showed zero NOx reduction potential for Wisconsin under the proposed EGU [electric generating unit] NOx control stringency." 81 Fed. Reg. at 74,553. Accordingly, EPA "sought comment on whether or not to include Wisconsin in the final CSAPR Update." *Id.* The Wisconsin Department of Natural Resources ("DNR") agreed that Wisconsin "should not be included" in the Rule since Wisconsin "already operates one of the most well-controlled fossil generation systems" and "cannot be controlled further." Wisconsin DNR Comment, at 1, EPA-HQ-OAR-2015-0500-0299 (JA__). Similarly, the Wisconsin Public Service Commission ("PSC") commented that Wisconsin had a "nearly zero" reduction potential. Wisconsin PSC Comment, at 3, EPA-HQ-OAR-2015-0500-0319 (JA__).

The final Rule that EPA adopted ignored these and parallel serious concerns for other States, resulting in a regulation that, for many States,

imposes costly FIPs without meaningful benefit to downwind States. Wisconsin is an ideal exemplar. EPA predicts that the Rule will reduce Wisconsin's total NOx emissions by merely 24 tons, 81 Fed. Reg. at 74,553,[4] out of the 61,000 tons that EPA predicts the entire rule will reduce, 81 Fed. Reg. 74,573. As discussed below, Wisconsin is linked only to a single downwind receptor in Allegan, Michigan (a modeled maintenance receptor, currently in attainment, *see infra* Part II). 81 Fed. Reg. 74,538. EPA's modeling predicted that without the Rule, Wisconsin emissions will contribute 2.5360 ppb to Allegan, Michigan's ozone in 2017.[5] *With* the Rule, EPA predicted that Wisconsin emissions will

[4] In Table IV.E-2, Wisconsin's "[a]djusted historical emissions"—which approximate the emissions EPA anticipates in 2017 *without* the Rule, Ozone Transport Policy Analysis Technical Support Document ("TSD"), at 12–13 & n.16 (Aug. 2016), EPA-HQ-OAR-2015-0500-0555 (JA__)—are 7,939 tons. *See also* Ozone Transport Policy Analysis TSD, at 29 (Table D-3, Column "Final Base Case $0/ton Emission Budgets) (JA__). Wisconsin's budget—which is based on the emissions EPA anticipates in 2017 *with* the Rule, Ozone Transport Policy Analysis TSD, at 13, 15 (Table C-1, Column "Final $1400/ton Cost Threshold") (JA__)—is 7,915 tons. Subtracting the latter from the former yields 24 tons.

[5] *See* AQAT Final Calibrated Spreadsheet, Ozone Transport Policy Analysis TSD, Appendix B, EPA-HQ-OAR-2015-0500-0492, sheet "0 eng EB links," row "13," column "BD." The "AQAT" tool is what EPA used to "estimate the changes in . . . air quality contributions as a result of the changes in emissions." Ozone Transport Policy Analysis TSD at 5 (JA__). The "0 eng EB" sheet "contains the contributions and design values for the $0/ton final emissions budgets base case"—in other words, contributions based solely on the "adjusted 2015 historical emissions"

contribute 2.5358 ppb to Allegan, Michigan's ozone in 2017.[6] Thus, EPA predicts its Rule will reduce Wisconsin's effect on Allegan, Michigan by only two *ten-thousandths* of a part per billion (the difference between the numbers), *or 0.00027% of the 75 ppb standard*. That near-zero benefit could not possibly justify the significant costs of imposing a FIP on Wisconsin under any rational cost-benefit analysis. *See* Wisconsin PSC Comment at 3–5 (noting the "disproportionate compliance costs" for "nearly zero increment[al]" improvements) (JA__).

EPA's unlawful omission of the required cost-benefit analyses causes significant problems for multiple States. Like Wisconsin, Iowa is also linked only to Allegan, Michigan. 81 Fed. Reg. at 74,538. Without the Rule, EPA predicted that Iowa emissions will contribute .8138 ppb to

with "zero" "change[s] in emissions" from the Rule. Ozone Transport Policy Analysis TSD at 13 n.16, 43 (JA__). The "0 eng EB links" sheets show the "linkages" from each State to each monitor. *Id.* at 43 (JA__).

[6] *See* AQAT Final Calibrated Spreadsheet, sheet "1400 eng EB links," row "13," column "BD." This sheet shows the State level "contributions" and "linkages" for the "$1,400/ton emissions budgets analysis," which EPA ultimately selected. Ozone Transport Policy Analysis TSD at 43 (JA__).

Allegan, Michigan, and with the Rule, .8133 ppb[7]—meaning the Rule's entire benefit with respect to Iowa is a .0005 ppb improvement. Cedar Falls Utilities commented that EPA's understanding and inventory of available controls from Iowa sources was fundamentally flawed, that the cost to Cedar Falls Utilities[8] and Iowans generally far exceeded the $1,400 control level, and that the modeled impact of further controlling Iowa was negligible or non-existent. Cedar Falls Utilities Comment, at 4–7, EPA-HQ-OAR-2015-0500-0325 (JA__).

A similar calculation is much more difficult for other upwind States because EPA zeroes out certain linkages in its "1400 eng EB links" spreadsheet and because EPA never conducted the mandatory cost-benefit analysis. However, the same problem appears to exist for many other States. Of the downwind monitors that EPA did not zero out, EPA's

[7] *See* AQAT Final Calibrated Spreadsheet (compare sheet "0 eng EB links," row "13," column "V" with sheet "1400 eng EB links," row "13," column "V").

[8] In particular, Cedar Fall Utilities emphasized that EPA's Iowa FIP rendered its generation unit (Streeter No. 7) practically useless. Cedar Falls Utilities Comment at 5–7 (JA__).

modeling shows a maximum improvement of .0037 ppb for Texas,[9] .0064 ppb for Alabama,[10] and .0239 ppb for Arkansas.[11]

EPA's response to this fundamental defect with the Rule is that "all 22 CSAPR Update states have [some] EGU emission reductions available" (even if negligible), 81 Fed. Reg. at 74553, and that the "*cumulative* impact" is an "important part of resolving . . . downwind air quality problems," EPA Response to Comments at 457 (JA__) (emphasis added). In other words, even though EPA concedes that some States "have a relatively small impact on downwind air quality," EPA Response to Comments at 457 (JA__); *see supra* pp. 20–23, the agency believes that it can issue FIPs for those States (and thus impose significant costs) based on the benefits allegedly obtained from imposing *other* FIPs on *other* States. But the Good Neighbor Provision addresses each *individual State's* obligations, and the related FIP provision does not change this

[9] *See* AQAT Final Calibrated Spreadsheet (compare sheet "0 eng EB links," column "AX," rows "12," "13," and "25" with sheet "1400 eng EB links," column "AX," rows "12," "13," and "25").

[10] *See* AQAT Final Calibrated Spreadsheet (compare sheet "0 eng EB links," column "I," rows "23," and "24" with sheet "1400 eng EB links," column "I," rows "23," and "24").

[11] *See* AQAT Final Calibrated Spreadsheet (compare sheet "0 eng EB links," column "K," rows "13," "18," and "22" with sheet "1400 eng EB links," column "K," rows "13," "18," and "22").

fact. The actions are also arbitrary and capricious because EPA did not explain why it could not simply retain its FIP-issuance methodology where it makes sense as a matter of the agency's statutory obligations, but carve out States for whom application of that methodology would lead to irrational FIPs with no benefit to downwind States.

Finally, EPA's legal error was its complete failure "to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and not the specifics of any particular cost-benefit analysis as to any FIP (which the agency never conducted). Therefore, this Court should vacate the Rule in its entirety, and remand it to EPA to conduct the proper analysis in the first instance.[12]

II. EPA Arbitrarily Ignored Monitored Data When Identifying Maintenance Receptors[13]

As the Industry Petitioners' Opening Brief explains, EPA arbitrarily and unlawfully ignored actual monitored data in favor of its

[12] The case for vacatur is particular compelling with respect to Wisconsin and Iowa. EPA's own numbers show that applying a FIP to these States could not possibly "prohibit[ ]" either "significant[ ]" contribut[ions]" to "nonattainment" or "interfere[nce] with maintenance," 42 U.S.C. § 7410(a)(2)(D)(i), in any downwind State, meaning all of the relevant considerations require vacatur, *see Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[13] Petitioner State of Alabama does not join this argument.

own theoretical modeling when identifying maintenance receptors. Industry Opening Br. Part I.A. The State Petitioners incorporate that argument here. *See* D.C. Circuit Handbook at 37.

III. EPA Adopted An Unreasonable Approach To Coastal Monitors[14]

EPA based upwind-state-to-downwind-receptor linkages on projected ozone concentrations over water bodies, thereby artificially inflating projected 2017 ozone design values ("DVs") for several downwind receptors, which EPA linked to upwind States that it regulated under the Rule. That EPA based the Rule on projected ozone "over water," 81 Fed. Reg. at 74,534, was a fatal flaw given this Court's holding that EPA cannot deem a State to contribute to downwind ozone problems based on contributions to offshore ozone. *Michigan*, 213 F.3d at 681 (invalidating EPA's inclusion of Wisconsin in NOx SIP Call because EPA "[did] not show on the record that Wisconsin's ozone contribution affects any onshore state nonattainment"); *see* UARG Comment, at 22, EPA-HQ-OAR-2015-0500-0253 (JA__) (discussing the

[14] Petitioner State of Alabama does not join this argument.

importance of *Michigan*'s holding on this issue). This aspect of the Rule is unsupported, arbitrary, and unlawful.

EPA used the Comprehensive Air Quality Model with Extensions ("CAMx")—a grid-cell-based model with grid cells measuring 12-kilometers-by-12-kilometers (each cell covering about 56 square miles)—"to simulate [receptors'] pollutant concentrations." 81 Fed. Reg. at 74,526. In projecting each receptor's ozone DV, EPA used a "3 x 3 matrix," evaluating modeled ozone concentrations not only in the 12-kilometer grid cell that includes that receptor (i.e., the location at which the ozone monitor is sited) but also in the eight 12-kilometer cells that surround the receptor's own grid cell. *Id.* at 74,533–34; Air Quality Modeling TSD at 13 (JA__). But EPA's 3x3-matrix approach did not merely consider all the projected DVs at all nine grid cells that include and surround the receptor's grid cell—for example, EPA did not merely average those nine DVs to derive an estimated DV for the receptor itself. Rather, EPA went further by basing DV projections on the "highest" of the nine grid cells' DVs, even if the highest DV was not in the grid cell that includes the receptor—and, crucially, the highest DV was in a grid cell located over water bodies, not over land. 81 Fed. Reg. at 74,534.

Importantly, this error was not an isolated flaw, or one of limited scope: Many EPA-projected problem receptors are near (generally, within several kilometers or less) large water bodies, including Lake Michigan, the Atlantic Ocean, the Gulf of Mexico, and Chesapeake Bay. EPA's grid contains over-water grid cells within the 3x3-grid-cell arrays for multiple nonattainment and maintenance-only receptors. *See* Regulatory Impact Analysis for the Proposed Rule, ES-3 (Fig. ES-1) (Nov. 2015), EPA-HQ-OAR-2015-0500-0195 (JA__); Midwest Ozone Group Comment, Exhibit 14, EPA-HQ-OAR-2015-0500-0383 (JA__). The modeling projected significantly more ozone over water than over adjacent onshore receptors. *See* Midwest Ozone Group Comment, at 30–34, EPA-HQ-OAR-2015-0500-0327 (JA__–__); UARG Comment at 22 (JA__). Consequently, as EPA's own analysis shows, at least half the near-shoreline receptors EPA studied had inflated DV projections due to application of EPA's 3x3 approach. 81 Fed. Reg. at 74,534 & n.122 (noting that at half the coastal sites EPA examined, the DV using EPA's 3x3 approach "is lower [than] or within 0.5 ppb of the corresponding value from the monitor-cell approach," indicating that EPA-projected DVs at the other half overstated ozone by 0.5 ppb or more).

In the face of this problem, EPA arbitrarily rejected alternative modeling methods offered by comments that would have eliminated the use of over-water data for receptors located on land. For instance, under the "monitor-cell" approach for near-shoreline receptors, the model would use only the projected DV for the grid cell in which the receptor itself was located (which, because all receptors are located on land, would necessarily reflect only ozone that occurs over land). 81 Fed. Reg. at 74,534.

Furthermore, EPA entirely disregarded, and provided no rationale for rejecting, an alternative fix offered by comments, i.e., "us[ing] the highest value in [the] 'over land' grid cells adjacent to the monitoring site." *Id.* This approach, like comments' monitor-cell approach (but unlike EPA's 3x3 approach), would have satisfied *Michigan*'s holding that EPA regulate based on "onshore" ozone, while incorporating conservatism by using the highest onshore value. EPA did not even offer any assessment of the "highest-overland-grid-cell" approach. EPA also failed to acknowledge that this highest-overland-grid-cell alternative approach would have addressed EPA's articulated concern with the monitor-cell approach, i.e., that monitors "are sometimes located very

close to the border of two or more grid cells." 81 Fed. Reg. at 74,534. The highest-overland-grid-cell approach would also have satisfied EPA's concern regarding "onshore wind flows," *id.*, as that approach would—consistent with *Michigan*—capture the highest on-land projected ozone values, including high values resulting from breezes that bring over-water ozone to onshore locations.

Finally, EPA suggested that it was unnecessary to apply the monitor-cell or highest-overland-grid-cell approach because EPA used "relative response factors" in its modeling rather than "absolute modeled concentrations." *Id.* But that rationale was no justification for EPA's rejection and dismissal of the alternative approaches offered by comments because EPA also would have applied relative-response factors to either of those alternative approaches—thereby resolving any concerns EPA might have about those approaches' effects—to the same extent and in the same way EPA applied them to the approach it used. And EPA's reliance on relative response factors was, in any event, inapposite because it did not address the inconsistency of EPA's approach with *Michigan*.

EPA's failure had concrete and unreasonable ramifications: EPA linked certain States, including Iowa and Wisconsin,[15] *only* to near-shoreline receptors. 81 Fed. Reg. at 74,534, 74,538–39, Tables V.E-2, V.E-3. Under *Michigan*, this approach was unlawful and unreasonable.

IV. EPA Arbitrarily Failed To Timely Act—Within A Year—On SIPs Submitted By Several States And Instead Unlawfully Delayed Making A Decision On Those Plans For Several Years While It Developed Data Sufficient To Justify Denial And Federal Takeover Of The State Programs

The Clean Air Act is "an experiment in cooperative federalism." *See Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Cooperation between the federal government and each State is required to achieve the goals of the Act. 42 U.S.C. § 7401(a)(3), (4). Under the Act, the federal government sets national air-quality standards, and States implement those standards through SIPs approved by EPA. *See id.* § 7407(a). EPA sets the goals and basic requirements of the SIP, but it is the States that retain broad discretion and authority "to determine the methods and particular control strategies they will use to achieve the statutory

[15] Arkansas, Mississippi, and Pennsylvania also appear to have been adversely affected by EPA's approach; those States are also linked only to monitors located in close proximity to large water bodies, although not all of those monitors were deemed "coastal" by EPA. *See* 81 Fed. Reg. at 74,534.

requirements." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976)). Here, EPA upended this regime by ignoring several States' already-submitted SIPs, developing a FIP years later, and then using this proposed FIP as the basis for rejecting the prior-submitted SIPs.

A. Under Section 7410(a)(1), States must submit SIPs within three years of EPA's promulgation of NAAQS. States cannot delay submission pending new data or guidance from EPA—they must meet the deadline or face imposition of a FIP. *EME Homer II*, 134 S. Ct. at 1600–01. Once a SIP revision is declared technically and administratively complete, EPA "shall act on the submission" within 12 months. 42 U.S.C. § 7410(k)(2). Congress' use of "shall" in this context "creates a nondiscretionary duty for the Administrator" to act timely on a SIP submission. *See Sierra Club v. Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("'Shall' means shall" and "impose[s] a mandatory duty upon the subject of the command"); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) ("when a statutory provision uses both 'shall'

and 'may,' it is a fair inference that the writers intended the ordinary distinction").

Acting outside this statutory framework here, EPA ignored its mandate to act on timely submitted SIPs until it could develop sufficient information to justify preparing a FIP. The Supreme Court held that States must submit SIPs based on information available at the time and, under that logic, the same must be true of EPA action on SIPs—EPA must act on a SIP based on the information available during EPA's statutory review period. *EME Homer II*, 134 S. Ct. at 1600–01. Then, if later information demands, EPA can avail itself of the provisions in the Clean Air Act allowing for SIP revisions.

When EPA disapproves of a SIP, it assumes "the role of primary regulator" and must promulgate a FIP within two years. *Texas v. EPA*, 829 F.3d 405, 412 (5th Cir. 2016); 42 U.S.C. § 7410(c)(1). A FIP "fill[s] all or a portion of a gap or otherwise correct[s] all or a portion of an inadequacy in a [SIP]." 42 U.S.C. § 7602(y). EPA may impose a FIP only if (1) "a State has failed to make a required submission" or if the "[SIP] revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A)"; or (2) EPA "disapproves a [SIP]

submission in whole or in part." *Id.* § 7410(c)(1)(A)–(B). Unless (or until) the State corrects the deficiency in its SIP, EPA "steps into the State's shoes" and assumes the State's role with respect to implementation of appropriate control measures in the State. *Texas*, 829 F.3d at 412; 42 U.S.C. § 7410(c)(1).

B. In the present case, EPA unlawfully ignored SIPs timely[16] submitted by seven States, including Texas, Ohio, and Wisconsin,[17] and instead developed a FIP for each State and used that FIP as the basis for rejecting the prior-submitted SIPs. Rather than follow its statutorily mandated duty to review a SIP within 12 months, EPA spent years *first* developing and proposing a FIP, then used the proposed FIP as a basis to deny SIPs that had been submitted years earlier but were never acted

[16] The normal statutory deadline was delayed by litigation challenging the underlying standard. *See generally* 77 Fed. Reg. 30,088, 30,091 (May 21, 2012); *WildEarth Guardians v. Jackson*, No. 11-cv-5651-YGR, 2012 WL 4953101 (N.D. Cal. Oct. 17, 2012) (requiring EPA to make initial findings on the relevant SIPs no later than January 4, 2013).

[17] The States were Texas, 81 Fed. Reg. 53,284 (Aug. 12, 2016); Kentucky, 78 Fed. Reg. 14,681 (Mar. 7, 2013); Indiana and Ohio, 81 Fed. Reg. 38,957 (June 15, 2016); Louisiana, 81 Fed. Reg. 53,308 (Aug. 12, 2016); New York, 81 Fed. Reg. 58,849 (Aug. 26, 2016); and Wisconsin, 81 Fed. Reg. 53,309 (Aug. 12, 2016). As an example, Texas submitted its SIP on December 13, 2012, and EPA declared it technically and administratively complete on December 20, 2012. 81 Fed. Reg. at 53,285. Only Kentucky's plan was timely reviewed. 78 Fed. Reg. 14,681. Twenty-four States did not submit SIPs. 80 Fed. Reg. 39,961-02 (July 13, 2015).

on by EPA. EPA based the decision to deny not on information available when EPA was required to make a decision on the SIPs, but on data developed years after the statutory deadline for EPA action (i.e., within 12 months of declaring the SIP administratively and technically complete).

For example, by statute EPA was obligated to make a decision to approve or deny the SIP submitted by Texas no later than December 20, 2013. 42 U.S.C. § 7410(k)(2). But EPA did not propose to deny Texas' SIP until several months after EPA proposed to include Texas in the FIP. 80 Fed. Reg. at 75,710 (Dec. 3, 2015) (proposed rule); 81 Fed. Reg. 21,290 (Apr. 11, 2016) (proposed disapproval of Texas' SIP).[18] The disapproval was based on information and models developed by EPA in support of its

[18] EPA published the final disapproval on August 12, 2016. 81 Fed. Reg. 53,284.

FIP, not on information available during the time EPA should have been reviewing Texas' SIP.[19]

EPA waited until it could develop information sufficient to determine the outcome it wanted—federal takeover of state programs. This was impermissible. States cannot delay submission of a SIP pending new information, and likewise EPA cannot delay acting on a SIP pending new information. EPA unlawfully extended the statutory deadlines set forth in the Clean Air Act (as to itself) to suit its own ends—something the Supreme Court has said that States cannot do. *EME Homer II*, 134 S. Ct. at 1600–01 (disallowing this Court from permitting States to submit SIPs after the three-year deadline set forth in the Act). Under that logic, EPA should not be allowed to do the same, especially when it is itself responsible for the development of such information and guidance.

[19] Texas petitioned the Fifth Circuit for review of EPA's denial of its SIP. *See Texas v. EPA*, No. 16-60670 (5th Cir. 2016). But after Texas filed its initial brief, that proceeding was stayed by agreement pending discussions among the parties. *See* Unopposed Joint Stipulation, *Texas v. EPA*, No. 16-60670 (5th Cir. May 5, 2017). Consistent with Fifth Circuit Rule 42.4, on a joint motion to stay the proceedings, the court dismissed the case without prejudice; it may be reinstated by letter at any time within 180 days. *See* Clerk Order, *Texas v. EPA*, No. 16-60670 (5th Cir. May 17, 2017).

C. EPA defends itself by stating: "If the EPA were to permit states an opportunity to develop and submit state plans to address the emission reductions required by this rule before imposing a federal plan, the EPA could not ensure that these emission reductions would be achieved in a timely manner." 81 Fed. Reg. at 74,513. In other words, EPA is confirming it had delayed so that it could preemptively substitute itself as the entity with "primary responsibility for assuring air quality" within each State, when Congress already reserved that role for the States. 42 U.S.C. §§ 7407(a), 7410. Whereas States are required to submit SIPs within the statutory deadline—despite a lack of information or guidance from EPA—EPA casts this concept aside as to itself when reviewing SIPs and proposing FIPs. This course of conduct violates the core principles of the Clean Air Act as established by Congress.

The Act does not contemplate that EPA may proceed as it has—ignoring review of SIPs for years and waiting well past the time it was required to review a plan so that it could develop a basis to justify a predetermined outcome. Indeed, the Act's safeguard provisions confirm that Congress expected EPA to act swiftly on SIPs, and *then*, if new information necessitated, require States to amend their SIPs. 42 U.S.C.

§ 7410(k)(5)–(6). Congress would not have included such safeguards and procedural deadlines if EPA had authority to simply ignore them pending development of new information and to supplant SIPs with FIPs.[20]

The SIP revision process specified in the Act was designed to avoid the very outcome here. EPA asserts that States, on their own, could have amended their SIPs once EPA announced its new protocols in the proposed FIP. *See* 81 Fed. Reg. at 53,286 ("states have the ability at any time, including before or after the imposition of a FIP, to submit an approvable SIP, which corrects any deficiency"); 81 Fed. Reg. at 74,513. However, not only does this argument ignore the structure of the Act, the argument as applied in this case is hollow. Here, only after taking years to develop new information—well after the statutory deadlines had passed—did EPA finally act on the SIPs. *See, e.g.*, 81 Fed. Reg. at 53,284 (denying Texas' SIP revision on August 12, 2016). Even if States such as Texas had agreed with EPA's post-hoc methodology and information developed well outside the statute's SIP-review timeframes, and sought to generate a model for both nonattainment and maintenance areas and

[20] EPA may also conditionally approve a SIP, upon commitment by a State to develop and adopt a specific enforceable SIP element. 42 U.S.C. § 7410(k)(4).

revised their SIPs accordingly, such exercises would take considerable time and resources to complete—longer than the few months allowed by EPA in this case. With EPA freely ignoring its statutory mandate to timely review SIPs, it seems unlikely that the agency would have reviewed any such revision before finalizing the FIP. *See* 42 U.S.C. § 7410(c)(1) (requiring EPA to promulgate a FIP "unless the State corrects the deficiency [that authorized promulgation of a FIP], *and the Administrator approves the [SIP] or [SIP] revision*, before the Administrator promulgates such [FIP]" (emphasis added)). Had EPA acted timely on the SIPs, then later it could have required revision based on the new information and allowed each State reasonable time to revise its SIP. 42 U.S.C. § 7410(k)(5) (permitting up to 18 months for revisions of SIPs). Instead, EPA arbitrarily charted its own course, a course that violated the Act.

For this issue, Petitioners respectfully request that the Rule be remanded pending reconsideration as to those States that timely submitted SIPs that were unlawfully denied by EPA outside of the review period set forth in the Act. EPA should base its decision on the information available when it should have reviewed each SIP and then

later, if necessary, EPA may request amendments in accordance with 42 U.S.C. § 7410(k)(5).

V. EPA Arbitrarily And Unlawfully Included Biogenic Sources Of Ozone With Manmade Activities In Determining The Significance Of Upwind States[21]

The Good Neighbor Provision does not require States to control emissions from non-human activity (biogenic emissions) because such emissions are not "prohibit[able]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). In *Michigan*, this Court recognized that the Good Neighbor Provision, "[b]y its terms," is limited to "emissions *activity*" that "contribute[s] significantly to nonattainment" in a downwind State. 213 F.3d at 677 (citing 42 U.S.C. § 7410(a)(2)(D)(i)(I)) (emphasis added). Even in the Rule at issue here, EPA implicitly recognized that its authority is limited to "the contributions from *anthropogenic* emissions from upwind states to downwind ozone concentrations." 81 Fed. Reg. at 74,526 (emphasis added).

EPA's "source apportionment" modeling—which it used to "[q]uantify [u]pwind [s]tate [c]ontributions," 81 Fed. Reg. at 74,536—

[21] Petitioner State of Alabama does not join this argument.

overstates anthropogenic ozone due to a built-in bias in the method. Ozone is formed by chemical reactions between NOx and volatile organic compounds (VOCs). *See* 81 Fed. Reg. at 74,513. Both precursors (NOx and VOCs) come from both biogenic and anthropogenic sources, so ozone can come purely from background sources, purely from anthropogenic sources, or from a combination of both. In its source-apportionment modeling, however, EPA counts all ozone produced by a combination of biogenic and anthropogenic sources as anthropogenic ozone. 81 Fed. Reg. at 74,536 n.123 ("As part of this [source-apportionment] technique, ozone formed from reactions between biogenic VOC and NO[x] with anthropogenic NO[x] and VOC are assigned to the anthropogenic emissions."). But if anthropogenic emissions of VOCs or NOx from an upwind State were reduced or eliminated, some of the now-free biogenic VOCs will combine with the now-free biogenic NOx to produce pure biogenic ozone. Thus, only roughly half of the ozone formed by a combination of biogenic and anthropogenic sources should count as anthropogenic ozone. By counting it all as anthropogenic ozone, EPA in essence double counted.

Cedar Falls Utilities pointed out this problem to EPA, noting that EPA "rejected the use of modeling better suited to tell it whether given states' emissions are significant in terms of anthropogenic sources of NOx." Cedar Falls Utilities Comment at 10 (JA__); *see also* Cedar Falls Utilities Comment Exhibits, Ex. D, at 1, EPA-HQ-OAR-2015-0500-0369 (JA__) (noting that EPA's technique "apportions biogenic emissions to anthropogenic sources when biogenic emissions react with anthropogenic sources"). The very guidance expressly cited by EPA and provided by Environ, the developer of EPA's selected air-quality model, notes that "[t]he use of APCA," the method EPA used, *see* 81 Fed. Reg. at 74,536, "instead of OSAT results in more ozone formation attributed to anthropogenic NOx sources and less ozone formation attributed to biogenic sources. APCA is not really a 'source apportionment' technique because it *expresses biases*." *See* 81 Fed. Reg. at 74,536 n.124; ENVIRON, CAMx User's Guide, v. 6.2, at 169 (March 2015) (emphasis added), *available at* http://www.camx.com/files/camxusersguide_v6-20.pdf.

In some States, this error was plainly the difference between being deemed "significant" or not. Iowa, for example, is linked only to a single downwind receptor, Allegan, Michigan, and EPA's source apportionment

modeling estimates that Iowa sources contribute .81 ppb to that monitor, *see* 81 Fed. Reg. at 74,537, Table V.E-1, only .06 ppb above the .75 ppb cutoff for insignificance, 81 Fed. Reg. at 74,518. Yet Cedar Falls Utilities submitted expert documentation demonstrating that if biogenic sources of ozone were properly discounted, Iowa's contribution would be only .44 ppb (roughly half EPA's estimation—unsurprising, given the double counting, *see supra* p. 40), well below the threshold for significance. Cedar Falls Utilities Comment Exhibits, Ex. D, at 8.

This Court should remand to EPA for the purpose of addressing and removing the "bias" inherent in its techniques of significance assessment and source apportionment, or, at the very least, vacate the Rule with respect to Iowa.

VI. EPA Failed To Provide Adequate Notice Of Its Intent To Use CSAPR Modeling In The West[22]

Section 553 of the APA requires an agency to provide published notice of its proposed rulemaking. Such notice must include either "the terms or substance of the proposed rule or a description of the subjects

[22] Petitioner States of Alabama, Arkansas, Ohio, Texas (and Texas Commission on Environmental Quality), and Wisconsin, as well as Petitioner City of Ames, do not join this argument.

and issues involved." 5 U.S.C. § 553(b). The agency must "fairly apprise interested persons of the subjects and issues the agency [is] considering." *Am. Transfer & Storage*, 719 F.2d at 1303; *USW v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980). EPA failed to advise western States, including Wyoming, of its intent to use the CSAPR modeling in the West without any analysis of the West's unique circumstances, such as topography, wildfires, altitude, and naturally occurring background concentrations, and without analyzing the suitability of the one-percent-contribution screening threshold to unique western circumstances.

Instead, EPA's statements in a Notice of Data Availability ("Notice") and the Proposed Rule misled western States into believing that EPA would not apply the CSAPR modeling to the West. *See, e.g.*, 80 Fed. Reg. at 75,715 (proposed rule); *see generally Notice of Availability of the EPA's Updated Ozone Transport Modeling Data for the 2008 Ozone NAAQS*, 80 Fed. Reg. 46,271 (Aug. 4, 2015). In fact, the proposed rule contains an entire section entitled "Why We Focus on Eastern States." 80 Fed. Reg. at 75,715. In that section, EPA acknowledged that "there may be additional criteria to evaluate regarding transported air pollution in the West" and represented that EPA and the States would "evaluate

interstate transport in the western states on a case-by-case basis." *Id.* Wyoming relied on these statements when it chose not to spend the considerable resources necessary to fully interrogate the complex CSAPR modeling. *See* Wyoming Dep't of Environmental Quality Comment, EPA-HQ-OAR-2015-0500-0034. EPA then applied the CSAPR modeling directly to the West without performing a regional or state-specific analysis and disapproved parts of a SIP revision that Wyoming had submitted to EPA over a year before EPA had even published the Notice for the Cross-State Air Pollution Rule. *See* 82 Fed. Reg. 9,142 (Feb. 3, 2017).

Thus, while EPA technically invited all States to comment on the CSAPR modeling, in the same breath it took away any incentive for western States to spend their limited resources doing so by pledging to conduct additional case-by-case analyses in the West. EPA's misleading statements did not fairly apprise Wyoming and the other western States that the subject of the Notice and Proposed Cross-State Air Pollution Rule was, in fact, a host of other unidentified future rulemakings. Accordingly, EPA violated Section 553 of the APA.

VII. EPA's Bait-And-Switch Approach To Downwind NAAQS Levels And Interstate Transport Issues Is Arbitrary And Requires This Court's Intervention[23]

In this case, and in *Murray Energy Corp. v. EPA*, No. 15-1385 (currently pending and held in abeyance before this Court), EPA has offered irreconcilable explanations for its approach to the intertwined relationship between downwind States' NAAQS obligations and interstate transport issues. One of the critical issues in *Murray Energy* is EPA's attempt to set the 2015 Ozone NAAQS at such low levels that States could not possibly fulfill their "responsibility" for ensuring that "national primary and secondary ambient air quality standards will be achieved and maintained." 42 U.S.C. § 7407(a). One reason that States cannot attain the 2015 Ozone NAAQS is because EPA simply assumed—without any factual support or rational basis—that its interstate transport regulations would fully control upwind emissions, such that impacts of those emissions would not undermine downwind States' ability to meet their NAAQS obligations. *See* State Petrs. Reply Br. 8–10, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Sept. 14, 2016).

[23] Petitioner State of Ohio, as well as Petitioner Cedar Falls Utilities, does not join this argument.

As EPA argued in *Murray Energy*, "[i]nterstate emissions are regulated under the Good Neighbor Provision of the Act, which prevents upwind states from causing significant deterioration of air quality in downwind states. Thus, while interstate emissions may appear 'uncontrollable' in a downwind state, these emissions are, in fact, controlled by the Act, and ozone formed by emissions in any state is not properly considered background ozone." EPA Resp. Br. 99, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. July 29, 2016).

The Rule at issue in this case demonstrates that EPA's assurances in *Murray Energy* were incomplete (at best), and that its approach to the inexorably intertwined relationship between downwind States' NAAQS obligations and interstate transport issues is arbitrary and capricious. *See State Farm*, 463 U.S. at 43. As EPA explained in the Rule here, "[f]or most states, the EGU NOx ozone season emission budgets finalized in this action represent a *partial remedy* to address interstate emission transport for the 2008 ozone NAAQS." 81 Fed. Reg. at 74,508 (emphasis added). Put another way, EPA has conceded that even for the 2008 NAAQS at issue here (let alone for the 2015 Ozone NAAQS), interstate

"emissions are *[not]*, in fact, controlled by the" EPA's regulations. EPA Resp. Br. 99, *Murray Energy Corp.*

It is of course true that "agencies have great discretion to treat a problem partially," and this Court "would not strike down [either EPA's NAAQS rules or its cross-air provisions] if [they] were a first step toward a complete solution." *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989). At the same time, EPA has the statutory duty not to engage in rulemaking in an arbitrary and capricious fashion. *See State Farm*, 463 U.S. at 43. In particular, EPA cannot lawfully impose NAAQS obligations on downwind States at levels premised on the existence of a phantom complete solution to the interstate transport difficulties that these States face.

In the end, EPA simply lacks the legal authority to put an end to all interstate emissions, and the agency has properly never claimed the desire or legal right to do so. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 496 (2001) (Breyer, J., concurring) (explaining that the Clean Air Act does not "demand[ ] the return of the Stone Age"). The agency is thus duty-bound to reasonably and lawfully address this critical fact in its rulemakings; it cannot continue its arbitrary, bait-and-switch tactics

on this issue. In particular, this Court should make clear to EPA that the agency must make specific and comprehensive allowances for downwind States, such that they are held harmless for any uncontrolled interstate air pollution.

CONCLUSION

The Rule should be vacated.

Dated: September 18, 2017

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

s/ Misha Tseytlin
MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

Attorneys for State of Wisconsin
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
tseytlinm@doj.state.wi.us

[additional counsel listed on next page]

ADDITIONAL COUNSEL

STEVE MARSHALL
Alabama Attorney General

s/ Robert D. Tambling
ROBERT D. TAMBLING
Assistant Attorney General
Office of the Attorney General
State of Alabama
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130
Counsel for Alabama

LESLIE RUTLEDGE
Arkansas Attorney General

s/Nicholas J. Bronni
NICHOLAS J. BRONNI
Arkansas Deputy Solicitor General
323 Center Street
Little Rock, Arkansas 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov
Counsel for Arkansas

MICHAEL DEWINE
Ohio Attorney General

s/ Eric E. Murphy
ERIC E. MURPHY
State Solicitor

30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
eric.murphy@ohioattorneygeneral.gov
Counsel for Ohio

PETER MICHAEL
Wyoming Attorney General

s/ James Kaste
JAMES KASTE
Deputy Attorney General,
Water and Natural Resources Division

ERIK PETERSEN
Senior Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946
Counsel for Wyoming

KEN PAXTON
Texas Attorney General

JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General
craig.pritzlaff@oag.texas.gov
LINDA B. SECORD
Assistant Attorney General
linda.secord@oag.texas.gov

Office Of The Attorney General Of Texas, Environmental Protection Division
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
(512) 463-2012
Counsel for Texas and the Texas Commission on Environmental Quality

s/ Harvey M. Sheldon
HARVEY M. SHELDON

Hinshaw & Culbertson, LLP
222 North LaSalle Street
Chicago, IL 60601
(312) 704-3504
hsheldon@hinshawlaw.com
Counsel for Cedar Falls Utilities

s/ Leslie Sue Ritts
LESLIE SUE RITTS

Ritts Law Group, PLLC
620 Fort Williams Parkway
Alexandria, VA 22304
(703) 823-2292 (office)
(703) 966-3862 (cell)
lritts@rittslawgroup.com
Counsel for City of Ames, Iowa

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(C) because this brief contains 8,980 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). The total number of words contained in this brief and the Industry Petitioners' Brief is fewer than 18,000 words, per this Court's Order of September 6, 2017.

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

Dated: September 18, 2017

s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 18, 2017

s/ Misha Tseytlin

MISHA TSEYTLIN

STATUTORY ADDENDUM

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42 U.S.C. § 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but

in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that

the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national

ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless

the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit

designations referred to in paragraph (1) for the July 1997 PM2.5 national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM2.5 national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

42 U.S.C.A. § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

> **(A)** include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;
>
> **(B)** provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation

plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

> **(A)** finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
>
> **(B)** disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

> **(B)** No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.
>
> **(C)** Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409
>
> **(D)** For purposes of this paragraph--

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

> **(A)** a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and
>
> **(B)** other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

> **(A)** there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and
>
> **(B)** such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission

under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any

attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

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

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during

the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

> **(A)** in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or
>
> **(B)** in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect

immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the

development 1 effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.