ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1406 (and consolidated cases)

STATE OF WISCONSIN, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and E. SCOTT PRUITT, Administrator, United States Environmental Protection Agency,
Respondents.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

PROOF OPENING BRIEF OF PETITIONER CONSERVATION GROUPS AND PETITIONER STATE OF DELAWARE

Charles McPhedran
Earthjustice
1617 JFK Boulevard, Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

Neil Gormley
David Baron
Earthjustice
1625 Massachusetts Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
ngormley@earthjustice.org
dbaron@earthjustice.org

Counsel for Sierra Club and Appalachian Mountain Club

Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636
valerie.edge@state.de.us

Counsel for State of Delaware Department of Natural Resources & Environmental Control

Dated: September 18, 2017

(Additional counsel listed within)

Joshua R. Stebbins
Zachary M. Fabish
Sierra Club
50 F Street NW, 8th Floor
Washington, DC 20001
(202) 675-7917
josh.stebbins@sierraclub.org
zachary.fabish@sierraclub.org

Counsel for Sierra Club

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Sierra Club, Appalachian Mountain Club, and the State of Delaware Department of Natural Resources & Environmental Control (collectively, "Conservation Groups and Delaware") hereby submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

16-1406 – State of Wisconsin, State of Alabama, State of Arkansas, State of Ohio, State of Wyoming

16-1428 – State of Texas and Texas Commission on Environmental Quality

16-1429 – Murray Energy Corporation

16-1432 – Western Farmers Electric Cooperative

16-1435 – Utility Air Regulatory Group

16-1436 – Midwest Ozone Group

16-1437 – Indiana Energy Association and Indiana Utility Group

16-1438 – City of Ames, Iowa

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

16-1440 – Mississippi Power Company

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

16-1442 – Wisconsin Paper Council, Wisconsin Manufacturers and Commerce, Wisconsin Industrial Energy Group, Wisconsin Cast Metals Association

16-1443 – Sierra Club and Appalachian Mountain Club

16-1444 – Oklahoma Gas and Electric Company

16-1445 – Prairie State Generating Company, LLC

16-1448 – State of Delaware Department of Natural Resources & Environmental Control

17-1066 – Cedar Falls Utilities

Respondents:

The U.S. Environmental Protection Agency is listed as a respondent in all consolidated cases except case 16-1441. E. Scott Pruitt, Administrator of the U.S. Environmental Protection Agency, is listed as a respondent in all cases except cases 16-1435, 16-1438, 16-1445, 16-1448, and 17-1066.

Intervenors:

The following entities have moved to intervene in all consolidated cases: American Lung Association; Appalachian Mountain Club; Environmental Defense Fund; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; and Sierra Club.

The following entities have moved to intervene in all consolidated cases except cases 16-1443 and 16-1448: State of New York, State of Maryland, State of New Hampshire, State of Rhode Island, State of Vermont, and Commonwealth of Massachusetts.

Other intervenors include: Cedar Falls Municipal Utilities; Duke Energy Carolinas, LLC; Duke Energy Progress, LLC; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Murray Energy Corporation; and Utility Air Regulatory Group.

(iii) *Amici* in This Case

The American Thoracic Society filed a motion to participate as amicus curiae on February 16, 2017. An order was entered granting their participation on March 2, 2017.

(B) Circuit Rule 26.1 Disclosure of Sierra Club and Appalachian Mountain Club

See disclosure statement *infra* pages v-viii.

(C) Ruling Under Review

Petitioners seek review of the final action taken by EPA at 81 Fed. Reg 74,504 (Oct. 26, 2016) titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS."

(D) Related Cases

Conservation Groups and Delaware are unaware of any related cases other than the consolidated cases listed above.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Sierra Club and Appalachian Mountain Club make the following disclosures:

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club is a national nonprofit environmental organization with more than 667,000 members nationwide. Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to education and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Appalachian Mountain Club

Non-Governmental Corporate Party to this Action: Appalachian Mountain Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Appalachian Mountain Club is a regional nonprofit organization representing more than 90,000 members in the Eastern U.S.

The organization promotes getting people outdoors for safe and healthy recreation and works to protect the health of the landscapes and waterways of the Northeast.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

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

Statutes

Federal Register Notices

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

2016 Transport Rule	81 Fed. Reg. 74,504 (Oct. 26, 2016)
Act	Clean Air Act
Catalytic devices	Selective catalytic reduction devices
CSAPR	Cross-State Air Pollution Rule
EPA	U.S. Environmental Protection Agency
lbs/MMBtu	Pounds per million British thermal units
NAAQS	National Ambient Air Quality Standards
NO_X	Nitrogen oxides
FIP	Federal Implementation Plan
ppb	parts per billion
RIA	Regulatory Impact Analysis
SIP	State Implementation Plan

INTRODUCTION

These petitions challenge an EPA rule that fails to protect people from dangerous air pollution coming from other states. In 2008, EPA adopted a revised ambient air quality standard for ground-level ozone to protect public health; today, over 109 million people live in areas of the country that still fail to meet the standard. This urgent public health problem is due, in significant part, to the failure of upwind states to control emissions of ozone-forming pollution within their borders that is subsequently transported into downwind states. Despite EPA's Clean Air Act obligation to address such interstate pollution by prohibiting upwind states' significant contributions to air quality violations in downwind states, EPA has issued a rule that—by EPA's own admission—fails to eliminate states' significant contributions, frustrating the efforts of downwind states to achieve satisfactory air quality by the deadlines specified in the Act.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 42 U.S.C. § 7607(b)(1)-(2) to review the final action taken by EPA at 81 Fed. Reg. 74,504 (Oct. 26, 2016), JA____, entitled "Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS; Final Rule." Petitioners filed timely petitions for review of this action on December 23 and 27, 2016.

STATUTES AND REGULATIONS

Pertinent statutes are in a separate addendum.

ISSUES PRESENTED

Issues Raised by Sierra Club, Appalachian Mountain Club, and Delaware:

1. Whether EPA violated the Clean Air Act or acted arbitrarily by promulgating emission budgets for upwind states that do not prohibit significant contributions to downwind nonattainment (and interference with maintenance) of the 2008 ozone standard by the deadlines for attainment.

2. Whether EPA violated the Clean Air Act or acted arbitrarily by promulgating emission budgets for upwind states that do not prohibit such significant contributions as expeditiously as practicable.

3. Whether EPA violated the Clean Air Act or acted arbitrarily by authorizing upwind sources to use emission credits from another rule to pollute above the level of the emission budgets.

Issues Raised by Delaware:

4. Whether EPA's failure to base its significant contribution analysis on emissions data prior to marginal attainment dates is unlawful and arbitrary because it disregards statutory timelines and unfairly shifts the burden of transported pollution to downwind states like Delaware.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Clean Air Act requires EPA to set national ambient air quality standards (NAAQS) for certain pollutants that endanger public health or welfare. 42 U.S.C. §§ 7408, 7409. These standards must be established at a level that protects public health "with an adequate margin of safety." *Id* § 7409. States and EPA then must identify areas of the country where air quality fails to meet the standard and designate them as "nonattainment" areas. *Id*. § 7407(d). Nonattainment areas that subsequently attain the standard are called "maintenance" areas. *Nat. Res. Def. Council v. EPA ("NRDC")*, 777 F.3d 456, 458-59 (D.C. Cir. 2014).

By fixed deadlines, states must adopt plans providing for implementation, maintenance, and enforcement of the ambient standards, and submit these plans to EPA for approval. 42 U.S.C. § 7410(a). If EPA finds that a state has failed to make a required submission or disapproves a plan submitted by a state, EPA must issue a federal implementation plan ("FIP") for the state within two years. *Id.* § 7410(c)(1).

Since substantial amounts of air pollution often travel across state borders and cause harms downwind, state plans must include "good neighbor" provisions in accordance with 42 U.S.C. § 7410(a)(2)(D)(i)(I), which provides:

> Each such plan shall … contain adequate provisions 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 contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such [NAAQS].

Federal plans implementing the Clean Air Act's good neighbor provisions, like state plans, must comply with the requirements of section 7410(a)(2)(D)(i), including the requirement to prohibit air pollution that contributes significantly to downwind nonattainment or interferes with downwind maintenance. *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir. 2008); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593-95 (2014).[1] Further, this Court has held that the requirement that good neighbor plans be "consistent" with the provisions of the subchapter—i.e., Title I of the Clean Air Act—means that federal good neighbor plans must eliminate significant contributions by the deadlines for downwind areas to attain the NAAQS. *North Carolina*, 531 F.3d at 911-13 (quoting 42 U.S.C. § 7410(a)(2)(D)).

The deadline for attainment of the ozone NAAQS is "as expeditiously as practicable but not later than" three, six, nine, fifteen, or twenty years—depending on the "classification" of the area—after the date the area is designated

[1] This brief uses the terms "significant contribution" and "significantly contribute" to encompass both significant contribution to nonattainment and interference with maintenance, unless otherwise specified.

nonattainment.[2] 42 U.S.C. § 7511(a)(1) & tbl.1; *NRDC*, 777 F.3d at 460. Thus, areas classified as being in "marginal" nonattainment, for example, must attain the NAAQS by a deadline three years from the date they are designated nonattainment, while "moderate" nonattainment areas have six years from the date of designation. 42 U.S.C. § 7511(a)(1) tbl.1. The attainment deadlines are "central to the regulatory scheme," *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002), and "leave no room for claims of technological or economic infeasibility." *NRDC*, 777 F.3d 456, 468 (D.C. Cir. 2014) (quoting *Sierra Club*, 294 F.3d at 161).

II. FACTUAL BACKGROUND

Ground-level ozone, the main component of urban smog, is a corrosive air pollutant formed from the interaction of other pollutants, called ozone precursors, in the presence of heat and sunlight. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002) (citing Office of Air Quality Planning and Standards, U.S. EPA, EPA/451-K-97-002, Ozone: Good Up High, Bad Nearby 2-3 (1997)). Nitrogen oxides (NO_X)—emitted by power plants, factories, and motor vehicles—are important ozone precursors. 81 Fed. Reg. at 74,511/1, JA____. Exposure to ambient ozone causes many adverse health effects, including asthma attacks,

[2] Ozone nonattainment areas are classified into five categories "representing graduated degrees of non-compliance with the NAAQS: Marginal, Moderate, Serious, Severe, and Extreme." *NRDC*, 777 F.3d at 460 (citing 42 U.S.C. § 7511(a)(1) & tbl. 1).

respiratory-related hospital visits, scarring of the lungs, and early death. 81 Fed. Reg. at 74,574 tbl.VIII.4, JA____; Sierra Club et al. Comments on 80 Fed. Reg. 75,706 at 3–4 (EPA-HQ-OAR-2015-0500-0287) (Feb. 1, 2016) ("Conservation Groups' Comments"), JA____-__. In addition, elevated ozone levels harm crops, forests, and ecosystem composition. 80 Fed. Reg. 75,706, 75,712 (Dec. 3, 2015), JA____, ____; Conservation Groups' Comments at 5, JA____. These documented harms to public health and ecosystems have lead EPA to strengthen the NAAQS for ozone on several occasions.[3]

Although EPA determined in 2015 that the 2008 ozone standard was insufficiently protective of public health and adopted a stronger one, 80 Fed. Reg. at 65,294/1-2, the 2015 standard remains in the early stages of implementation. Thus this case addresses non-implementation of—and non-compliance with—the 2008 standard, which was set at 75 parts per billion. 73 Fed. Reg. 16,436, JA____. According to EPA, 177 counties—home to more than 109 million people—still fail to attain the 2008 ozone standard, thus failing to protect human health with an

[3] 62 Fed. Reg. 38,856 (July 18, 1997), JA____; 73 Fed. Reg. 16,436 (Mar. 27, 2008), JA____; 80 Fed. Reg. 65,292 (Oct. 26, 2015), JA____. *See also* https://www.epa.gov/ozone-pollution/table-historical-ozone-national-ambient-air-quality-standards-naaqs (last visited June 29, 2017), JA____.

adequate margin of safety.[4] Many of the people at risk from elevated ozone levels live in Eastern states whose ozone nonattainment difficulties are attributable, in significant part, to pollution transported from upwind states. This interstate transport "compounds the difficulty for downwind states in meeting [the standard]," 80 Fed. Reg. at 75,711, JA____, and endangers human health.

III. REGULATORY BACKGROUND

A. Implementation of the 2008 Ozone NAAQS.

When EPA adopted the 2008 ozone NAAQS of 75 parts per billion on March 12, 2008, 73 Fed. Reg. 16,436, JA____, that revision to the NAAQS triggered EPA's obligation to promulgate nonattainment designations by March 12, 2010. *NRDC*, 777 F.3d at 463. EPA extended the two-year deadline by an additional year, to March 12, 2011, 77 Fed. Reg. 30,088, 30,090-91 (May 21, 2012), JA____, ____-__, then missed the extended deadline. *NRDC*, 777 F.3d at 463. Conservation groups filed suit to compel the designations. In response EPA designated 46 nonattainment areas (many containing multiple counties), effective

[4] EPA, 8-Hour Ozone (2008) Nonattainment Area Summary with History, available at https://www3.epa.gov/airquality/greenbook/hnsum2.html (last updated June 20, 2017), JA____.

July 20, 2012—36 of them marginal, three moderate, two serious, three severe, and two extreme. 77 Fed. Reg. 30,160 (May 21, 2012), JA____.[5]

Although the Act provides that attainment deadlines are calculated from the date of designation—here, July 20, 2012—EPA attempted to extend those attainment deadlines by several months, to December 31 of the corresponding year. *NRDC*, 777 F.3d at 463; 77 Fed. Reg. 30,160, JA____. Conservation groups filed suit once more, and this Court rejected the delay of attainment deadlines as "untethered to Congress' approach." *NRDC*, 777 F.3d at 469. In response, EPA affirmed that attainment deadlines for marginal and moderate ozone nonattainment areas are July 20, 2015 and July 20, 2018, respectively. 80 Fed. Reg. 12,264, 12,268/2 (Mar. 6, 2015), JA____, ____.[6]

On July 13, 2015, EPA issued a finding—effective August 12, 2015—that 24 states failed to submit plans adequately addressing their ozone transport obligations for the 2008 ozone NAAQS by the statutory deadline of March 12, 2011, 81 Fed. Reg. at 74,512/1, JA____, triggering EPA's obligation to issue a federal plan within two years of that finding. 42 U.S.C. § 7410(c)(1).

B. The 2016 Transport Rule.

[5] Several areas were subsequently reclassified. *See* 81 Fed. Reg. 90,207 (Dec. 14, 2016), JA____ (reclassifying four marginal nonattainment areas as moderate).
[6] Several marginal nonattainment areas were subsequently granted one-year extensions of the applicable attainment deadline, to July 20, 2016, pursuant to 42 U.S.C. § 7511(a)(5). *See* 81 Fed. Reg. 26,697 (May 4, 2016), JA____.

On October 26, 2016, EPA issued the rule at issue in this case. 81 Fed. Reg. 74,504, JA____ ("2016 Transport Rule" or "Rule"). The Rule is intended to address nitrogen oxide emissions from 22 upwind states in the "Eastern transport region" that contribute to ozone air quality problems in downwind states.[7]

For each of the 22 covered upwind states, the Rule establishes a nitrogen oxide "emission budget" defining the state's "allowable emission levels" for 2017 and future years. EPA, Regulatory Impact Analysis at ES-7 to 8, JA____-__ (EPA-HQ-OAR-2015-0500-0580) (Sept. 2016) ("RIA"); 81 Fed. Reg. at 74,539/3, JA____. The emission budgets take effect in 2017 because several downwind states face attainment deadlines in July 2018, and these states must use air quality data from 2017 and earlier to demonstrate compliance. 81 Fed. Reg. at 74,507/3,

[7] The rule also responds to the remand of emission budgets implementing the 1997 ozone standard. 81 Fed. Reg. 74,504, JA____. EPA's prior Transport Rule had required states in the Eastern United States to reduce power plant emissions of sulfur dioxide and nitrogen oxides that cross state lines and significantly contribute to violations of the 1997 ozone and fine-particle standards in other states. 76 Fed. Reg. 48,208 (Aug. 8, 2011), JA____. Following decisions by this Court and the Supreme Court, this Court invalidated the EPA ozone-season emission budgets for nitrogen oxides for 11 states and sulfur dioxide budgets for four states, and remanded the matter to EPA for corrective action. *EME Homer City Generation, L.P.* v. *EPA*, 795 F.3d 118, 129-30, 138 (D.C. Cir. 2015) ("*EME Homer City II*"). The 2016 Transport Rule replaces the ozone budgets invalidated by the D.C. Circuit for nine states and removes two states from the Transport Rule ozone-season trading program. EPA addressed sulfur dioxide remand issues in a memorandum separate from the 2016 Transport Rule. 81 Fed. Reg. at 74,507/2, JA____.

JA____. *See NRDC*, 777 F.3d at 467-68 (describing method for demonstrating compliance).

According to EPA itself, the emission budgets established for 2017 and future years do not eliminate upwind states' significant contributions to downwind nonattainment and maintenance problems; rather, for 21 out of the 22 states (all except Tennessee), the emission budgets merely "mitigate" significant contribution. 81 Fed. Reg. at 74,508 tbl.1.B-1 & n.19, 74,512/1, JA____ & ____, ____. EPA concedes that "the emissions reductions required by this rulemaking do not fully resolve most of the air quality problems identified in this rule." *Id.* at 74,536/2, JA____. As a result, "when all the emission reductions required by this rule are in place, both attainment and maintenance problems at downwind receptors may remain." *Id*. at 74,520/3, JA____.

EPA's calculations show that the emission budgets adopted are too lenient to eliminate significant contributions. According to the agency:

- Nineteen locations in downwind states have ozone "receptors" that are "identified as non-attainment and/or maintenance" for this Rule. RIA at 3-9, JA____. The "average ozone design value" (used by the agency to indicate nonattainment) for these nineteen locations is 75.9 parts per billion (ppb), while the average of the maximum design

values (used by the agency to indicate maintenance problems) of all 19 receptors is 78.1 ppb. *Id.*, JA____.

- Many upwind states make very large contributions to downwind states' ongoing difficulties in attaining and maintaining the standard of 75 ppb. 81 Fed. Reg. at 74,537 tbl.V.E.-1, JA____. For example, pollution from Illinois alone is responsible for 17.9 ppb of ambient ozone pollution in one downwind nonattainment area, while New York alone is responsible for 18.5 ppb in another, and Kentucky contributes 10.88 ppb to one downwind area with maintenance problems (EPA does not specify the downwind areas). *Id.*, JA____.
- "The effect of the [2016 Transport Rule] on the 19 nonattainment and/or maintenance receptors is an average reduction in the average and maximum ozone design values of 0.28 ppb and 0.29 ppb in 2017, respectively." RIA at 3-10, JA_____.

Thus the reductions in downwind ambient air pollution achieved by the Rule are small both in comparison to the severity of nonattainment and maintenance difficulties in downwind areas and to the size of the contributions from upwind states.

A similar pattern holds for Delaware. EPA's own analysis shows that upwind contributions to Sussex County, Delaware, substantially exceed the EPA-defined significance threshold (0.75 ppb):

State	% contribution	ppb
MD	13.48%	9.18
PA	7.19%	4.9
VA	6.30%	4.29
OH	4.30%	2.93
WV	3.42%	2.33
NC	3.23%	2.2
NJ	2.53%	1.72
KY	2.03%	1.38
IN	1.63%	1.11
TX	1.37%	0.93
Total	45.5%	30.97
DE	9.76%	6.65

EPA, Final CSAPR Update Values & Contribution Spreadsheet, JA____ (EPA-HQ-OAR-2015-0500-0459) (Monitor 100051003, line 247). Thus the aggregate contribution of upwind states, including those as far away as Texas, is more than four times Delaware's own contribution (30.97 and 6.65, respectively). Despite this, EPA required no state to reduce emissions through the 2016 Transport Rule to reduce pollution in Delaware.

EPA does not claim that it will require additional emissions reductions to eliminate significant contributions in time for the 2018 attainment deadline. To the contrary, EPA claims that eliminating significant contributions by the deadline is

"not feasible." 81 Fed. Reg. at 74,523/1, JA____. Instead of eliminating all significant contributions, EPA claims that the emission budgets "reflect … those activities that can be implemented by the 2017 ozone season." 81 Fed. Reg. at 74,516/3-17/1, JA____-__. *See also id.* at 74,521/3, JA____ (rule "focuses on … immediately available reductions").

EPA fails to account for several pollution control measures that could have been implemented by the 2017 ozone season. First, the emission budgets do not include reductions that power plants could achieve by engaging pollution control equipment that is already-installed, but idled. EPA concedes that power plants frequently operate without engaging their installed pollution controls, 80 Fed. Reg. at 75,731/3, JA____; Conservation Groups' Comments at 15-16, JA____-__, and that their idled controls "can be restored to operation in no more than a few months." 81 Fed. Reg. at 74,561/3, JA____. Yet rather than requiring reductions it concedes are achievable by engaging idled controls, EPA calculates the emission budgets using historical fleetwide emission averages that reflect power plants' failure to engage their installed controls. 81 Fed. Reg. at 74,543/2-3, JA____.

Second, EPA fails to account for reductions achievable through optimizing the performance of existing controls. EPA concedes that some power plant pollution controls are performing below their capacity, 80 Fed. Reg. at 75,731, JA____, and that their performance could be optimized "quickly"—"within a few

months." 81 Fed. Reg. at 74,517/1, 74,561/3, JA____, ____. But rather than include these achievable reductions in the emission budgets, EPA uses historical fleetwide averages reflective of poorly operated controls, 81 Fed. Reg. at 74,543/2-3, JA____.

Third, the emission budgets fail to account for achievable reductions from "re-dispatch," or shifting power generation from higher-emitting power plants to lower-emitting power plants—another emission reduction approach that EPA concedes is feasible in the near term. 80 Fed. Reg. at 75,712/1, JA____. Conservation Groups submitted comments demonstrating that generation-shifting can reduce nitrogen oxide emissions by approximately 23,000 tons, or an additional 7.5 percent below EPA's calculated budget. Conservation Groups' Comments, App. 1 (Sum Totals tab), JA____. Without responding to those comments, EPA set the emission budgets to require only "minimal" reductions from redispatch, EGU NO_X Mitigation Strategies Final Rule Technical Support Document at 12, JA____ (EPA-HQ-OAR-2015-0500-0554) ("Mitigation Analysis") (budgets reflect reductions of "only around one half of one percent" from redispatch), and even admits that the budgets can be met without any redispatch, 81 Fed. Reg. at 74,547/1, JA____. In addition, although the Conservation Groups' Comments (at 15-16), JA____-__, demonstrate an enormous potential to shift generation between higher- and lower-emitting coal plants, EPA

only accounts for reductions from shifting to natural gas, without responding to the data submitted by commenters.

In addition, the 2016 Transport Rule allows emissions in excess of the calculated emission budgets through use of "banked allowances." EPA implements the calculated emission budgets through an emissions trading scheme. But rather than require sources to reduce their emissions or obtain allowances that correspond to equivalent emission reductions, EPA allows sources to use credits "banked" in 2015 and 2016 under the emissions trading scheme for a different regulatory program—the Transport Rule adopted in 2011 to implement the less-protective 1997 ozone NAAQS. Under the 2011 Transport Rule, sources were allocated allowances based on past emissions, then required to hold allowances in an amount equal to the number of tons of pollution they emitted in each ozone season. 81 Fed. Reg. at 74,563/3, JA____. Sources that emitted below the level of their assigned allowances could trade their allowances to other sources or retain (bank) them.

In the 2016 Transport Rule, EPA allows sources to offset their emissions in 2017 and thereafter with allowances reflecting emissions reductions that occurred in 2015 and 2016 under the prior rule. *Id*. at 74,557-60, JA____-__. EPA states that it authorized the use of banked allowances in the name of economic efficiency, *id.* at 74,561/1, JA____, even though allowances do not constitute property rights, *id.* at 74,559/2, JA____, and even though authorizing the use of these surplus

allowances will enable sources in upwind states to continue levels of pollution that result in significant contribution to violations of the 2008 NAAQS in downwind affected areas.

SUMMARY OF ARGUMENT

EPA acted unlawfully and arbitrarily by adopting emission budgets that do not eliminate upwind states' significant contributions to downwind nonattainment and maintenance areas by the deadlines for attainment of 2008 ozone standard. EPA's claim that it is excused from compliance with this statutory requirement when it acts before the deadline for promulgation of a federal plan is contrary to the plain language of the statute, contrary to decisions of this Court and the Supreme Court, and unreasonable. Further, by failing to provide for pollution reductions achievable in the near-term through engaging already-installed controls, optimizing the use of installed controls, and shifting generation to lower-emitting sources, and by authorizing sources to emit above the budgets through the use of banked allowances, EPA contravened the statutory requirement to eliminate upwind states' significant contributions as expediously as practicable and acted arbitrarily.

Separately, Delaware contends that EPA's application of the rule to marginal nonattainment areas and failure to require reductions of significant contribution to those areas, including Delaware, suffers similar flaws. In addition, EPA

unreasonably failed to consider how its modeling beyond NAAQS attainment deadlines unfairly and permanently shifted the responsibility to reduce pollution from upwind states to downwind areas like Delaware.

STANDARD OF REVIEW

Judicial review focuses on whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(B), (d)(9)(A). When a "statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal citation and quotations omitted). Under *Chevron* step two, EPA's interpretation of ambiguous statutory provisions must be rejected if, among other things, "the agency has [not] offered a reasoned explanation for why it chose that interpretation," *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011), or the interpretation "frustrate[s] the policy that Congress sought to implement," *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008).

EPA's action is arbitrary and capricious if the agency has not considered statutory requirements, *see Massachusetts v. EPA*, 549 U.S. 497, 532-34 (2007); has not explained how its action comports with those requirements, *see Mountain Commc'ns, Inc. v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004); or has acted contrary to its own interpretation statutory requirements. *See BP W. Coast Prods.*

v. FERC, 374 F.3d 1263, 1274 (D.C. Cir. 2004). Agency action is also arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or failed to "identif[y] and explain[] the reasoned basis for its decision," *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996).

STANDING

Petitioners Sierra Club and Appalachian Mountain Club ("Conservation Groups") have standing to bring this suit on behalf of their members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Their members suffer elevated ozone pollution where they live, work, and recreate, due in significant part to emissions of ozone and nitrogen oxides transported from upwind states. *See* Declarations[8]; Final CSAPR Update Values & Contributions Spreadsheet, JA____. By breathing the air where they live, work, and recreate, these members are harmed by their exposure to elevated ozone pollution, including health risks and a diminished ability to engage in and enjoy recreational and aesthetic interests. *See* Declarations. For example, Elizabeth Bennett of Prospect, Jefferson County, Kentucky suffers from asthma, as does her

[8] All declarations are included in the addendum to this brief and referenced as "ADD ____."

granddaughter. Bennett Decl. ¶¶ 4, 6, ADD002. When air quality is poor, Ms. Bennett's breathing becomes heavy and labored, and she and her granddaughter must forgo outdoor activities. *Id*. James Kleissler of Pittsburgh, Allegheny County, Pennsylvania also suffers from asthma, and his symptoms—including shortness of breath, wheezing, tightness of the chest, and coughing—are worse on bad air days. Kleissler Decl. ¶ 6, ADD005. Francis Blake of Houston, Harris County, Texas also has asthma that is aggravated by exposure to increased air pollution. Blake Decl. ¶¶ 6, 11, ADD009. Virginia Bryant of Philadelphia, Philadelphia County, Pennsylvania and Russell Charest of Meriden, New Haven County, Connecticut are among the many Americans put at special risk from air pollution by allergies. Bryant Decl. ¶ 5, ADD013; Charest Decl. ¶ 5, ADD017.

Because the emission budgets adopted by EPA allow upwind states to continue to emit pollution that contributes to elevated ozone emissions where Conservation Groups' members live, work, and recreate, EPA's rule prolongs and increases the harm to their members. The Court can redress this harm by remanding for EPA to adopt a rule that comports with the Clean Air Act, and by vacating the provisions of the final rule authorizing the use of carry-over emission credits for compliance. *See, e.g.*, *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012). Further support for Conservation Groups' standing appears in the materials cited in this brief and in the declarations attached hereto.

Regarding Delaware, states are "entitled to special solicitude in our standing analysis" because they are "quasi-sovereign," having both "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain," and "the last word as to whether its...inhabitants shall breathe pure air." *Massachusetts*, 549 U.S. at 518-20 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). Delaware fulfills its quasi-sovereign duties in protecting its interests in the quality of its environment, the health of its citizens, and the vitality of its economy.

When a litigant is vested with a procedural right, she has standing if there is some possibility that the requested relief will prompt the party causing the injury to reconsider its decision. *Massachusetts*, 549 U.S. at 498. Congress established such a right in 42 U.S.C. § 7607(b)(1), which "is of critical importance to the standing inquiry" because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992)). Delaware availed itself of this right by filing comments and a petition pursuant to 42 U.S.C. § 7607(b)(1). EPA's failure to require states to reduce their upwind pollution violates the Clean Air Act and harms Delaware's ability to comply with Clean Air Act requirements to attain and maintain the NAAQS. For example, two-thirds of Delaware and a substantial majority of its population are

encompassed within two areas that EPA designated as nonattainment for the 2008 ozone NAAQS. Mirzakhalili Decl. ¶3, ADD022. Delaware pays a substantial portion of its state operating budget to Medicaid and Medicare expenses for its residents, many of whom are young, elderly, and/or poor, and thus known to be more vulnerable to adverse health effects from ozone exposure. *Id*. ¶ 5. Further, EPA's failure to protect Delaware from upwind pollution directly harms Delaware by requiring it to obtain reductions from sources in Delaware itself, where further emission reductions from power plants will cost approximately $8,300 a ton for nitrogen oxides. Delaware Comments on 80 Fed. Reg. 75,706, Oct. 22, 2015 Letter (Att. 1) at 5, JA____ (EPA-HQ-OAR-2015-0500-0344) (Feb. 1, 2016) ("Delaware Comments"). The 2016 Transport Rule requires reductions costing $1,400 or less for a ton for nitrogen oxides, and more reductions are easily obtainable at costs substantially less than the next ton of nitrogen oxide reduction from a power plant in Delaware. None of these states adopted a good neighbor plan to prohibit emissions significantly contributing to nonattainment in or interfering with maintenance in Delaware prior to Delaware's attainment date. Then, EPA failed to establish a federal implementation plan to fill that role. By failing to prohibit emissions that significantly contribute to nonattainment and interfere with maintenance in Delaware at lower cost, EPA shifted the burden to Delaware to obtain instate reductions at much higher cost, which harms Delaware's economy

and is not in compliance with the Clean Air Act. For these reasons, Delaware has standing.

ARGUMENT

I. EPA'S ADOPTION OF EMISSION BUDGETS THAT DO NOT PROHIBIT SIGNIFICANT CONTRIBUTIONS BY THE ATTAINMENT DEADLINES IS CONTRARY TO THE CLEAN AIR ACT AND ARBITRARY.

A. Section 7410(a)(2)(D) Requires EPA to Prohibit All Significant Contributions by the Applicable Attainment Deadline.

EPA's obligation under section 7410(a)(2)(D) is to "prohibit[]" sources in upwind states "from emitting any air pollutant in amounts which will contribute significantly to nonattainment … or interfere with maintenance in … any other state with respect to" the 2008 ozone standard. 42 U.S.C. § 7410(a)(2)(D). Further, EPA must prohibit these emissions "consistent" with the other provisions of Title I of the Clean Air Act, including the deadlines for attainment specified in section 7511(a). *North Carolina*, 531 F.3d at 911-13 (quoting 42 U.S.C. § 7410(a)(2)(D)). As EPA concedes, most of the relevant downwind areas were subject, as of the date of the 2016 Transport Rule, to an attainment deadline of July 20, 2018, requiring them to achieve satisfactory air quality during the 2017 ozone season, while others remained subject to attainment deadlines in 2015 and 2016. *Supra* at 8-9; 81 Fed. Reg. at 75,507/3, JA____. Under this circuit's precedent,

> EPA must determine what level of emissions constitutes an upwind state's significant contribution to a downwind nonattainment area "consistent with the provisions of [Title I]," which include the deadlines for attainment of NAAQS, and set the emissions reduction levels accordingly.

North Carolina, 531 F.3d at 913 (emphasis added) (quoting 42 U.S.C. § 7410(a)(2)(D)). *Accord id.* at 911-12.

Rather than heed this requirement, the emission budgets in the 2016 Transport Rule authorize 21 out of 22 covered upwind states to continue emitting pollution that will, according to EPA, contribute significantly to nonattainment (or interfere with maintenance) of the 2008 ozone standard in downwind states in 2017 and future years. *Supra* at 10-11. The Rule thus allows upwind states to continue emitting, past the applicable statutory attainment deadlines, the very pollution that the statute requires EPA to "prohibit[]."

In *North Carolina*, this Court considered and rejected a previous attempt by EPA to promulgate a weak federal good neighbor plan that did not eliminate significant contributions to downwind nonattainment by the attainment deadline. 531 F.3d at 911-12. The federal plan at issue in *North Carolina* consisted of two "Phases," and EPA conceded that the plan would not eliminate the upwind states' significant contribution to downwind nonattainment until Phase 2. *Id.* at 904. Citing feasibility constraints, EPA delayed the start of Phase 2 until 2015—after the 2010 attainment deadline faced by downwind states. *Id.* at 904, 911. North Carolina challenged the rule as inconsistent with Clean Air Act sections

7410(a)(2)(D) and 7511, and this Court agreed. The Court held that, by adopting an approach that only partially addressed upwind states' significant contributions by the attainment deadline, EPA improperly forced downwind nonattainment areas to attain the ozone standard "without the elimination of upwind states' significant contribution," in violation of the "statutory mandate to promulgate [the federal plan] consistent with" provisions requiring downwind states to timely attain the NAAQS. *Id.* at 912.

So here. Several of the downwind nonattainment and maintenance areas addressed by the Rule here are subject to an attainment deadline of July 20, 2018. 81 Fed. Reg. at 74,507/3, JA____. As in *North Carolina*, the 2016 Transport Rule impermissibly leaves these areas to attain the standard "without the elimination of upwind states' significant contribution." 531 F.3d at 912. EPA requires those areas to demonstrate attainment using 2017 data, but has failed to prohibit significant contributions that interfere with attainment and maintenance in that year or later years. EPA thus has failed to "set the emissions reduction levels" consistent with the Act's attainment deadlines, as EPA "must." *Id.* at 913.

Several more downwind areas addressed by the Rule already have failed to attain the 2008 standard by the Act's attainment deadlines. As to these areas, EPA's failure to prohibit significant contributions is therefore causing or contributing to violations of deadlines "central to the regulatory scheme" enacted

by Congress. *Sierra Club*, 294 F.3d at 161. Of the 19 downwind receptors addressed by the 2016 Transport Rule, 13 are located in counties classified in 2012 as being in "marginal" nonattainment of the 2008 ozone standard. 77 Fed. Reg. 30,088, JA____. That marginal classification made them subject to an attainment deadline of July 20, 2015. 80 Fed. Reg.12,264, 12,268, JA____, ____ (establishing "attainment dates that run from the effective date of designation, i.e., July 20, 2012"); 42 U.S.C. § 7502(a)(2)(A) (attainment deadline for "marginal" nonattainment areas is three years after designation); *NRDC*, 777 F.3d at 465-68 (holding that attainment deadlines must run from the date of designation and noting that, under that approach, the attainment deadline for areas in marginal nonattainment of the 2008 ozone standard is "July 20, 2015").

In the absence of effective action to address contributions of pollution from upwind states, 12 of the 13 downwind receptors at issue in this rule located in marginal nonattainment areas failed to attain the 2008 ozone standard by the deadline. 81 Fed. Reg. at 74,533, JA____ (listing receptors); 81 Fed. Reg. at 26,698-99, JA____-__ (listing areas that failed to attain). In response, EPA granted retroactive one-year extensions to several downwind states. 81 Fed. Reg. at 26,698, JA____. Each of those downwind nonattainment areas remained subject to the July 20, 2016 extended attainment deadline when the Rule issued on October 26 of that

year.[9] For states not eligible for an extension of the attainment deadline, EPA determined that they had failed to attain the standard. *Id*. at 26,699, JA____. As a result, those states were "bumped up" by operation of law to a "moderate" nonattainment classification, triggering more stringent pollution reduction obligations for those states. *Id.*; *see also* 42 U.S.C. §§ 7511(b)(2)(A), 7511a(b). These areas now must implement more stringent emission reduction measures in an attempt to attain the standard notwithstanding continued contributions of pollution from upwind states—which EPA has failed to prohibit.

In sum, as of the date of the final 2016 Transport Rule—October 26, 2016—some of the downwind nonattainment areas addressed by the Rule faced an attainment deadline of July 20, 2018, while others had already failed to meet their attainment deadline, triggering more stringent control requirements. Because the emission budgets in the 2016 Transport Rule allow upwind states to continue emitting pollution in amounts that EPA agrees will significantly contribute to downwind states' nonattainment of the 2008 ozone standard (and interfere with maintainance of the standard) in 2017 and future years, the Rule contravenes section 7410(a)(2)(D)'s requirement that EPA prohibit such emissions by the

[9] One downwind nonattainment area addressed by the 2016 Transport Rule—Philadelphia, PA (which includes New Castle County, Delaware)—remains in marginal nonattainment, and subject to an extended attainment deadline of July 20, 2016, as of the date of this brief.

applicable attainment deadlines. *See* 42 U.S.C. § 7410(a)(2)(D); *North Carolina*, 531 F.3d at 908.

B. EPA Was Not Excused from the Obligation to Prohibit Significant Contributions by the Attainment Deadlines When It Issued the 2016 Transport Rule.

EPA seeks to justify its failure to prohibit significant contributions by the attainment deadlines on the ground that the deadline specified in section 7410(c) for promulgation of a federal plan had not expired when EPA issued the 2016 Transport Rule. 81 Fed. Reg. at 74,522/2, JA____ ("[n]othing in [§ 7410(c)(1)]" compels a full remedy). EPA's claims about section 7410(c)(1) are irrelevant, however, because the requirement to prohibit significant contributions by the attainment deadlines is contained in section 7410(a)(2)(D), not section 7410(c)(1). Section 7410(a)(2)(D) provides expressly and without exception that good neighbor plans "shall contain adequate provisions prohibiting" significant contributions "consistent" with the provisions of Title I, without regard to whether the plan issues before the FIP deadline or after. 42 U.S.C. § 7410(a)(2)(D). Both this Court and the Supreme Court have held that EPA is bound by the requirements of section 7410(a)(2)(D) when it promulgates a good neighbor plan. *North Carolina*, 531 F.3d at 912 ("Section 110(a)(2) … requires EPA to consider all provisions of Title I [of the Clean Air Act]—both procedural and substantive—and to formulate a rule that is consistent with them."); *EPA v. EME Homer City*

Generation, L.P., 134 S.Ct. at 1607 (when acting under § 7410(c)(1), EPA is "obligated" to follow § 7410(a)(2)(D), and "cannot avoid the task of" construing and implementing its language).

EPA identifies no authority for the proposition that agencies may flout one statutory requirement (the obligation to prohibit significant contribution by the attainment deadlines) so long as they are not simultaneously in violation of a different statutory deadline (the FIP deadline of § 7410(c)(1))—and there is no such authority. On the contrary, an agency must give effect to all provisions of a statute. *See Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) ("[An agency] must comply with all of its statutory mandates.").

Further, EPA's claim that the statute does not require it to prohibit significant contributions by the attainment deadlines is also unreasonable and arbitrary at *Chevron* step two, because it conflicts with the agency's own interpretation of § 7410(a)(2)(D) described elsewhere in the same rule preamble. EPA concedes that "it would be inconsistent with the [Clean Air Act] for EPA to identify [downwind locations] that are at risk of NAAQS violations … due to transported upwind emissions and then not prohibit [those] emissions." 81 Fed. Reg. at 74,520/1, JA____. Yet "not prohibit [those] emissions" is precisely the course EPA has taken here. Rather than attempting to explain this conflict, EPA simply ignores it; nowhere does the agency indicate how its decision not to

prohibit significant contributions can be reconciled with its own interpretation of § 7410(a)(2)(D). *See BP W. Coast Prods.*, 374 F.3d at 1274 (holding action arbitrary where it conflicted with agency's own interpretation of statute).

EPA also claims, without confronting the language of § 7410(a)(2)(D), or the holding of *North Carolina*, that the Rule is "align[ed]" with the Act's attainment dates, and consistent with *North Carolina*, because its implementation "start[s] with the 2017 ozone season"—"the last full season from which data can be used to determine attainment of the NAAQS by the July 20, 2018 attainment date." 81 Fed. Reg. at 74,507/3, JA____. This justification fails completely as to nonattainment areas subject to attainment deadlines in 2015 and 2016. It also fails as to moderate areas with a deadline of July 20, 2018, because it does not satisfy section 7410(a)(2)(D) or *North Carolina* for EPA merely to "start" reducing emissions by the attainment deadline. As this Court has held, to satisfy the statutory obligation to prohibit significant contributions consistent with the attainment deadlines—deadlines that "leave no room for claims of technological or economic infeasibility," *NRDC*, 777 F.3d at 468—EPA "must" "determine what level of emissions constitutes an upwind state's significant contribution to downwind nonattainment … and set the emissions reduction levels accordingly." *North Carolina*, 531 F.3d at 913 (emphasis added). Indeed, in *North Carolina* itself, EPA had prohibited some significant contributions before the attainment

deadline, while leaving others to be implemented later. The Court rejected that approach as inconsistent with the statute because it forced downwind areas to attain the standard "without the elimination of upwind states' significant contribution." *Id.* at 912 (emphasis added).

C. The "One Step At A Time" Doctrine Does Not Override EPA's Statutory Obligation.

EPA also invokes several cases that approve agency decisions to proceed "one step at a time" as purported justification for its failure to prohibit ozone transport emissions. 81 Fed. Reg. at 74,522/2, JA____. EPA claims that "agencies have the authority to tackle problems in an incremental fashion." *Id.*, JA____. But such general propositions cannot override EPA's specific statutory obligations.

EPA "is a creature of statute." *North Carolina*, 531 F.3d at 922. Where the statute is clear, EPA "must follow the statute," *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016), "even if its choice … would have been otherwise reasonable." *U. S. Sugar Corp. v. EPA*, 830 F.3d 579, 644 (D.C. Cir. 2016). EPA's discretion to act incrementally, therefore, is bounded by statutory requirements. *See Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 413 (D.C. Cir. 2013) ("the one-step-at-a-time doctrine … allows an agency to take incremental steps toward achieving a statutory mandate if taking incremental steps is consistent with the statutory text") (Kavanaugh, J., concurring) (emphasis added).

The cases on which EPA relies confirm this conclusion. None of them hold—or even suggest—that an agency may proceed one step at a time where to do so would override statutory requirements. Rather, each of them simply upholds incremental agency action against the charge that the decision to proceed incrementally was arbitrary and capricious. *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989); *Gen. Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1059 (D.C. Cir. 1989); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1209-14 (D.C. Cir. 1984). *See also Ctr. for Biological Diversity*, 722 F.3d at 410 (describing the issue in *Grand Canyon* as "whether agency's reliance on the one-step-at-a-time doctrine was arbitrary and capricious"). Indeed, *National Association of Broadcasters* specifically recognizes that statutes may define the extent to which agencies may proceed incrementally. 740 F.2d at 1210 (whether agency may defer resolution of problems raised in a rulemaking is not "capable of being captured in a single doctrinal formulation," in part because, "in some circumstances, statutes … mandate" a particular course).

II. EPA'S ADOPTION OF EMISSION BUDGETS THAT DO NOT PROHIBIT SIGNIFICANT CONTRIBUTIONS AS EXPEDITIOUSLY AS PRACTICABLE IS CONTRARY TO THE CLEAN AIR ACT AND ARBITRARY.

In addition to the fixed outside deadlines for attainment of the ozone NAAQS, EPA is also required to prohibit significant contributions "consistent"

with section 7511(a)'s requirement to attain the NAAQS "as expeditiously as practicable." 42 U.S.C. §§ 7410(a)(2)(D), 7511(a). *See North Carolina*, 531 F.3d at 912 (EPA must prohibit significant contributions consistent with "all" provisions of Title I of the Clean Air Act). EPA contravened this requirement and acted arbitrarily by failing to account for several categories emissions reduction that are practicable—indeed, practicable within the 2017 timeframe adopted by the Rule.

A. EPA Unlawfully and Arbitrarily Rejected Emission Reductions Available Through Better and Increased Use of Controls as Well as Redispatch of Electricity Generation.

Even though EPA purports to calculate the emission budgets for upwind states based on what reductions are "achievable by the 2017 ozone season," 81 Fed. Reg. at 74,521/2, 74,516/3-17/1, JA____, ____-__, EPA rejected additional, easily achievable reductions without any rational justification. In doing so, EPA failed to prohibit significant contributions "as expeditiously as practicable" and acted arbitrarily.

First, EPA refused to require reductions in nitrogen oxides that power plants can achieve through better operation of their existing selective catalytic reduction devices ("catalytic devices").[10] In the proposed rule, EPA proposed to set emission

[10] Selective catalytic reduction injects a reagent into flue gas to reduce nitrogen oxides to molecular nitrogen and water. EPA, Air Pollution Control Technology Fact Sheet, EPA-452/F-03-032, JA____, *available at* https://www3.epa.gov/ttncatc1/dir1/fscr.pdf (last checked July 13, 2017).

budgets requiring that power plants with installed catalytic devices reduce their emissions of nitrogen oxides to an average of 0.075 pounds per million British thermal unit ("lbs/MMBtu"). 81 Fed. Reg. at 74,544. In response, commenters submitted emissions data showing that more than 150 existing coal-fired power plants with catalytic devices achieve nitrogen oxide emission averages lower than .065 lbs/MMBtu. Conservation Groups' Comments at 12-15, JA____-__. Commenters explained that higher fleetwide average emissions reflect "operational choices," not technological limitations: many catalytic devices are "poorly or irregularly operated." *Id*. at 15, JA____. Further, catalytic devices "can be readily improved or tuned to achieve greater reductions." *Id*. at 16, JA____.

In the final rule, EPA actually *increased* the emissions rate from proposal—to 0.1 lbs/MMBtu, or 35 percent higher than the .065 lbs/MMBtu rate that units with catalytic devices are achieving. Although EPA agreed at proposal that some catalytic devices "are being underused," some "are not fully operating," and some "have been idled for years," 80 Fed. Reg. at 75,731-32, JA____-__, and never revised that assessment, EPA persisted in basing the emissions budgets on fleetwide ozone-season averages reflective of poorly operated controls, rather than the levels that have been demonstrated to be achievable when catalytic devices are operated correctly. 81 Fed. Reg. at 74,543, JA____. EPA failed to provide any

reasoned explanation why a rate reflective of poorly operated or idled control devices represents the greatest practicable reduction. *See* 81 Fed. Reg. at 74,543-44, JA____-__. By adopting an emissions rate that reflects poorly operated or idled control devices, EPA failed to prohibit significant contributions as expeditiously as practicable, 42 U.S.C. § 7511(a), and "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard." *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 56. *See also United Techs. Corp. v. DOD*, 601 F.3d 557, 562-63 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions.").

Second, EPA arbitrarily declined to require emissions reductions achievable from "re-dispatch," that is, shifting of electricity generation from higher-emitting to lower-emitting power plants. EPA agrees that upwind states can reduce their emissions of nitrogen oxides by this method, but its emission budgets provide for only small reductions from redispatch. Commenters submitted a detailed analysis showing that upwind states could easily achieve much greater nitrogen oxides reductions through redispatch, "helping to close the gap between the propos[al] and what is necessary to fully resolve significant contributions to ozone transport." Conservation Groups' Comments at 16 & App. 1, JA____ & ____.

EPA failed to respond to Sierra Club's comment, and persisted in assuming only admittedly "minimal" reductions from redispatch in the emission budgets.

Mitigation Analysis at 12, JA____ (calculating reductions of "only around one half of one percent"). The final emission budgets, EPA concedes, can be met "without re-dispatch." 81 Fed. Reg. at 74,547/1, JA____. EPA does not deny that redispatch could yield greater reductions, or give any reason why the additional achievable reductions should not be incorporated into the emission budgets. EPA thus failed to prohibit significant contribution as expeditiously as practicable and failed to "identif[y] and explain[] the reasoned basis for its decision" not to include greater reductions from redispatch in the budgets. *See Transactive Corp.*, 91 F.3d at 236 (pronouncing action arbitrary). Further, EPA's "failure to respond to contrary arguments" on this point "epitomizes arbitrary and capricious decisionmaking." *Ill. Pub. Telecomm. Ass'n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997).

EPA also failed to incorporate any reductions from redispatch from poorly controlled to better controlled coal units, which the Conservation Groups' analysis show would yield large, easily achievable reductions. Conservation Groups' Comments at 16 & App. 1, JA____ & ____. EPA incorporated only generation shifts from coal units to natural gas units. Mitigation Analysis at 12-13, JA____-__. EPA failed to respond to these comments, and gave no reason for declining to include reductions based on redispatch between coal units, let alone a reason consistent with the statutory obligation to prohibit significant contributions as expeditiously as practicable. Mitigation Analysis at 12, JA____; EPA, Response to

Comments at 528-32, JA____-__ (EPA-HQ-OAR-2-015-0500-0572). This too was unlawful and arbitrary. *Ill. Pub. Telecomm. Ass'n*, 123 F.3d at 694; *Transactive Corp.*, 91 F.3d at 236.

Apart from EPA's failures to respond to comments and to articulate reasonable explanations for rejecting all of these achievable reductions, in each instance EPA failed to acknowledge or apply its statutory obligation to prohibit significant contributions "as expeditiously as practicable." 42 U.S.C. §§ 7410(a)(2)(D), 7511(a). EPA's decisions are therefore "untethered to Congress's approach," and fail at *Chevron* step two. *NRDC*, 777 F.3d at 469.

B. EPA's Refusal to Eliminate Banked Allowances is Unlawful and Arbitrary.

The 2016 Transport Rule incorporates a provision that allows sources to "bank" nitrogen oxide allowances generated under the prior Transport Rule for use in future compliance periods. EPA thus creates an allowance glut that will prolong and exacerbate significant contribution to downwind areas. By failing to prohibit significant contributions that will prevent downwind areas from meeting attainment deadlines, *North Carolina*, 531 F.3d at 912, and by failing to secure downwind attainment "as expeditiously as practicable," 42 U.S.C. § 7511(a)(1), EPA acted unlawfully and arbitrarily.

Under the 2016 Transport Rule, unused emission allowances are banked for use in a future compliance period. 81 Fed. Reg. at 74,557/1, JA____. EPA's final

rule describes the buildup of surplus allowances generated under the prior version of the Transport Rule, estimating that—due to this buildup—about 350,000 banked allowances would likely be available at the start of the 2017 ozone season. *Id*. at 74,558/1, JA____. EPA identifies several factors that led to this buildup during the period between Transport Rule promulgation in 2011 and implementation of Transport Rule budgets in 2015, including increases in natural gas supply, decreases in natural gas prices, and increases in wind and other low- or zero-emitting renewable energy resources. *Id*. at 74,558/3, JA____; *see also* 80 Fed. Reg. at 75,746/1-2, JA____.

As EPA admits, the massive buildup of these surplus allowances poses a significant threat to the effectiveness of the 2016 Transport Rule in reducing nitrogen oxide emissions and resulting harmful ozone pollution:

> this anticipated total of banked allowances reflects the fact that the seasonal NO_X emissions budgets established in CSAPR are to a significant extent *not acting to constrain actual NO_X emission levels* during the ozone season.

81 Fed. Reg. at 74,558/1, JA____ (emphasis added). "[N]ot acting to constrain actual NO_X emission levels" means that the 2016 Transport Rule would provide no actual emission benefits, a complete failure of EPA's statutory mandate to prohibit a significant contribution to downwind pollution and prevent the harmful effects of ozone that EPA itself has identified. In fact, EPA goes on to note that the total expected banked emission allowances equals *five times* the *total* emission

reduction potential that informs the emission budgets under the 2016 Transport Rule. *Id*. at 74,558/1-2, JA____.

In comments (at 18), JA____, the Conservation Groups urged that EPA not allow use of allowances generated under a previous, weaker NAAQS (the 1997 NAAQS) to override good neighbor obligations under a newer, more protective NAAQS (the 2008 NAAQS). The Conservation Groups also noted that the enormous pool of surplus allowances could mean that no real reductions in nitrogen oxide emissions will occur for many years beyond the 2017 ozone season—indeed, until that pool runs dry. Conservation Groups' Comments at 19, JA____. Further, EPA's proposed rule regarding banked allowances runs the risk that actual resolution of transport obligations under the 2008 NAAQS will be postponed indefinitely. *Id*., JA____.

In the final rule, EPA applied a one-time conversion of banked 2015 and 2016 allowances for use in 2017 and thereafter. EPA estimates this will result in the banking for future use of 99,700 allowances. 81 Fed. Reg. at 74,560/1, JA____. This amount is more than the annual 2017 electric generating unit nitrogen oxide ozone season budget for any of the 22 states subject to the 2016 Transport Rule—in fact, banked emission allowances under EPA's final rule exceed the *three largest* state 2017 budgets *combined*. *Id.* at 74,553, JA____. The availability of

these allowances will authorize—indeed, incentivize—sources of air pollution in upwind states to buy allowances instead of reducing pollution.

Overall, EPA's final rule fails to protect downwind states from significant contributions of pollution. Regarding banked allowances, EPA itself notes that "it is feasible to implement the final CSAPR Update rule emission budgets that the EPA is promulgating in this action, *even without availability of banked allowances for compliance*." *Id*. at 74,559/3, JA____ (emphasis added). That is, banked allowances are not necessary at all to implement final emission budgets and the 2016 Transport Rule. Moreover, EPA affirms that in its original Transport Rule provisions, "the agency explicitly reserved its authority to *eliminate or revise allowances* issued in a given compliance year." *Id*., JA____ (emphasis added). EPA also explicitly confirms that such allowances do not constitute property rights. *Id.* at 74,630/2, JA____. Thus, there are no legal barriers to eliminating allowances altogether. Under these circumstances, there can be no dispute that disallowing the use of banked allowances—and commensurately reducing significant contributions from upwind states—is immediately "practicable."

EPA's unlawful use of banked allowances suffers from another fundamental flaw: it applies allowances generated under the prior 1997 ozone standard of 80 ppb (and its related state budgets under the original Transport Rule) to emissions and budgets under the 2008 ozone standard of 75 ppb. However, nitrogen oxide

reductions under the 1997 ozone standard—and its different, weaker benchmark of public health protection—do not ensure the prohibition of "significant contribution" under the more protective 2008 ozone standard at issue now. EPA concedes as much:

> Banked compliance instruments with respect to the 1997 ozone NAAQS in 2015 or 2016 *are not inherently interchangeable* with emission reductions needed to address interstate emission transport for the 75 ppb 2008 ozone NAAQS starting in 2017.

Id. at 74,559/3, JA____ (emphasis added). EPA cannot lawfully apply obsolete excess allowances generated under a less stringent standard to authorize continued significant contribution to nonattainment (and interference with maintenance) under the current, more protective standard. Indeed, EPA's violation is particular egregious in the context of a rule that already—even apart from the banked allowances—fails to prohibit significant contribution under the 2008 standard. *See* Part I, *supra*.

In short, the decision to authorize those additional, banked emissions represents a violation of the statutory requirement to eliminate the significant contribution by statutory downwind nonattainment deadlines, as well as the requirement to secure downwind attainment "as expeditiously as practicable."

III. EPA'S FAILURE TO PROHIBIT UPWIND STATES' SIGNIFICANT CONTRIBUTIONS OF POLLUTION TO DELAWARE IS

INCONSISTENT WITH STATUTORY TIMELINES AND ARBITRARY.[11]

A. EPA's Significant Contribution Analysis for Delaware is Inconsistent With Statutory Timelines.

The good neighbor plan is one of many state implementation plan (SIP) requirements in 42 U.S.C. § 7410 that become the blueprint for attaining and maintaining compliance with a new NAAQS. EPA acknowledges in its Final Rule that "[s]ubmission of interstate transport SIP requirements [good neighbor plans] is one of the first chronological actions in NAAQS implementation." 81 Fed. Reg. at 74,516/1-2, JA____. Section 7410(a)(2)(D) requires good neighbor plans at the time of SIP development, in order to reduce upwind pollution contributing to nonattainment at the same time that pollution within a nonattainment area is being reduced. This fairly distributes the responsibility and costs of reducing the pollution that causes unhealthy air quality among the parties contributing to the pollution.

For the 2008 ozone NAAQS, SIPs (with good neighbor plans) were due on March 12, 2011.[12] Except for three moderate nonattainment areas with attainment deadlines of July 20, 2018, the remaining areas designated nonattainment with the 2008 ozone NAAQS for which the 2016 Transport Rule is designed to achieve

[11] The issues in this section are raised by Delaware.
[12] 42 U.S.C. §7410(a)(1) requires state implementation plans to be submitted within three years of promulgation of a new or revised NAAQS.

reductions were all designated as marginal areas with attainment deadlines of July 20, 2015.[13] Here, upwind states did not establish good neighbor plans according to 42 U.S.C. § 7410(a)(2)(D). The 2016 Transport Rule is EPA's attempt to fulfill those obligations.

However, the 2016 Transport Rule does not fill the gap caused by upwind states' inaction because EPA failed to link its analysis of significant contribution to the Clean Air Act timeline. EPA did not adopt a plan based on the actual data of contribution of states to nonattainment or interference with maintenance in other states *at the time the good neighbor plans* were required by 42 U.S.C. § 7410(a)(2). EPA's projections for 2017 showed that several states (Maryland, Pennsylvania, Virginia, Ohio, West Virginia, North Carolina, New Jersey, Kentucky, Indiana and Texas) continued to contribute greater than significance levels to Delaware's nonattainment with the ozone NAAQS. EPA, 2017 Ozone Contributions Spreadsheet, JA____ (EPA-HQ-OAR-2015-0500-0007). Yet no action was taken to reduce this pollution for Delaware's benefit prior to Delaware's July 20, 2015 attainment dates.[14]

---

[13] 77 Fed. Reg. 30,088 (May 21, 2012), JA_____; 81 Fed. Reg. 74,504, JA____.

[14] Sussex County Delaware was designated a marginal nonattainment area. 77 Fed. Reg. at 30,111, JA____. New Castle County was designated marginal as part of the Philadelphia Nonattainment area. *Id.*, JA____. Attainment dates were modified to July 20, 2015 at 80 Fed. Reg. 12,264, JA____.

Although upwind states refused to fulfill their statutory obligations to reduce upwind contribution and EPA failed to fulfill its statutory obligation to rectify that deficit, Delaware made every effort to fulfill its obligation to attain. Today, Delaware instate emissions contribute less than 9 percent of its ozone pollution. Final CSAPR Update Values & Contribution Spreadsheet, lines 242-247, JA____-__. In Delaware, the next ton of nitrogen oxides reduced from an EGU will cost approximately $8,300, and these emissions control requirements disproportionately burden Delaware's local industry, which has been subject to repeated efforts to attain the ozone NAAQS. Delaware Comments, Oct. 22, 2015 Letter (Att. 1) at 5, JA____. By contrast, the 2016 Transport Rule imposes controls projected to cost only $1,400 per ton of emission reductions in upwind states that contribute over 4 times Delaware's contribution to its maintenance problems.

EPA has failed to require any state to reduce its significant contribution to Delaware relevant to the 2008 ozone NAAQS. In the absence of the abatement of upwind pollution, Delaware has been forced to effectively "cover" the pollution reductions the Clean Air Act require upwind states to abate in order to progress toward attainment. EPA's subsequent failure to require upwind reductions violates the Clean Air Act because it shifted the burden to Delaware to continue to permanently "cover" the reductions that should have been required according to the 42 U.S.C. § 7410(a)(2)(D) in the original SIPs (or subsequent FIP if the states

fail to fulfill their responsibility). EPA's explanation for why it used the year 2017 for modeling is that it is the year when EPA intended to implement the Rule and that it was attempting to not "overcontrol" in 2017. This explanation completely ignores the critical fact that 2017 is beyond the attainment date for marginal areas and ignores the statutory obligations of states to try to attain even in the absence of reductions in transported pollution. Had EPA based its analysis of significant contribution on data from the time that the original SIPs were due according to the Clean Air Act (and prior to marginal nonattainment dates), EPA would have required states to reduce pollution for the benefit of Delaware that was significantly contributing to its nonattainment problems. This would have re-shifted the portion of the burden upwind states are required to shoulder under the good neighbor provisions of section 7410(a)(2)(D) and effectuated the purposes of the good neighbor SIPs (to prohibit upwind pollution so that downwind areas do not solely carry the burden to attain and maintain). EPA's failure to base its 2016 Transport Rule in the statutory timeframes punishes downwind states who have made every effort to comply with their statutory obligations to attain and unlawfully relieves upwind states of their requirement to prohibit emissions that significantly contribute to downwind nonattainment or interfere with maintenance. EPA's rationale for using 2017 air quality projections to determine significant contribution is unreasonable and frustrates the purpose of section 7410(a)(2)(D),

which is to require reductions in upwind pollution in a timely manner to enable downwind states to attain and maintain the NAAQS, and the Rule is unlawful.

B. EPA's Refusal to Require Upwind States to Reduce their Pollution Significantly Contributing to Delaware Based on Emissions Projections for a Single Year That is After the Attainment Deadline is Unlawful, Arbitrary, and Inconsistent with the Statutory Purpose to Secure Attainment and Maintenance of the NAAQS.

EPA explained its rationale for using 2017 for both its modeling analysis and the implementation date of the 2016 Transport Update:

> The EPA is aligning implementation of the final rule with the relevant attainment dates for the 2008 ozone NAAQS, as required by the D.C. Circuit's decision in *North Carolina v. EPA*. The EPA's final 2009 Ozone NAAQS SIP Requirements Rule established the attainment deadline of July 20, 2018 for ozone nonattainment areas currently designated as Moderate. Because the attainment date falls during the 2018 ozone season, the 2017 ozone season will be the last full season from which data can be used to determine attainment with the NAAQS by the July 20, 2018 attainment date.

81 Fed. Reg. at 74,507, JA____ (citations omitted). As explained above, *supra* at 29-30, EPA's suggestion it complied with the attainment deadlines by requiring reductions that start in 2017 is untenable. The claim is particularly absurd with respect to marginal nonattainment areas like Delaware, which faced attainment deadlines in 2015 and 2016.[15] Consequently, Delaware and other marginal

[15] As discussed in the section above relative to burden shifting, EPA could have created a rule based on information about contribution prior to attainment dates to

nonattainment areas were required to attain in July 2015 without any realization of reductions from good neighbor plans required by 42 U.S.C. § 7410(a)(2)(D). The 2016 Transport Rule does not remedy the omissions.[16]

EPA based its determination of whether states would be required to reduce significant contribution for another state based on projected air quality measurements for one year—2017. Delaware pointed out that the model assumed air quality outcomes based on how the economy and energy-based market forces likely affect major emission related parameters such as fuel prices, source shutdowns, new source construction, and the impact of new emission control requirements. Given these issues and other major factors that impact ozone formation and transport such as weather and meteorological patterns, Delaware would be unable to attain and maintain the NAAQS without reductions in transported pollution. Delaware Comments, Oct. 22, 2015 Letter (Att. 1) at 3, JA____. EPA's one year of modeling data indicated to EPA that Delaware's air quality met the design value and no upwind state would need to reduce its contributions in order for Delaware to attain and maintain. However, the Clean Air Act has more requirements for attaining than merely demonstrating for one year

---

craft a rule applicable after the attainment date that would have still addressed contribution from prior years.

[16] Even as to moderate areas, the Rule is inadequate, since it only requires small reductions in 2017, which is the third of the three years for which air quality will be measured to determine attainment.

that the air quality meets the design value. First, the state must demonstrate that the area attained the standard (showing the three consecutive years immediately prior to the attainment date meet the design value). 42 U.S.C. § 7407(d)(3)(E)(i). Additionally, the state must present an approvable maintenance plan demonstrating that the air quality measurements meeting the design value are due to permanent and enforceable pollution emissions reductions in order to be re-designated attainment/maintenance. 42 U.S.C. § 7407(d)(3)(E)(iii) & (iv).

Thus, even if Delaware's air quality attains the 2008 standard by measurable data by the extended 2016 attainment deadline, Delaware cannot be reclassified to attainment without demonstrating that lowered pollution is due to permanent and enforceable pollution emissions reductions. Delaware submits that its aggressive attempts to attain coupled with economic forces may have temporarily shifted towards electric generating units that emit less pollution and those market forces coupled with unusual weather conditions may have allowed actual measurements within Delaware to be below design values.[17] However, market forces and unusual weather conditions are insufficient to justify a reclassification to attainment or

[17] Delaware's New Castle County is part of the Philadelphia Attainment Area that was required to attain by July 20, 2015. Although EPA has issued proposed findings of attainment for both Delaware areas, the Philadelphia Area is based on the issuance of an Extension Year that is the subject to a pending challenge before this Court in *State of Delaware v. EPA*, No. 16-1230 which has been fully briefed and argument is scheduled for October 5th.

support a maintenance SIP. Delaware Comments, Oct. 22, 2015 Letter (Att.1) at 2-8, JA____-__. Nor should Delaware be required to permanently shoulder the burden for reductions other states were required to make (but failed to make) pursuant to 42 U.S.C. § 7410(a)(2)(D). Further, the newest data is indicating that air quality in Delaware's New Castle County nonattainment area is exceeding the design values in 2016 and 2017. Mirzakhalili Decl. ¶3.

As a result, either Delaware's nonattainment area will be "bumped up" to moderate nonattainment or determined to be attainment. Either scenario results in Delaware being unnecessarily subjected to additional Clean Air Act requirements. If the Delaware area is bumped up to moderate nonattainment, Delaware has no in-state emissions it can reduce as part of a revised SIP but could be subjected to sanctions and increased offset requirements. Alternatively, if the area is determined to have three years of clean data, EPA will determine the area met the NAAQS. But Delaware will be unable to prepare a maintenance SIP pointing to sufficiently permanent or enforceable emissions reductions—because it believes the compliant design values are due more to unusual weather conditions and economic forces than to permanent and enforceable emissions reductions. Delaware simply wants EPA to enact a rule that enables it to achieved healthy air quality and fulfill its obligations to attain and maintain pursuant to the entirety of the Clean Air Act. EPA's response is that it cannot address transported emissions when it had not

identified a problem with attainment or maintenance and that the D.C. Circuit has confirmed the EPA's reliance on future year projections for purposes of identifying downwind air quality problems for purposes of interstate transport. This explanation ignores the fact that the 2016 Transport Rule was promulgated after Delaware had already implemented air pollution reductions to attain the standard. EPA's obligation to avoid overcontrol is no excuse for its failure to address upwind pollution in accordance with the Act's timelines.

North Carolina, which EPA relies on to support its future year projections, also required EPA to ensure its approach to interstate transport is consistent with all of the procedural and substantive requirements in Title I. 531 F.3d at 912-13. Indeed, EPA's failure to act consistent with the Act's timelines, including the marginal attainment dates, is why it has not identified a problem for Delaware with attainment or maintenance. EPA's failure to respond to these problems with its decisions in how to identify downwind air quality problems for purposes of interstate transport, creates a situation where upwind states are relieved of their obligations and the burden on states like Delaware is compounded.

EPA's multiple errors in crafting this Rule include using future year projections beyond marginal attainment dates, using a model that is based on projections of use of power plants that relies on economic projections, using an emissions trading schedule that allows the use of banked emissions, and claiming

that because of the timing of when it enacted the Rule EPA had no obligation to completely address transport. However, the end result is that EPA's action is unlawful and unreasonable because it failed to adopt a good neighbor plan that effectuates the purpose of the statute—to prohibit pollution that significantly contributes to nonattainment or interferes with maintenance in downwind states, including Delaware.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioners respectfully ask the Court to remand the Rule to EPA without vacatur, with instructions to promulgate a federal implementation plan free from the defects identified above. In light of several areas' current or impending failure to attain the 2008 ozone standard by the deadlines established by Congress, Petitioners submit that EPA should be ordered to promulgate a final FIP within six months from the date of remand. *See Delaney v. EPA*, 898 F.2d 687, 695 (9th Cir. 1990) (providing a six-month timeline for promulgation of a FIP). Further, Petitioners request vacatur of the 2016 Transport Rule to the extent it allows the use of allowances banked prior to the 2017 ozone season for compliance.

Delaware respectfully requests that the Court instruct EPA that the revised federal implementation plan must eliminate upwind pollution that significantly

contributed to nonattainment or interfered with maintenance of the ozone standard prior to the marginal attainment deadlines.

DATED: September 18, 2017

Respectfully Submitted,

s/ Charles McPhedran
Charles McPhedran
Earthjustice
1617 JFK Boulevard, Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

Neil Gormley
David Baron
Earthjustice
1625 Massachusetts Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
ngormley@earthjustice.org
dbaron@earthjustice.org

Counsel for Sierra Club and Appalachian Mountain Club

Joshua R. Stebbins
Zachary M. Fabish
Sierra Club
50 F Street NW, 8th Floor
Washington, DC 20001
(202) 675-7917
josh.stebbins@sierraclub.org
zachary.fabish@sierraclub.org

Counsel for Sierra Club

s/ Valerie S. Edge
Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636
valerie.edge@state.de.us

Counsel for State of Delaware Department of Natural Resources & Environmental Control

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with the Order Setting the Briefing Format and Schedule entered on September 6, 2017, the foregoing **Proof Opening Brief of Petitioner Conservation Groups and Petitioner State of Delaware** contains 11,299 words, as counted by counsel's word processing system, and thus complies with the 12,000 word limit established by the Court's Order.

Further, this document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) & (a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **14-point Times New Roman** font.

DATED: September 18, 2017

/s/ Charles McPhedran
Charles McPhedran

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2017, I have served the foregoing **Proof Opening Brief of Petitioner Conservation Groups and Petitioner State of Delaware,** including the Addendum thereto, on all registered counsel through the Court's electronic filing system (ECF).

/s/ Charles McPhedran
Charles McPhedran