ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2015

No. 11-1302 and consolidated cases (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,
v.
Environmental Protection Agency, *et al.*,
Respondents.

On Petition for Review of a Final Order of the
United States Environmental Protection Agency

CORRECTED CONSOLIDATED BRIEF OF INTERVENOR SAN MIGUEL ELECTRIC COOPERATIVE, INC. AND AMICUS SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONERS ON REMAND

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and amici appearing in this Court and all rulings and related cases are listed in the Rule 28(a)(1) statement in the Opening Brief of Industry and Labor Petitioners on Remand. Intervenor adopts the Certificate as to Parties, Rulings, and Related Cases set forth in that brief.

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There are no authorities upon which this brief chiefly relies.

GLOSSARY

CAA	Clean Air Act
CAIR	Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 FR 25,162 (May 12, 2005)
CSAPR	Cross-State Air Pollution Rule
EGU	Electric Generating Unit
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
JA	Joint Appendix
MW	Megawatt
NAAQS	National Ambient Air Quality Standard(s)
NO_x	Nitrogen Oxide
$PM_{2.5}$	Fine Particulate Matter
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
Transport Rule	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals 76 FR 48,208 (Aug. 8, 2011)

RULE 26.1 CERTIFICATE OF INTERVENOR AND AMICUS

San Miguel Electric Cooperative, Inc. (San Miguel) is a 400 MW, mine-mouth, lignite-fired electric generating unit (EGU) located in Atascosa County, Texas, roughly 45 miles south of San Antonio. San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. and South Texas Electric Cooperative, Inc. San Miguel is a not-for-profit electric cooperative, small business entity, incorporated in the State of Texas under the Electric Cooperative Corporation Act, Tex. Util. Code, Chapter 161. San Miguel does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public and no publicly owned company has an ownership interest in San Miguel.

Southeastern Legal Foundation, Inc. (SLF) is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly-held corporation has 10% or greater ownership interest in SLF.

JURISDICTIONAL STATEMENT

EPA published the Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208 (Aug. 8, 2011) (the "Transport Rule") under 42 U.S.C. § 7601(a). Petitions for review were timely filed on or before October 7, 2011, invoking the Court's jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether EPA lacked statutory authority to impose Federal Implementation Plans for the 1997 NAAQS and the 2006 NAAQS on a majority of the States subject to the Transport Rule.

2. Whether EPA has a basis to impose emissions limitations under the annual sulfur dioxide (SO_2) and nitrogen oxide (NO_X) programs of the Transport Rule, and whether EPA has "overcontrolled" Texas in contravention of Section 110(a)(2)(D)(i)(I) of the Clean Air Act (CAA) by requiring Texas to reduce emissions by more than the amount necessary to achieve attainment and maintenance in every downwind State to which it is linked.

3. Whether EPA violated its statutory requirements to provide adequate, detailed notice and a meaningful opportunity to comment on the Transport Rule.

STATUTES AND REGULATIONS

The text of the relevant statutes, including 42 U.S.C. §§ 7410, 7505a, and 7607, are reproduced in the Joint Petitioners' Addendum to Circuit Rule 28(a)(5).

STATEMENT OF THE CASE

Intervenor adopts the Statement of the Case in the Opening Brief of Industry and Labor Petitioners on Remand.[1]

SUMMARY OF ARGUMENT

I. In the Clean Air Act (CAA), Congress gave States primary responsibility for crafting the means by which they would comply with national ambient air quality standards (NAAQS) requirements through State Implementation Plans (SIPs). Congress provided specific instructions regarding when EPA could initiate Federal Implementation Plans (FIPs) if States failed to meet their responsibilities. For 22 States with approved good-neighbor SIPs for the 1997 NAAQS, EPA has attempted to circumvent Congress' scheme by rewriting the history of their previously approved SIPs to allow EPA to impose FIPs without the rulemaking required by 42 U.S.C. § 7410(k)(5). For 10 States that had submitted good-neighbor SIPs for the 2006 NAAQS, EPA short-circuited

[1] San Miguel is located in Texas. Therefore, this brief is focused on the Transport Rule's impact on Texas. However, no argument included herein should be construed to contradict, limit, or otherwise affect the arguments made by the other petitioners in this matter.

the SIP disapproval/FIP initiation process contemplated by Congress by proposing FIPs for States with pending SIP submittals.

II. The Transport Rule overcontrols Texas electric generating units (EGUs) by imposing draconian emissions limitations on them. EPA's sole "link" justifying Texas' inclusion in the annual SO_2 program is Texas' alleged "significant contribution" to nonattainment of a single monitor in Madison, Illinois. This is a monitor located near a steel mill, in an area that EPA has found to be in attainment today and where relevant emissions – both in Texas and near the receptor – were projected to decrease under a base-case scenario, without the imposition of the Transport Rule. The data also demonstrates that the Transport Rule overcontrols Texas with regard to impacts on downwind states' ozone concentrations, as the two areas EPA identified as having links to Texas have been found to have attained the relevant ozone NAAQS. EPA has failed to justify the burdensome emissions reductions the rule imposes, which have resulted in significant overcontrol in contravention of the CAA.

III. EPA failed to provide CAA-required notice and comment opportunity to San Miguel or the State of Texas regarding Transport Rule requirements prior to finalization. Therefore, EPA may not impose any annual SO_2 and NO_X program requirements on Texas, until EPA has fulfilled the CAA's notice and comment requirements.

ARGUMENT

I. EPA LACKED STATUTORY AUTHORITY TO IMPOSE FIPS FOR THE 1997 NAAQS AND THE 2006 NAAQS ON A MAJORITY OF THE TRANSPORT RULE STATES.

In *EPA v. EME Homer City, Generation, L.P.*, - 134 S. Ct. 1584 (2014), the Supreme Court held that when a State failed to submit a good-neighbor SIP revision addressing a new NAAQS, EPA had no obligation to provide the State a second SIP submittal opportunity before EPA promulgated a FIP under 42 U.S.C. § 7410(c). *Id.* at 1609-10. Conversely, as the Court made clear, EPA's authority under § 7410(c) to promulgate a FIP does not exist without either an EPA finding of a State's "failure to submit" a required SIP or EPA's "disapproval" of a SIP submitted by a State: "[O]nce EPA has found a SIP inadequate, the Agency has a statutory duty to issue a FIP 'at any time' within two years (unless a State first 'corrects the deficiency'…)." *Id.* at 1600.

As the Supreme Court explained, "EPA's FIP authority is triggered at the moment the Agency disapproves a SIP," *id.* at 1598. But, that "moment" arises only after notice-and-comment rulemaking by EPA on a SIP submitted to EPA for approval. *See Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973) ("EPA's consideration of, and its subsequent approval or disapproval of, a SIP is a rulemaking action subject to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §553."). Once the rulemaking is completed and a SIP is

disapproved, the EPA FIP "authority" that is "triggered" is the authority to propose and promulgate a FIP in accordance with rulemaking requirements for specific EPA rules, including FIPs. *See NRDC v. Train*, 421 U.S. 60, 70 (1975) ("Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies" the requirements of 42 U.S.C. § 7410.); 42 U.S.C. § 7607(d)(1)(B).

In August 2010, EPA proposed Transport Rule FIPs establishing a multi-state program addressing the 1997 NAAQS for ozone and $PM_{2.5}$ and the 2006 NAAQS for $PM_{2.5}$. *See* 75 Fed. Reg. 45210 (Aug. 2, 2010). At that time, 22 of the States subject to the proposed Transport Rule FIPs had EPA-approved good-neighbor SIPs implementing both of the 1997 NAAQS ("CAIR SIPs"). *Id.* at 45341-42. In addition, at that time, 10 States had submitted good-neighbor SIPs for the 2006 NAAQS and were awaiting a separate EPA rulemaking addressing whether those SIPs should be approved or disapproved. *See, e.g.*, 76 Fed. Reg. 14831 (Mar. 18, 2011) (proposed disapproval of Kansas's interstate transport SIP revision for the 2006 $PM_{2.5}$ NAAQS). The existence of approved CAIR SIPs for 22 States and the absence of EPA disapproval of SIPs for 10 other States meant, for separate and distinct reasons discussed below, that EPA lacked authority to "devise" (*i.e.*, propose) and later "promulgate" good-neighbor FIPs for those States for those NAAQS. How, therefore, could EPA justify including these States in the

Transport Rule program without prior findings of "failures to submit" SIPs or promulgating final rules "disapproving" SIPs? EPA answered with two unlawful solutions.

A. EPA's "Correction" of 1997 NAAQS CAIR SIP Approvals for 22 States.

For 22 States, EPA chose an Orwellian measure (which EPA revealed only upon promulgation of the final Transport Rule). As noted above, in approving each CAIR SIP, EPA had found that the SIP met all the good-neighbor requirements for the 1997 NAAQS. *See, e.g.*, 73 Fed. Reg. 25516, 25517 (May 7, 2008). None of the rules fully-approving these 22 good-neighbor SIPs were challenged under § 7407(b). In addition, these 22 fully approved SIPs (and their required emission reductions) were "federally enforceable." 42 U.S.C. §§ 7413(a), 7602(q). If EPA decided to "disapprove" them retroactively, as EPA had done for a different type of SIP in *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013), however, there would be no federally enforceable good-neighbor SIP emission reduction requirements in place for these States. As a result, in an attempt to create retroactive FIP authority while leaving good-neighbor emission reduction requirements in place, EPA decided the record of what happened in those 22 SIP approval rulemakings had to be altered in an attempt to change the legal consequences of those prior approvals. 76 Fed. Reg. at 48220.

Before promulgation of the Transport Rule, EPA had, after notice-and-comment rulemaking, approved these good-neighbor SIPs "in full," 42 U.S.C. § 7410(k)(3), finding that they met all applicable good-neighbor SIP requirements for the 1997 NAAQS. In order to revive "findings of failure" that preceded full approval of the 22 good-neighbor SIPs, EPA simply erased the earlier rulemaking findings supporting full approval of these SIPs. As EPA put it: "EPA is … correcting its prior approvals of SIP submissions … to rescind any statements that the CAIR related SIP submissions either satisfy or relieve the State of the obligation to submit a SIP to satisfy … [good neighbor] requirements … with respect to the 1997 … NAAQS." 76 Fed. Reg. at 48220. With the disappearance of these inconvenient EPA findings supporting the prior EPA approvals, EPA reasoned that the 22 CAIR SIP submittals would be retroactively transformed into submittals that did not satisfy the 1997 NAAQS good-neighbor requirements, while at the same time the emission requirements in those still-approved good-neighbor CAIR SIPs would remain federally enforceable.

Nothing in administrative law, or in the judicial review scheme of the Clean Air Act, allows EPA to change the legal effect of previously promulgated legislative rules except through a new rulemaking. Section 7410(k)(6) clearly does not give EPA this authority, as explained at length in the State Petitioners' Brief. *See* State and Local Petitioners' Opening Brief on Remand ("State Br.") at

5-16. CAA "findings" supporting a rule may subsequently prove erroneous, but unless the rule supported by those findings is set aside by a court in a § 7407(b) judicial review proceeding, it remains binding on regulated parties and on EPA until revised or repealed. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 659 (D.C. Cir. 1975). None of these 22 CAIR SIPs were even subject to a review proceeding under § 7407(b) following EPA approval. Because these good-neighbor SIPs were fully approved, EPA lacked any good-neighbor FIP authority with respect to the 1997 NAAQS and these 22 States.

B. The 10 States Submitting Good-Neighbor SIPs for the 2006 NAAQS.

The proposed Transport Rule FIPs included FIPs for 10 States that had submitted good-neighbor SIPs for the 2006 NAAQS, which EPA had neither approved nor disapproved when it proposed good-neighbor FIPs for these States. EPA's "authority" to develop FIPs for States with submitted SIPs, however, could arise only as a result of EPA's first disapproving a SIP submittal. Indeed, while the Clean Air Act contemplates that States will have at least the opportunity to submit a new SIP that "corrects" any identified deficiency in a SIP submittal before FIP promulgation, 42 U.S.C. § 7410(c)(1), EPA published its disapprovals of these submittals in the Federal Register only *after* the Transport Rule FIPs were signed, making any revised SIP to "correct . . . the deficiency" identified in the

disapproval impossible.[2] More broadly, because EPA had not disapproved a submitted SIP at the time EPA proposed Transport Rule FIPs for these 10 States, these FIPs, from start to finish, were outside EPA's authority to promulgate in the Transport Rule. *See* State Br. at 31-33 (argument of Kansas and Indiana).

In *EME Homer City*, the Supreme Court did not address the merits of the FIP-related questions raised by the 22 previously-approved good-neighbor SIPs, 134 S. Ct. at 1599 n.12, and noted that petitions for review had been filed challenging 3 of the 10 SIP disapprovals, *id*. at 1598 n.11. The issue that the Supreme Court resolved was whether § 7410(c) required EPA to provide States that did not submit an approvable SIP a "second bite at the apple" to submit a SIP that EPA would have to approve or disapprove before EPA could exercise its FIP authority. *EME Homer City* did not consider whether EPA could devise a FIP that would identify and correct deficiencies in a SIP submittal, where that submittal was awaiting an EPA rulemaking on its approval or disapproval.

Between 1970 and 1990, § 7410(c) required proposal of a FIP 90 days after an EPA "disapproval" or an EPA finding of "failure to submit," and required EPA promulgation of a FIP 90 days therafter, EPA therefore was clearly precluded from

[2] The EPA Administrator signed the Transport Rule on July 6, 2011. *See* 76 Fed. Reg. at 48353. Two weeks later, EPA published in the Federal Register disapprovals of good-neighbor SIPs submitted by ten States covered by the 2006 $PM_{2.5}$ FIPs. *See, e.g.*, 76 Fed. Reg. 43143 (July 20, 2011).

devising a FIP and *initiating* a FIP rulemaking for a State without a finding of failure or a SIP disapproval. *Train,* 421 U.S. at 79. In 1990, Congress amended Section 7410(c), to extend the FIP promulgation schedule to two years. This extension of the FIP promulgation schedule, however, did not change the requirements governing EPA's authority to initiate FIP rulemaking. As the Court in *EME Homer City* explained, EPA's FIP authority is triggered by a "disapproval" or a finding of "failure to submit" and, once triggered, FIP promulgation must occur within two years. *EME Homer City*, 134 S. Ct. at 1602 n. 14 (EPA's authority to issue a FIP "begins the moment EPA determines a SIP to be inadequate."); *see also Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (1990 amendments to § 7410 "did not modify the 'division of responsibilities *Train* had discerned in the [CAA]").

San Miguel recognizes that, in summarizing the history of the case, the Supreme court described § 7410(c) as allowing EPA "to promulgate a FIP *immediately after* disapproving … [an inadequate] SIP." 134 S. Ct. at 1598 (emphasis added). To the extent that this statement is cited as support for EPA's devising a FIP *before* disapproving a pending SIP submittal, an issue that was not addressed by the parites, it would require this Court to conclude that the Supreme court held that the 1990 amendments substantially expanded EPA FIP authority without that Court addressing *Train* or the legislative history described in *Virginia*.

To the extent that the description suggests that a 42 U.S.C. § 7607(d) rulemaking could be initiated and completed instantaneously upon completion of a 42 U.S.C. § 7410(k)(3) "disapproval" rulemaking, it does not account for § 7607(d)'s detailed notice-and-comment rulemaking requirements. In terms of the question presented here – whether § 7410(c) authorizes FIP proposal before SIP disapproval – this sentence, summarizing EPA's authority under § 7410(c), is dicta.

Indeed, an interpretation of § 7410(c) under which EPA could postpone even beginning an "approval/disapproval" rulemaking on a pending SIP submittal until months after initiating a FIP rulemaking to correct deficiencies in that pending submittal would make no sense. At a minimum, it would raise questions about EPA's pre-judging the SIP "approval/disapproval" rulemaking. To interpret § 7410(c)(1) to permit EPA to "hide the ball" by simultaneously disapproving SIPs and promulgating FIPs would render meaningless the language in § 7410(c) that allows States whose good-neighbor SIPs had been disapproved the opportunity to "correct the deficiency" by submitting a new SIP.[3] This result is inconsistent with the State/federal relationship established by Congress in § 7410.

The Supreme Court in *EME Homer City* understood that States have the right to fashion, in the first instance, SIPs that implement ambiguous statutory

[3] While such SIP submittals would not delay EPA's obligation to promulgate a FIP in two years, they would discharge EPA's obligation to promulgate a FIP if the submittal were approved by EPA. *See EME Homer City*, 134 S. Ct. at 1601.

requirements like the good-neighbor provision. *See* 134 S. Ct. at 1601 n.13 (Quoting briefs from earlier D.C. Circuit litigation that emphasized state discretion to formulate good-neighbor SIPs, and that EPA's role "is to determine whether the SIP submitted is 'adequate' . . . not to dictate contents of the submittal in the first instance . . . ."). Given the discretion that must be exercised in formulation of a SIP, any SIP submitted by a State may be expected to reflect different policy choices than those EPA might make in a FIP. For example, the phrase "contribute significantly to nonattainment" is not generically defined in any EPA rule governing SIP submittals. As a result, States have discretion to give that term content in developing good-neighbor SIPs. Among other things, States could choose to define contribution "thresholds" and "cost effectiveness" criteria for emission reductions in ways that differ from the ways EPA would define them.

When EPA disapproves a SIP submittal, it must find that the submittal fails to meet "minimum" SIP requirements governing the submittal, and must, in any SIP disapproval action, specifically identify those SIP deficiencies. *Train*, 421 U.S. at 79. Section 7410(c) requires SIP disapproval before FIP proposal in order, not to postpone FIP promulgation, but to provide the State an opportunity to submit a SIP that will "correct" identified deficiencies in enough time for EPA to approve the SIP before the FIP promulgation deadline.

C. Remedy

The 22 States with approved good-neighbor CAIR SIPs should not have been included in the Transport Rule FIPs for the 1997 NAAQS. For entirely different reasons, the 10 States with pending good-neighbor SIPs for the 2006 NAAQS should also not have been included. All these States should have been put on a separate, and later, good-neighbor FIP track, one that would be initiated by a SIP call under § 7410(k)(5) for the 22 CAIR States and by a final disapproval (followed by a FIP proposal) for the 2006 NAAQS SIP submittal States. As the industry and state petitioners' briefs detail, the Transport Rule has numerous deficiencies that require rejection of the upwind/downwind linkages relied upon to support individual FIPs. Additionally, much time has passed since the Transport Rule was promulgated in 2011, with substantial reductions occurring across the region. States targeted in the Transport Rule for substantial upwind reductions to protect downwind nonattainment areas now find that those areas today have been re-designated "attainment" by EPA. As a result, if the Transport Rule is not vacated in its entirety, as State and Local Petitioners request, this court should stay further compliance with the Transport Rule and direct EPA to complete before January 1, 2016, the rulemaking needed to correct deficiencies identified by the Court and revise emission budgets and allowance allocations for 2016.

II. THE TRANSPORT RULE UNLAWFULLY AND UNNECESSARILY OVERCONTROLS EMISSIONS FROM TEXAS EGUS.

The Transport Rule requires Texas "to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked." *EME Homer City*, 134 S. Ct. at 1608 (emphasis omitted). Petitioners have effectively outlined how EPA's regulations of Texas EGUs in the Transport Rule conflict with the Supreme Court's decision in *EME Homer City*, the CAA, and case law. To supplement this discussion, it is important to gain perspective of the scale of Texas' alleged contribution to the $PM_{2.5}$ nonattainment reading at the Madison, Illinois, monitor relative to the compliance obligations imposed on Texas and outline the actual conditions of downwind receptors of Texas emissions. EPA has ignored these conditions and issued a Transport Rule that overcontrols Texas emissions.

A. Texas' Alleged Contribution to the Madison, Illinois Monitor is Miniscule.

Texas' modeled contribution to the Madison, Illinois, monitor is 0.18 µg/m^3– 0.03 µg/m^3 above the 0.15 µg/m^3 significance threshold for the 1997 $PM_{2.5}$ NAAQS. 76 Fed. Reg. at 48240 (tbl.V.D-1). To provide a sense of scale, assuming that a single resident of Madison, Illinois, inhaled the maximum amount of exterior air, every day over a 70 year lifetime, a 0.18 µg/m^3 contribution would

result in that person breathing in 82.4 milligrams of $PM_{2.5}$.[4] Assuming also that a standard sweetener packet (e.g. Splenda) contains 1,000 milligrams, the alleged individual receptor exposure in Madison, Illinois attributed to Texas' amounts to the inhalation of less than a twelfth of a Splenda packet of $PM_{2.5}$ spread out over a period of 70 years. It is remarkable that this is the "significant contribution" that EPA relies upon to require Texas EGUs to reduce SO_2 emissions by over 50%, which constitutes the second largest initial SO_2 reduction of any state and is comparable to the major reductions required of SO_2 "Group 1" States such as Illinois, Missouri, and Pennsylvania, even though Texas' modeled $PM_{2.5}$ contribution is less than half of the least of those other states' contributions. *Compare* 76 Fed. Reg. 49305 (Table VIII.A-3), *with* JA3497 ("2010" column) *and compare id.* at 48240-41 (Tables V.D-1, V.D-2), *with id.* at 48305 (Table VIII.A-3); *see also id.* at 48214, 48252 (reflecting the distinction between Group 1 States and Group 2 States such as Texas, *see id*. at 48213 (Table III-1).

[4] The calculation necessary to derive this mass of inhalation over the average human lifetime is not in the record, though the underlying data is in the record. This illustration is not offered to establish that overcontrol has occurred as the State and Local Petitioners' Brief on Remand and the Opening Brief of Industry and Labor Petitioners on Remand have established that based exclusively on the record. Rather, this calculation is provided for illustrative purposes and perspective only and can be replicated using commonly accepted toxicological exposure calculation methodologies, such as those found in TCEQ Regulatory Guidance No. 442, *TCEQ Guidelines to Develop Toxicity Factors* (October 2012).

B. Actual Emissions and Air Concentration Data Demonstrate that the Transport Rule is Overcontrolling Texas' Emissions.

The Transport Rule relies on the effect of Texas' $PM_{2.5}$ emissions on a single monitor – the Granite City Monitor (171191007) in Madison, Illinois – as the means to bring Texas into the annual programs of the Transport Rule, and ultimately require Texas EGUs to reduce their SO_2 emissions by over 50%. *See* 76 Fed. Reg. at 48241 (tbl.V.D-2) (annual $PM_{2.5}$ NAAQS), 48243 (tbl.V.D-5) (24-hour $PM_{2.5}$ NAAQS).[5] Conditions at the monitor demonstrate that these reductions are not necessary and should not be imposed on Texas.

As an initial matter, EPA has already "determined that the most recent air quality data establish that the" area where the Madison Monitor is located "meets the [annual] $PM_{2.5}$ NAAQS." 76 Fed. Reg. 29652, 29654 (May 23, 2011). To the extent that there are attainment concerns for $PM_{2.5}$ in the area of the monitor, local conditions are driving these concerns. The Madison Monitor is located near the U.S. Steel-Granite City Works ("USS-GCW") steel plant. *See* 76 Fed. Reg. at 29653. In finding that the monitor is in attainment with the annual $PM_{2.5}$ NAAQS, EPA cites data illustrates that the area's $PM_{2.5}$ concentrations are dependent on the

[5] EPA did not issue a FIP to Texas based on the 24-hour $PM_{2.5}$ NAAQS, 76 Fed. Reg. at 48214, and Texas's emission budgets are based only on the annual $PM_{2.5}$ NAAQS. For the "percentage" SO_2 reduction calculation, compare JA1873 (2008–2010 actual SO_2 emissions of approximately 454,000–484,000 tons under CAIR), *with* 76 Fed. Reg. at 48262 (tbl.VI.D-3) (2012–2014 SO_2 budget of 243,954 tons); *see also* JA3499 (required NO_X reductions).

operation of the nearby steel plant. *Id.*[6] Even with the USS-GCW steel plant's role as the primary contributor to $PM_{2.5}$ concentrations in the area of the Madison Monitor, EPA concludes that "data suggest a downward trend in $PM_{2.5}$ concentration even in years with similar levels of steel production …, suggesting that air quality has improved as a result of long-term emission reductions from sources throughout the Saint Louis area and elsewhere." *Id.* at 29654. Further, EPA has noted that further controls – resulting from a Memorandum of Understanding – entered into by U.S. Steel and the State of Illinois "[wa]s expected to provide significant reductions of $PM_{2.5}$ emissions from [the steel mill] by the start of 2012 and again in spring 2013." *Id.*

In addition to local reductions in $PM_{2.5}$, EPA has already found that SO_2 emissions from Texas were declining without the effects of CAIR, and would only decline further, once CAIR limitations were in place. Compare Primary Response to Comments at 564 (JA1873) with Emissions Inventory TSD at 104-06 (JA3164-JA3166).[7] Thus, EPA's models predict that Texas "contributes significantly" to

[6] EPA's data indicates a recorded annual $PM_{2.5}$ average of 11.3 µg/ m^3 during 2009, a year of reduced operation, compared to 14.3 µg/m^3 in 2010. 76 Fed. Reg. at 29654.

[7] Comparing Texas EGU SO_2 emissions by year in thousands of tons: 2008 Emissions – 484; 2009 Emissions – 454; 2010 Emissions – 461; 2012 Final Base Case – 446. EPA, in response to comments, noted that "EPA agrees with the commenter that Texas EGUs have reduced their SO_2 emissions since 2005…EPA

"nonattainment" in an area that is in attainment today and where relevant emissions—both in the upwind state and near the receptor—are projected to decrease without CSAPR (or CAIR).

The Transport Rule links Texas to projected ozone attainment and maintenance problems in two locations: Baton Rouge, Louisiana and Allegan, Michigan, respectively. 76 Fed. Reg. at 48246. However, these two areas attained the relevant ozone NAAQS under CAIR. *See* 75 Fed. Reg. 54778 (Sept. 9, 2010); 75 Fed. Reg. 58312 (Sept. 24, 2010). Further, NO_X emissions that cause ozone have been falling steadily—a trend EPA projected would continue, both nationwide and for Texas, even without the Transport Rule (or CAIR). San Miguel and other Texas EGUs are subject to NO_X reduction requirements that will remain in place regardless of what happens to the Transport Rule (or CAIR). *See* 30 TEX. ADMIN. CODE § 117.3010(1)(A). As a result, San Miguel's (and other Texas EGUs') NO_X emissions will continue to be reduced in order to meet the requirements of the Texas program and a further ratcheting down of emissions limitations is not necessary to assure attainment or maintenance in Baton Rouge, Louisiana or Allegan, Michigan.

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also notes that its projected 2012 base case EGU SO_2 emissions are lower than recent historical emissions in Texas." JA 1873.

In sum, for the downwind areas linked to Texas for ozone and $PM_{2.5}$, there can be no "significant contributions to nonattainment" by Texas – or any other state – as EPA has found that these areas are meeting relevant NAAQS.

C. EPA's Emissions Limitations Target One Industry, Resulting in the Overcontrol of Emissions from EGUs.

In the Transport Rule, EPA measured upwind state contributions to downwind ozone and $PM_{2.5}$ concentrations from *all* sources of upwind pollutants. *See* 76 Fed. Reg. 48224-25. EPA then issued FIPs assigning emissions limitations to EGUs within each of those upwind states in an effort to reduce these states' contributions to linked downwind states.[8] EGUs, however, are not the sole sources of emissions of these pollutants. *See* 76 Fed. Reg. at 48225.[9] For NO_X emissions, EGUs only generate a fraction of Texas' emissions. For SO_2 emissions, EGUs

[8] The methodology that EPA used to calculate emissions reductions budgets is being addressed by the other petitioners in this matter. San Miguel opposes this methodology, and nothing herein should be construed to support EPA's methodology.

[9] The Transport Rule explains: "The inventories for all years include emission estimates for EGUs, non-EGU point sources, stationary nonpoint sources, onroad mobile sources, nonroad mobile sources, and biogenic (non-human) sources. EPA's air quality modeling relies on this comprehensive set of emission inventories because emissions from multiple source categories are needed to model ambient air quality and to facilitate comparison of model outputs with ambient measurements. In addition, EPA considers all relevant emissions (regardless of source category) when determining whether a state is found to be significantly contributing to or interfering with maintenance of a particular NAAQS in another state." 76 Fed. Reg. at 48225.

contribute a larger percentage of the State's overall emissions, but still far from the entirety of emissions impacting downwind states.[10] Despite this fact, EPA promulgated FIPs that limit solely EGU emissions, rather than attempting to identify the sources responsible for the alleged "significant contribution" to the downwind state.

Rather than assessing the actual portion of upwind state EGUs contribution to downwind state nonattainment in order to determine "significant contribution," EPA has looked to entire state's emissions (including non-EGU point sources, stationary nonpoint sources, mobile sources, etc.) and assigned an entire state's emissions burden on that state's EGU source category.

CAA §110 states that a SIP shall "prohibit[], 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 national primary or secondary ambient air quality standard." 42 USC § 7410(a)(2)(D)(i)(I) (emphasis added). This language clearly states that the "contribute significantly" metric must relate to a specific source category. The CAA does not allow for EPA to assess statewide emissions and then

[10] Compare State-level Total NO_X Emissions to State-Level EGU Emissions, Emissions Inventory TSD at 100-106 (JA3164-JA3166).

impose restrictions requiring a single point source category of emissions to bear the burden of controlling all of the downwind impacts of the upwind states' numerous point and non-point sources.

By requiring upwind states' EGUs to bear all of the emissions reductions obligations, EPA has acted arbitrarily and capriciously. Texas EGU emissions are only a portion of the overall state emissions contributing to ozone and $PM_{2.5}$ concentrations in downwind states. Returning to Texas' impacts on $PM_{2.5}$ attainment in Madison, Illinois, even if EPA's projections regarding Texas' contributions to the monitor were true, Texas' EGUs, which contribute but a percentage of overall downwind impact, are contributing at a rate below the contribution level. Despite this, the Transport Rule is only looking towards Texas EGUs to make assigned emissions reductions, which results in overcontrol of Texas EGU emissions and the failure of EPA to ensure that the Transport Rule impose limitations on the "source[s]…contribut[ing] significantly" to $PM_{2.5}$ nonattainment in Madison, Illinois, and ozone nonattainment in Baton Rouge, Louisiana, and maintenance in Allegan, Michigan.

III. INADEQUATE NOTICE AND OPPORTUNITY TO COMMENT

The notice-and-comment requirements applicable to the Transport Rule rulemaking are found in CAA § 307(d). 42 U.S.C. § 7607(d). The CAA requires that any proposed rulemaking include:

> "(A) the factual data on which the proposed rule is based;
>
> (B) the methodology used in obtaining the data and analyzing the data; and
>
> (C) the major legal interpretations and policy considerations underlying the proposed rule."

42 U.S.C. § 7607(d)(3). These requirements are more stringent than the notice and comment requirements of the APA. *See Union Oil Co. v. EPA*, 821 F.2d 678, 681-82 (D.C. Cir. 1987).

While some modifications are allowed between rule proposal and rule finalization, neither the CAA nor case law contemplates the kinds of changes made regarding Texas. EPA in the Transport Rule Proposal excluded Texas from the Rule's annual SO_2 and NO_X programs; EPA concluded that modelling did not show Texas sources significantly contributing to downwind nonattainment of the $PM_{2.5}$ NAAQS. 75 Fed. Reg. 45255-67, 45282-84. EPA sought comment on only one specific matter relating to Texas. This was whether emissions in Texas, along with other states, might increase after the finalization of CSAPR, based on EPA's speculation that potential changes in coal prices may result in increases in SO_2 emissions. 75 Fed. Reg. 45284. The request for comments was based on "this reason" alone. *Id.* Abandoning this reasoning in the final rule, EPA stated in its response to comments that:

> EPA notes that Texas is included in the final rule as a result of the state's contributions to downwind receptors in the **updated base case modeling**, thus, the comments on whether SO_2 emissions in Texas might increase if the state were not covered (as was projected in the modeling for the proposal) **are no longer relevant**.

JA 1872 (emphasis added).

By finding that the request for comments and the comments submitted were not relevant, EPA acknowledged that it failed to solicit comments that would have been relevant to the final rule.

Between proposal and finalization, EPA changed the substance and methodology of the rule, and ultimately concluded that Texas was a "significant contributor" of $PM_{2.5}$ to the Madison Monitor and included Texas in the SO_2 and NO_X annual programs. 76 Fed. Reg. at 48241 (Table V.D.-2), 48305-06, discussed *supra*. EPA argues that "the proposal made clear that Texas's contributions to nonattainment in Madison County were very close to the applicable significant contribution thresholds." EPA Brief for Respondents at 110. The only thing EPA cites as providing this clarity is an Air Quality Technical Support Document (TSD) buried in the docket which included a data table showing Texas's less-than-"significant contribution" to a number of monitors, including the Madison monitor. EPA Brief for Respondents at 108, n. 69.

EPA's argument has two fatal flaws. First, the existence of table that, among a list of monitors, included the Madison monitor showing contribution from Texas below the applicable significance threshold hardly put Texas on notice that its contribution would be increased in the final rule. Moreover, as discussed above, EPA itself in May 2011 found that the area where the Madison Monitor is located met the annual $PM_{2.5}$ NAAQS. Therefore, EPA is not only arguing that Texas should have predicted – of the countless monitors in the U.S. – the one monitor that Texas might significantly contribute to if data and modeling methodologies changed in the final rule, EPA expected Texas to make this determination for a monitor that available evidence indicated was is in attainment at the time.

EPA also attempts to deflect the notice problem by asserting that Texas made a "strategic choice" not to comment on potential inclusion in the annual programs. EPA Brief for Respondents at 110. This is simply not true. If Texas, or Texas regulated entities, had been provided notice on these issues, they would have certainly commented.

EPA next asserts that EPA's changed treatment of Texas from the Proposed Rule to the Transport Rule was the result of corrected data regarding Texas emissions sources. EPA Brief for Respondents at 109. EPA fails to support this position or explain how that might have been the case. In fact, applying so called

"corrected and updated" data to the original Rule Proposal methodology yields the conclusion that Texas would still not be making a significant $PM_{2.5}$ contribution. Decl. of Ralph E. Morris, ¶¶ 3, 17-20, Case No. 11-1315, Doc. No. 1336040 (Exh. 11) (JA3703).

As stated by the D.C. Circuit, EPA may not finalize a rule based on "unexpressed intentions." *Shell Oil v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). In order to provide appropriate notice and opportunity to comment, the CAA requires that a final rule be a "logical outgrowth" of the proposed rule. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518-19, 548 (D.C. Cir. 1983). Texas could only have been expected to comment on the requirements contemplated in the Transport Rule Proposal, and not divine that (1) EPA would change its methodology and rulemaking approach, and conclude that Texas was significantly contributing to the Madison Monitor and (2) that a "significant contribution to nonattainment" could occur given that the facts at the time showed the monitor to be in attainment.

Texas was entitled to receive notice of changes to the factual bases and methodology that would make it subject to the key substantive requirements of the Rule Proposal – the annual programs. But by taking comment solely on a now "irrelevant" rationale, substantially changing its methodology, and reversing its

conclusions regarding the inclusion of Texas in the annual SO_2 and NO_X programs, EPA failed to provide that notice and opportunity to comment and violated the requirements of the CAA. *See* 42 USC § 7607(d).

Finally, EPA has argued in prior briefing that pending petitions for reconsideration, including that of San Miguel, foreclose the petitioners claims regarding notice and Texas' inclusion in the annual SO_2 and NO_X programs. Specifically, EPA in its Brief for Respondents filed during the initial proceedings before this Court, stated that "[a]pproximately 62 petitions for administrative reconsideration are currently pending before EPA. In the absence of a decision by EPA denying a petition for reconsideration, judicial review of any claims raised solely in such administrative petitions is premature." EPA Brief for Respondents at 97-98.

It has been over three years since these Petitions for Reconsideration were filed, and EPA has still failed to Act. *See* Texas Docketing Statement, Addendum at 1-3 (Doc. No. 1337359). EPA is effectively holding these claims hostage, attempting to prevent judicial review on issues central to the questions before the Court. But EPA's attempt to prevent this review is invalid. The Court has jurisdiction to review EPA's failure to provide notice under the All Writs Act, 28 U.S.C. § 1651(a). *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (mandamus relief is available to prevent agencies from thwarting judicial

review); *Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 170 (D.C. Cir. 1985) (a petition for review may be treated as a petition for writ of mandamus). Finally, EPA's defense that pending administrative reconsiderations prevent judicial review could not apply to notice challenges brought by Texas (and entities within Texas, such as San Miguel), which EPA explicitly addressed in the final rule. 76 Fed. Reg. 48214. The Court need not wait to rule on these notice issues.

RELIEF

If the Court does not vacate the Transport Rule in its entirety as requested by the State and Local Petitioners, the Court should remand the Transport Rule to EPA to recalculate emission budgets and EPA should not be allowed to maintain unlawful emission budgets indefinitely by delaying rulemaking on remand. Thus, if the Transport Rule is not vacated in its entirety, this Court should direct EPA to complete the necessary rulemaking before January 1, 2016, so that EPA can promulgate lawful emission budgets, and make any necessary adjustments to allowance allocations for 2016, before that year's compliance period commences.

CONCLUSION

This Court should hold that the Transport Rule is beyond EPA's statutory authority and constitutes arbitrary agency action and direct the remedy discussed above.

Respectfully submitted,

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Dated: December 12, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that this brief has been prepared in Microsoft Word using 14-point Times New Roman typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 6,010 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1), and does not exceed 8,750 words, as mandated by this Court's October 23, 2014, Order (Doc. No. 1518738). Microsoft Word was used to compute the word count.

/s/ Michael Nasi
Michael Nasi

CERTIFICATE OF SERVICE

On December 12, 2014, this corrected brief was electronically filed and served via CM/ECF on all registered counsel. I further certify that I have caused a true and correct copy of the foregoing to be sent by First Class Mail to the following:

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