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October 1, 2008

-VIA HAND DELIVERY -

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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COMMISSION CLERK

Re: Docket No. 080007-EI

Dear Ms. Cole:

I am enclosing for filing in the above docket the original and seven (7) copies of Florida Power & Light Company's Request for Official Notice of Petitions for Rehearing of D.C. Circuit Opinion Vacating CAIR, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows XP, and the word processing software is Word 2003.

If there are any questions regarding this transmittal, please contact me at 561-304-5639.

Sincerely,

John T. Butler

COM
ECR 1 Enclosure
GCL 1 cc: Counsel for parties of record (w/encl.)
OPC
RCP 2
SSC
SGA 1
ADM
CLK

* CD forwarded to ECR.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Environmental Cost Recovery Clause	))	DOCKET NO. 080007-EI FILED: October 1, 2008

FLORIDA POWER & LIGHT COMPANY'S REQUEST FOR OFFICIAL NOTICE OF PETITIONS FOR REHEARING OF D.C. CIRCUIT OPINION VACATING CAIR

Florida Power & Light Company ("FPL") hereby requests that the Commission take official notice, pursuant to section 90.202 of the Florida Statutes, of petitions for rehearing and rehearing *en banc* that were filed by the following parties with the United States Circuit Court of Appeals for the District of Columbia Circuit on September 24, 2008, concerning that Court's July 11, 2008 opinion vacating the United States Environmental Protection Agency's Clean Air Interstate Rule ("CAIR"):

1. The United States Environmental Protection Agency;
2. The National Mining Association;
3. The Environmental Intervenors (*i.e.*, the Environmental Defense Fund, the National Resources Defense Council, and the United States Public Interest Research Group); and
4. The Utility Air Regulatory Group.

Copies of the above petitions are attached to this Request.

The applicable appellate rules do not specify a time period for the Court to act on petitions for rehearing or rehearing *en banc*, so it is not possible at this time to predict when the attached petitions will be resolved. As FPL has previously pointed out in the August 4, 2008

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prepared testimony of R. R. LaBauve, parties also will have the right to petition the Supreme Court of the United States for a writ of certiorari within 90 days after the petitions are resolved.

Respectfully submitted,

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By: _____
John T. Butler
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CERTIFICATE OF SERVICE
Docket No. 080007-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on the 1st day of October, 2008, to the following:

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Fla. Bar No. 283479

ORAL ARGUMENT HELD March 25, 2008
PANEL DECISION ISSUED JULY 11, 2008

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

No. 05-1244 and consolidated cases

STATE OF NORTH CAROLINA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

PETITION FOR REHEARING OR REHEARING EN BANC

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September 24, 2008

DOCUMENT NUMBER-DATE
09286 OCT-1 08
FPSC-COMMISSION CLERK

ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH CAROLINA, et al. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Docket No. 05-1244 (and consolidated cases)

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 35(c), counsel for respondent United States Environmental Protection Agency ("EPA") submits this certificate as to parties.

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

These cases are consolidated petitions for review of final agency actions, not appeals from the ruling of a district court.

(II) Parties to These Cases

Petitioners:

AES Corp. and its United States subsidiaries; AES Beaver Valley, LLC; AES Warrior Run, LLC; and Constellation Energy Group, Inc. (Nos. 05-1259 and 06-1226)

ARIPPA (Nos. 05-1249, 06-1242, and 06-1243)

City of Amarillo, Texas; Occidental Permian, Ltd.; and Southwestern Public Service Co. d/b/a Xcel Energy (Nos. 05-1260, 06-1228, and 06-1230)

Duke Energy Corp. (No. 05-1262)

Duke Power Co. LLC, d/b/a Duke Energy Carolinas, LLC (No. 06-1217)

Entergy Corp. (Nos. 05-1251, 06-1227, and 06-1229)

Florida Association of Electric Utilities (Nos. 05-1252 and 06-1235)

FPL Group, Inc. (Nos. 05-1253, 06-1240, and 06-1241)

Inter-Power/AhlCon Partners (No. 06-1245)

Minnesota Power, a Division of ALLETE, Inc. (Nos. 05-1246 and 06-1238)

Northern Indiana Public Service Co. (No. 05-1254)

South Carolina Electric & Gas Co. (Nos. 05-1256, 06-1222, and 06-1224)

South Carolina Public Service Authority and JEA (Nos. 05-1250, 06-1236, and 06-1237)

State of North Carolina (Nos. 05-1244, 06-1232, and 06-1233)

Respondent:

United States Environmental Protection Agency (all cases)

Amici:

States of Connecticut, New York, New Jersey, Delaware, Illinois, Massachusetts, Maryland, New Hampshire, New Mexico, and Rhode Island, and Washington, D.C.

Commonwealth of Pennsylvania

Tennessee Valley Authority

Intervenors for Respondent:

Environmental Defense

Midwest Generation, LLC

National Mining Association

Natural Resources Defense Council, Inc.

Ohio Environmental Council

U.S. Public Interest Research Group

Utility Air Regulatory Group

Alabama Power Company

There are no Intervenors for Petitioners.

Respectfully submitted,

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September 24, 2008

INTRODUCTION

Respondent United States Environmental Protection Agency ("EPA") seeks rehearing *en banc*, or in the alternative, Panel rehearing of the Panel's vacatur of the Clean Air Interstate Rule ("CAIR") and its associated Federal Implementation Plans. (Decision attached as Attachment 1). EPA is not seeking further review of the Panel's holdings with regard to "interference with maintenance," the 2015 date for full implementation of CAIR, or inclusion of Minnesota in CAIR.[1] Thus, EPA recognizes that a remand of CAIR is required. However, EPA seeks rehearing or rehearing *en banc* of the Panel's holding that CAIR must be vacated. The issue of remedy was not addressed in the briefs; thus the Panel did not have the opportunity to consider the public health, environmental, and economic harms that will result from vacatur of CAIR, including tens of thousands of premature deaths, heart attacks, emergency room visits, and lost school and work days. Furthermore, the Panel's holding is based on the apparent belief that CAIR's regional trading approach was significantly different from the one upheld by this Court in Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). The Panel's decision turns primarily on the fundamental legality of using an interstate trading program to address the requirements of Clean Air Act section 110(a)(2)(D)(i), 42 U.S.C. § 7401(a)(2)(D)(i), an issue no party contested. Thus the issue was not addressed in EPA's brief. As a result, there is significant information in the record not presented to the Panel demonstrating that the CAIR trading program used the same fundamental approach approved by Michigan. EPA also seeks rehearing *en banc* of the Panel's holding that EPA lacks authority to require sources to surrender allowances created under CAA Title IV to comply with the requirements of CAIR.

En banc consideration is merited under Rule 35. Alternatively, panel rehearing is merited under Rule 40. Consideration of the full record demonstrates that the Panel's decision is

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[1] As discussed below, these issues can be addressed by EPA on remand while CAIR is being implemented. With regard to the 2015 date for the second phase of CAIR, EPA believes that, upon reconsideration, it may be able to present additional information sufficient to demonstrate that CAIR would eliminate significant contribution as expeditiously as practicable. Slip Op. at 59. For example, because of the incentives created by a cap-and-trade program, the second phase of CAIR will achieve significant additional emission reductions that contribute to attainment *prior* to 2015. This issue was not briefed and thus not considered by the Panel.

inconsistent with a prior decision of the Court. The petition also presents questions of exceptional importance. Vacatur will eliminate substantial emission reductions that would have been achieved by CAIR wiping out the accompanying public health benefits of decreases in illness and premature death and significantly disrupting efforts by eastern States to meet national ambient air quality standards. The Panel's decision has also upended the settled expectations upon which substantial investment in control equipment and allowances has already been made, resulting in losses of billions of dollars to regulated companies. The Panel's decision also hamstrings EPA's ability to utilize trading programs to deal with broad-scale regional pollution problems, which prevents EPA from getting the greatest emissions reductions because trading programs get such reductions in the most efficient, least costly manner.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

EPA promulgated CAIR to address the interstate transport of pollutants that significantly contribute to nonattainment of the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM") in downwind States. The statutory authority for CAIR is section 110(a)(2)(D)(i) of the Clean Air Act (42 U.S.C. § 7410(a)(2)(D)(i)), which provides that States must include in their State Implementation Plans ("SIPs") provisions:

> (i) prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will -- (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary [NAAQS].

In determining whether emissions from one State "contribute significantly" to nonattainment in another State, EPA considers whether emissions from one State contribute to nonattainment concentrations of pollutants in another State by amounts that meet or exceed specific criteria and then determines how much those emissions can be reduced by the application of highly cost-effective controls. EPA's use of economic factors in determining what contribution must be eliminated was upheld by this Court in reviewing the "NOx SIP Call,"

which like CAIR established a regional trading program to eliminate the significant contributions of upwind States to nonattainment in downwind States. Michigan, 213 F.3d 663.

In CAIR, EPA determined that impacts of emissions from 29 jurisdictions in the eastern United States exceeded the air quality criteria for a finding of significant contribution. The Agency determined the emissions reductions that could be achieved for sulfur dioxide ("SO_2") (a PM precursor) and nitrogen oxides ("NOx") (a PM and ozone precursor) using controls determined to be highly cost-effective, assuming the existence of an emissions trading program for these pollutants among the States subject to CAIR.

In establishing the CAIR trading program for SO_2, EPA utilized the existing SO_2 allowances created and allocated to sources in each State by Title IV of the Clean Air Act. In States subject to CAIR, covered electric generating units ("EGUs") would have to surrender two Title IV SO_2 allowances (which under Title IV authorize the emission of one ton of SO_2) for each ton of SO_2 emitted during the years 2010 to 2014 and surrender 2.86 Title IV SO_2 allowances for each ton of SO_2 emitted thereafter. In establishing new trading programs for annual and ozone-season NOx emissions, EPA developed state budgets based on each State's share of regionwide recent historic heat input to EGUs, multiplying each source's heat input by a fuel factor (1.0 for coal, 0.6 for oil, and 0.4 for natural gas) to better reflect actual emissions.

II. SUMMARY OF THE PANEL DECISION

The Panel held that CAIR's unrestricted trading program is unlawful because it does not adequately address the requirement that States eliminate significant contribution to nonattainment in or interference with maintenance by other States from sources "within the State." Slip Op. at 16. It also held that EPA's method for allocating SO_2 allowances is unlawful because (1) EPA's decision to use existing allowances to preserve the Title IV program is based on a factor that is unrelated to the amount by which upwind States significantly contribute to downwind nonattainment, and (2) EPA has no legal authority under section 110(a)(2)(D) to require the surrender of Title IV allowances for compliance with a Title I requirement. Id. at

33-37, 42-45. Similarly, the Panel held that EPA's method for determining State NOx budgets (i.e., adjusting allowances for each State based on the fuel mix used by utilities in the State) is unlawful. Equity between types of sources is unrelated to the amount by which upwind States significantly contribute to downwind nonattainment and so is an improper factor to consider. Id. at 37-42.

The Panel also held that EPA improperly failed to consider North Carolina's claim that additional States should be included in CAIR to prevent interference with maintenance of the ozone standard in North Carolina, Slip Op. at 18-22, that EPA improperly used 2015 as the date for requiring full compliance with CAIR, id. at 22-25, and that EPA did not adequately address claims by Minnesota utilities that EPA had overestimated emissions from Minnesota. Id. at 52-56. The Panel held that EPA properly used 2010 as the relevant date for considering which upwind States made a significant contribution to downwind nonattainment, id. at 27-29. The Court also rejected a challenge to EPA's decision to move the first phase of the NOx requirements to 2009, id. at 56-57, and rejected challenges to EPA's criteria for determining which upwind States should be subject to CAIR requirements. It rejected claims by Texas and Florida that CAIR should apply to only a portion of those States. Id. at 29-32, 46-52.

Finally, the Panel held that CAIR must be vacated, rather than remanded, because the rule is "fundamentally flawed" and "very little will survive[ ] remand in anything approaching recognizable form." Slip Op. at 58-59.

STANDARD FOR *EN BANC* REVIEW

The Federal Rules of Appellate Procedure provide that rehearing *en banc* may be ordered where: "(1) *En banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) The proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Panel rehearing or rehearing *en banc* is warranted here because vacatur of CAIR will result in significant environmental and economic harm and will seriously impede EPA's ability to implement the requirements of the Clean Air Act, because the decision is in conflict with the

Court's prior decision in Michigan, and because the Panel did not entertain argument on a number of significant issues it resolved.

ARGUMENT

I. THE PANEL ERRED IN DETERMINING THAT CAIR MUST BE VACATED

In determining to vacate, rather than remand, CAIR, the Panel relied on the two-part test of Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993), that such a decision "depends on the 'seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change.'" Slip Op. at 58. Rehearing is required on the Panel's application of both prongs of this test. The Panel's determination that CAIR is "fundamentally flawed," Slip Op. at 59, is based on an incomplete view of the record, which resulted in a fundamental misunderstanding of the similarities between CAIR and the very similar NOx SIP Call Rule that the Court upheld in Michigan. The "disruptive consequences" of vacating CAIR are extreme, compromising public health and state air pollution control efforts, and yet were not briefed by any party.

A. The Panel Erred In Holding That CAIR Is "Fundamentally Flawed."

In Michigan, this Court upheld the NOx SIP Call, a regional approach to addressing interstate contributions to nonattainment implemented through an emissions trading program. In the NOx SIP Call, EPA determined that reducing emissions from all contributing States collectively would satisfy each State's requirement to eliminate its significant contribution to nonattainment in other States. Thus, EPA developed a region-wide emissions budget based on the amount of emission reductions that could be achieved through the application of highly cost-effective controls. Each covered State's portion of that budget was based on EGU heat input adjusted by a growth factor. On review, this Court generally upheld the NOx SIP Call, rejecting claims that it was invalid because it used economic considerations in determining what constituted "significant contribution" or because it did not correlate the level of emission

reductions required from each State to that State's impact on downwind nonattainment. 213 F.3d at 674-80.

EPA took a similar regional approach in CAIR. The Agency determined that region-wide reductions in emissions of SO_2 and NOx would eliminate the significant contribution of all States in the CAIR region to nonattainment in downwind States. EPA then determined a region-wide budget based on the application of highly cost-effective controls and allocated that budget to the States. No party in this case challenged EPA's authority to use a trading program to address significant contribution to downwind nonattainment. While the State of North Carolina challenged the lack of any limitations on trading, it specifically stated that "North Carolina does not submit that any trading is *per se* unlawful." NC Br. at 33. Thus, because no petitioner challenged EPA's authority to utilize a trading program, and because that issue had been favorably resolved in Michigan, EPA did not address the question in its briefs but limited its discussion to the narrow issue presented by petitioner, i.e., whether some limitation on the amount of trading that can occur (such as the limits on the use of banked allowances in the NOx SIP Call) was necessary. Because the fundamental basis of the Panel's decision is an issue that was not raised by petitioners and not briefed by EPA, rehearing is necessary to give EPA an opportunity to present both the legal and the factual basis for EPA's determination that the CAIR regional trading program already addresses the significant contribution of each State in the region to nonattainment in other States. For example, the record contains data demonstrating that emissions from all States in the CAIR region affect ozone and PM concentrations in States throughout the region. The record also contains data not considered by the Panel demonstrating the air quality benefits in reduced ambient pollution concentrations anticipated throughout the region from the emission reductions required by CAIR.

The Panel's attempt to distinguish Michigan appears to be based on a misunderstanding of either the NOx SIP Call, CAIR, or both. The Panel asserts that "the similarities with the NOx SIP Call are only superficial." Slip Op. at 59. However, EPA used the same fundamental

approach -- a regional emissions cap and a trading program to address upwind States' significant contribution to downwind nonattainment -- in both rules. Further, the Panel places inappropriate emphasis on the Michigan Court's statement that it was "able to assume the existence of EPA's allowance trading program only because no one has challenged its adoption." Slip Op. at 17, quoting Michigan, 213 F.3d at 676. In fact, the Michigan Court considered and rejected arguments that the NOx SIP Call's trading program was inconsistent with the section 110(a)(2)(D) requirement to eliminate each individual State's significant contribution. See Michigan, Brief of Petitioning States at 43 ("EPA's position that the NOx emissions budget for each of the 23 States represents those emission reductions 'necessary' to remedy the State's alleged significant contribution to regional ozone transport is also contradicted by the 23-State NOx trading program contained within the same rule."). Of direct relevance to the Panel's decision, petitioners in Michigan argued that EPA lacked authority to create a cap-and-trade program, that the trading program would allow sources to trade allowances regardless of the resulting impact of their emissions on concentrations of ambient ozone throughout the region, and that several of the States were expected to "exceed their supposedly 'necessary' emissions cap." Id. at 43 n.19, 45.

The Michigan Court rejected these arguments, recognizing and approving EPA's regional approach to emission reductions and its use of a trading program that would allow some States to exceed their budgets. 213 F.3d at 686-87. In upholding the NOx SIP Call against these challenges, the Court thus necessarily decided and rejected petitioners' challenges to interstate trading. American Iron & Steel Inst. v. EPA, 886 F.2d 390, 397 (D.C. Cir. 1989) ("[T]he outcome of the case . . . necessarily constituted a rejection of the claims [in the briefs].") Because the Michigan court necessarily considered and rejected claims that EPA lacks authority to allow States to eliminate their significant contribution to downwind nonattainment by participation in a trading program, the Panel's vacatur of CAIR on that ground is inconsistent, and rehearing "is necessary to secure or maintain uniformity of the court's decisions."

The Panel's reliance on the reference in section 110(a)(2)(D)(i) to sources "within the State" as the basis for its holding that CAIR is unlawful, Slip Op. at 16, is similarly misplaced. Section 110 is directed to States and contains the requirements that States must include in their implementation plans. Section 110(a)(2)(D) contains the specific requirement that in developing its plan, a State must ensure that sources do not significantly contribute to nonattainment or interfere with maintenance in another State. The language "within the State" is included for clarity to contrast with the phrase "any other State" in subsections (I) and (II). Given this straightforward grammatical construction, there is no basis to conclude that Congress intended the phrase to preclude EPA from adopting a trading program to deal collectively with upwind States' significant contribution. Moreover, the Panel's reading of the phrase is inconsistent with the Court's holding in Michigan that EPA may take a regional approach to addressing significant contribution and need not tie each State's budgets directly to its impact on downwind States.

Furthermore, section 110(a)(2)(D)(i)(I) requires States to have adequate provisions in their implementation plans prohibiting sources within the State from emitting pollutants in amounts that will significantly contribute to nonattainment or interfere with maintenance in another State. Where EPA has determined that participation in a regional trading program will eliminate the significant contribution of States in the program to nonattainment in other States, each such State complies with the statutory requirement by ensuring that all covered sources within the State hold allowances equal to their emissions, which requires the sources to either reduce their emissions or to acquire allowances from other sources within the region that result from emission reductions at those sources. In either event, the significant contribution to downwind nonattainment coming from within the participating States has been eliminated.[2/]

[2/] The Panel also based its holding on a concern that CAIR would eliminate a State's ability to seek further relief under CAA section 126 if necessary. Slip Op. at 17. This concern is based on a misunderstanding of EPA's position. Although EPA denied a petition by North Carolina that was based on the level of contribution shown in the CAIR record, EPA has made clear that post-CAIR developments can be the basis for a section 126 petition, giving as an example a Section 126 Petition presenting information showing that there is a different level of contribution

(continued...)

With the exception of the issue discussed below concerning EPA's legal authority to terminate or limit Title IV allowances in implementing a program under Title I, the Panel's holdings concerning EPA's methodologies for determining State SO_2 and NOx budgets are derived from its holding that participation in a cap-and-trade program does not meet the State's obligations under section 110(a)(2)(D)(i). Specifically, because the Panel held that EPA must require each State to achieve emission reductions "within the State," the Panel held that a method of determining State budgets on any other basis is unlawful. As demonstrated above, rehearing is required on the Panel's vacatur of CAIR because its central holding is based on issues that EPA did not have an opportunity to address and because that holding conflicts with this Court's opinion in Michigan. Because that central holding must be reconsidered, the Panel's subsidiary holdings on allowance allocations must be reconsidered as well.

The record clearly demonstrates the appropriateness of the CAIR State budget distribution schemes. The Panel questions "how the quantitative number of allowances created by 1990 legislation to address one substance, acid rain, could be relevant to 2015 levels of an air pollutant, $PM_{2.5}$." Slip Op. at 35. However, no one in this litigation disputed that regulating SO_2, a $PM_{2.5}$ precursor, is appropriate. In addition, the record demonstrates that there is a close relationship between the current allocation of Title IV allowances among States and actual SO_2 emissions (without CAIR) in each State. Thus, the allocation of Title IV allowances is a reasonable starting point for calculating the required emissions reductions. Moreover, the record demonstrates that the differences between alternative methods for allocating SO_2 allowances are not very substantial. Thus, even if the Court were to determine, after rehearing, that the allocation method is arbitrary or capricious, any inequity resulting from leaving it in place during remand is outweighed by the significant harms resulting from vacatur of CAIR described below.

[2/](...continued)
than EPA analyzed in CAIR. 71 Fed. Reg. 25, 328, 25,335 n.6 (Apr. 28, 2006).

The same is true of the methodology used to establish State NOx budgets. While the Panel focuses on the differential cost of controlling different types of EGUs, the Panel does not appear to have considered the fact that the fuel factors represent the relative emissions of NOx from facilities fired with different types of fuel. Thus, the allowance methodology utilized in CAIR more closely approximates emissions of NOx – and thus each State's significant contribution – than an allocation methodology based only on heat input, such as that utilized in the NOx SIP Call. The record further demonstrates that differences in initial allocations resulting from different allocation schemes are relatively minor for most States. Thus, even if the Court believes further explanation or revision is required, the methodology should remain in place on remand to allow EPA to make any necessary modifications while avoiding the very serious near term health and air quality problems resulting from vacatur. In addition, the SO_2, annual NOx and ozone season NOx trading programs are severable from each other, and vacatur of one need not lead to vacatur of all three programs.

That EPA is not seeking rehearing on all issues does not require vacatur of CAIR. If EPA, after consideration of the Panel's holdings on "interference with maintenance" and of the 2015 date for the final CAIR requirements, Slip Op. at 18-25, determines either that more States should be added to CAIR or that greater emission reductions are required, the program could be modified to incorporate those changes, and there is no reason not to obtain the significant benefits of the existing CAIR program in the interim. With regard to inclusion of Minnesota in CAIR, vacatur is not necessary because the Panel remanded for further explanation. Id. at 56.

B. Vacatur Of CAIR Will Result In Significant Harms.

The issue of remedy was not briefed in this case. Therefore, the Panel did not have before it an analysis of the environmental benefits of CAIR and the extremely disruptive consequences of vacatur. Most significantly, vacatur will jeopardize the massive emission reductions that were being achieved and expected to be achieved with CAIR and the accompanying improvements in public health. EPA has estimated that CAIR would prevent

13,000 deaths annually by 2010 and 17,000 premature deaths annually by 2015. CAIR would reduce annual SO2 emissions by 4.3 million tons, or 45% from 2003 levels, by 2010, and annual NOx emissions by 1.7 million tons or 53% from 2003 levels by 2009. Additional reductions would be achieved by 2015. Vacatur of CAIR will likely cause these significant emission reductions to be delayed or foregone, causing thousands of cases of illness or premature death. Declaration of Brian McLean (Attachment 2). Vacatur will also significantly disrupt state efforts to achieve the requirements of the Clean Air Act related to regional haze and ambient levels of ozone and $PM_{2.5}$. Declaration of William Harnett (Attachment 3).

The Panel's suggestion that the negative environmental consequences of vacatur might be offset by the continuation of the NOx Budget Trading program under the NOx SIP Call fails to recognize that the vast majority (about 90%) of the health benefits from CAIR arise from reductions in SO_2, which are not addressed by the NOx SIP Call. Nor does the NOx SIP Call address winter NOx emissions. Moreover, the NOx SIP Call trading program requirements have been eliminated in many States by State regulation, meaning the program cannot automatically spring back to life upon vacatur of CAIR. McLean Decl. ¶ 17. The Panel's further suggestion that section 126 may provide an interim remedy overlooks the fact that any such relief would occur years after the first CAIR compliance dates given the length of time required for States to prepare petitions and for EPA to address them, and the three-year compliance window for individual sources afforded by section 126(c), 42 U.S.C. § 7426(c).

Vacatur of CAIR will also have significant economic impacts, penalizing companies that acted early to reduce pollution. Billions of dollars were spent by utilities installing controls in anticipation of the effective date of CAIR. If CAIR is vacated, it is unclear if those controls will be operated and whether utilities will be authorized, or able, to recover the capital and operating costs of those controls. Vacatur will also destroy or reduce the value of the banked allowances that companies generated through early emission reductions. The price of Title IV SO_2 allowances declined from approximately $600 per ton before oral argument in this case, to $300

following the argument. It then plummeted to less than $100 after the decision, and has stabilized at approximately $150. This means that the 6.9 million tons of banked Title IV allowances have lost over three billion dollars in value. Such precipitous declines in allowance values will lead to companies slowing or stopping installation of controls, reducing or stopping operation of previously installed controls, and reducing use of other emission reduction strategies.

II. THE PANEL ERRED IN HOLDING THAT EPA LACKS AUTHORITY TO TERMINATE OR LIMIT TITLE IV ALLOWANCES IN IMPLEMENTING A PROGRAM PROMULGATED PURSUANT TO TITLE I

Rehearing or rehearing *en banc* is also warranted on the Panel's decision that EPA cannot terminate or limit Title IV SO_2 allowances to implement CAIR because the Panel's reading of the Clean Air Act is inconsistent with fundamental principles of statutory interpretation. The Panel's decision disregards the provisions in CAA section 403(f), 42 U.S.C. § 7651b(f), that SO_2 control requirements promulgated pursuant to CAA Title I can require sources to limit their SO_2 emissions below the levels permitted by the numbers of allowances they hold. As a result, the Panel's decision precludes EPA from reconciling the Act's mandates that the Agency both require sufficient reductions in SO_2 emissions under section 110 to meet the NAAQS and ensure a viable allowance program under Title IV, a reconciliation that Congress specifically provided for in section 403(f).

Title IV, which was added to the CAA by the 1990 Amendments to address the problem of acid rain, creates a cap-and-trade program for SO_2 emissions from EGUs with allowance allocations established by the statute. However, Congress recognized that more stringent regulation of SO_2 emissions might ultimately be required to respond to other public health or environmental risks and therefore included language to address it in section 403(f) of the Act.

Section 403(f) provides in relevant part:

> An allowance allocated under this subchapter is a limited authorization to emit sulfur dioxide in accordance with the provisions of this subchapter. Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United

> States to terminate or limit such authorization. Nothing in this section relating to allowances shall be construed as affecting the application of, or compliance with, any other provision of this chapter to an affected unit or source, including the provisions related to applicable [NAAQS] and State implementation plans . . . .

42 U.S.C. § 7651b(f). The first three sentences of this section demonstrate that Congress meant to be very clear that Title IV allowances are not a property right or any other sort of irrevocable grant, but rather are a "limited authorization" to emit SO_2 that the United States may limit or terminate. Because EPA is an agency of the United States,[3/] EPA may limit or terminate Title IV allowances in appropriate circumstances. Furthermore, the legislative history suggests that one of the purposes of section 403(f) was to provide that EPA could limit or eliminate Title IV allowances if appropriate in implementing its broad authorities under the Act. Language in an earlier House Bill providing that allowances could be terminated or limited "by Act of Congress" and "may not be extinguished by the Administrator" was deleted from the final legislation. See H. Rep. 101-490, pt.1, at102 (1990) (proposed section 503(f)), reprinted in 2 A Legislative History of the Clean Air Act Amendments of 1990, at 3126 (Comm. Print 1993) ("Legislative History"). As explained in a floor statement by a Senate conference manager explaining the final legislation, allowances can be terminated or limited by Congress or the Administrator and "are but the means of implementing an emissions limitation program, which can be altered in response to changes in the environment or for other sound reasons of public policy. S. Debate, Conf. Rep., Oct. 27, 1990, 1 Legislative History at 1034. But see 136 Cong. Rec. E 3672 (daily ed. Nov. 2, 1990) (extension of remarks of Rep. Michael Oxley expressing contrary view). EPA's interpretation of this ambiguous statutory language and legislative history is reasonable, see 70 Fed. Reg. at 25291, n.137. The Panel's decision is inconsistent with EPA's reasonable reading of the statute.

[3/]The term "United States" is a broad term that is never used to mean only Congress in the CAA. Compare 42 U.S.C. §§ 7402(c) and 7589(e)(3) (referencing "Congress") with 42 U.S.C. §§ 7411(b)(4), 7413(a)(3), (b)(2), (c)(1), (c)(3), (d)(1)(B), 7417(b), 7418(a), 7602(e), 7604(a)(1), (e) (referencing "United States" in contexts where it logically cannot mean only Congress).

The Panel's holding is also inconsistent with the final quoted sentence, which it did not address. That sentence states that, in exercising its authority concerning the NAAQS and SIPs, EPA is not limited by the Title IV allowance authorization provisions. This provision applies squarely to CAIR where EPA determined that additional controls on SO_2 emissions are necessary to eliminate the significant contributions of upwind States to nonattainment in other States, and relied on its broad authority under CAA sections 110 and 301 to provide criteria for the review of SIPs to help ensure they meet CAA requirements, including the requirements of section 110(a)(2)(D). See 42 U.S.C. §§ 7410(k)(5), 7601.

In doing so EPA was also cognizant of the congressional directive to promote "orderly and competitive functioning of the [Title IV] allowance system," 42 U.S.C. § 7651b(d)(1), and Congress' recognition that the allowances were "intended to function like a currency that is sufficiently valuable to stimulate . . . [emission control] efforts." See S. Rep. No.101-228 (1990), 5 Legislative History at 8664. In order to reconcile its competing statutory obligations, i.e., to require more stringent regulation of SO_2 under section 110(a)(2)(D) while ensuring a viable allowance trading system under Title IV, EPA required that Title IV allowances be used and terminated to satisfy the requirements of CAIR.

The Panel recognized that "it may be reasonable for EPA, in structuring" the optional trading program "to consider the impact on the Title IV [allowance] market," Op. at 44. However, the Panel made it impossible for EPA to do that by holding that EPA had no legal authority under section 110(a)(2)(D) to require the termination of Title IV allowances to eliminate interstate contribution to nonattainment. The Panel failed to recognize that Congress, in the fourth sentence of section 403(f), had given primacy to EPA's responsibility to require SIPs to achieve the emission reductions necessary to attain the NAAQS. Furthermore, this fourth sentence must be read in conjunction with the rest of section 403(f), which specifically states that the United States may limit or eliminate Title IV allowances.

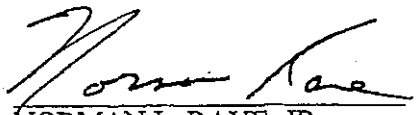
The Panel's decision is inconsistent with basic principles of statutory interpretation. The Court owes deference to EPA's interpretation of an ambiguous statute. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). It is unreasonable to hold that Congress would have recognized EPA's authority to limit a facility's ability to emit SO_2 below the level of allowances held by the facility, while at the same time depriving EPA of the ability to use that authority in a way that ensures that the congressionally-mandated Title IV program is not eviscerated. It is reasonable to read the Act, as EPA has, to give EPA the authority to modify Title IV allowances in the course of implementing its Title I authority if necessary to reconcile the goals of the two provisions. As this Court has previously recognized agencies have inherent authority to reconcile contradictory statutory requirements. See Atwell v. Merit Sys. Prot. Bd., 670 F.2d 272, 286 (D.C. Cir. 1981); Citizens to Save Spenser County v. EPA, 600 F.2d 844, 870-71 (D.C. Cir. 1979). In this case, that authority was specifically confirmed by Congress by including section 403(f) in the statute. Because the Panel failed to properly defer to EPA's reasonable interpretation of the Clean Air Act, rehearing or rehearing *en banc* is appropriate.

CONCLUSION

Because the Panel in deciding to vacate CAIR did not consider the full record before EPA resulting in its opinion being inconsistent with this Court's decision in Michigan, and did not consider the substantial public health, environmental, and economic harms resulting from vacatur, Panel rehearing or rehearing *en banc* on the question of vacatur should be granted to allow EPA to properly address those issues, either through further briefing and argument, or on remand without vacatur. The Panel's decision that EPA lacks authority to terminate or limit Title IV allowances in implementing CAIR is inconsistent with basic principles of statutory interpretation and should be reheard or reheard *en banc*.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General



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September 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2008, I caused a true and correct copy of the foregoing Respondent EPA's Petition for Rehearing or Rehearing En Banc to be served by first class mail, postage-prepaid, on the following:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH CAROLINA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 05-1244 and consolidated cases

DECLARATION OF WILLIAM T. HARNETT

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

1. I am the Director of the Air Quality Policy Division (AQPD) of the Office of Air Quality Planning and Standards (OAQPS) within the Office of Air and Radiation at EPA, a position I have held since March 2006. OAQPS is the EPA office that has the primary responsibility for developing regulations that implement several important Clean Air Act (CAA) programs including the criteria pollutant program for the national ambient air quality standards (NAAQS) and AQPD is the division within OAQPS which has responsibility for developing regulations for implementing the NAAQS.

2. In my current capacity as Director of AQPD, I am responsible for overseeing EPA's promulgation of significant regulations related to implementation of the NAAQS as well as management of EPA's air pollution permitting programs. My division, in coordination with other EPA offices, developed the Clean Air Interstate Rule (CAIR). In this capacity, I am familiar with the requirements of CAIR and the July 11, 2008 decision in North Carolina. v. EPA (No. 05-1244). My division is also responsible for issuing guidance and regulations for states to address regional haze.

3. Prior to joining AQPD, I directed the Information Transfer and Program Integration Division within OAQPS. Prior to that assignment, I served as the Associate Director for the Air Quality Strategies and Standards Division within OAQPS. I have a Bachelor's degree from Benedictine University.

4. This declaration is filed in support of EPA's petition for rehearing or rehearing en banc in North Carolina v. EPA. Its purpose is to explain how vacatur of CAIR would significantly disrupt the efforts of states throughout the eastern United States to meet the 1997 NAAQS for ozone and fine particles (PM2.5) and the regional haze program requirements. In addition, it provides information demonstrating that the majority of the significant health benefits from CAIR are associated with the sulfur dioxide (SO2) reductions.

Consequences of CAIR Vacatur on States' Air Quality Plans

5. States are required by the CAA to develop state implementation plans ("SIPs") to provide for implementation, attainment, maintenance and enforcement of the NAAQS within the state. These SIPs must also include adequate provisions to prohibit emissions that significantly contribute to nonattainment in, or interfere with maintenance by, any other state with respect to any NAAQS. SIP revisions providing for attainment of the 1997 PM2.5 NAAQS were due by

April 2008 and SIP revisions providing for attainment of the 1997 ozone NAAQS were due by June 2007. States that fail to meet these deadlines, or that submit SIPs that EPA must disapprove because they fail to demonstrate attainment, may be subject to sanctions including increased emissions offset ratios and the loss of highway funds.

6. Vacatur of CAIR will significantly disrupt the efforts of states throughout the eastern United States to meet the NAAQS for ozone and PM2.5. Because of the substantial emission reductions that CAIR would provide, states in the CAIR region were intending to rely on CAIR as an integral or primary component of their ozone and PM2.5 attainment strategies.

7. In the CAIR region, 54 areas are required to submit SIPs demonstrating how they will achieve attainment of the 1997 PM2.5 standard. Of the 7 PM2.5 attainment SIPs submitted to EPA to date, all 7 relied on the CAIR reductions. Based on a survey of the EPA Regional Offices for CAIR states, EPA expects that states were intending to rely on CAIR reductions in all 47 of the remaining PM2.5 attainment SIPs.

8. In states that are covered by CAIR or affected by CAIR, 31 areas are required to submit attainment SIPs for the 1997 ozone standard.[1] Of the 22 ozone SIPs submitted to EPA to date, all 22 relied on the CAIR reductions. Based on a survey of the EPA Regional Offices for these states, EPA expects that states were intending to rely on CAIR reductions in all 9 of the remaining ozone attainment SIPs.

[1] This number only includes those currently covered under subpart 2 (of title 1, part D of the CAA). Although a number of nonattainment areas under the 0.08 ppm 8-hour ozone standard were originally covered under subpart 1 and were also required to submit an attainment demonstration, the DC Circuit Court of Appeals vacated EPA rules that placed areas under subpart 1. EPA is currently in the process of proposing rulemaking that will address the implementation requirements for those former subpart 1 areas; some of these areas will likely also have to submit attainment demonstrations under EPA's anticipated rulemaking.

9. In the absence of CAIR, states would likely need to revise the attainment demonstration components of the SIPs to show how they will achieve the necessary emissions reductions. It would take time for states to reassess their air quality plans, conduct new modeling if necessary, make new emissions control decisions, take public comment, and complete the rulemaking process to adopt revised SIPs.

10. The time consumed in the SIP revision process would result in a delay in emissions reductions which could delay attainment and the accompanying health benefits. States could also be vulnerable to new source review emissions offset sanctions and highway funding sanctions for failing to have approved SIPs in place by the required deadlines.

11. A vacatur of CAIR would have impacts beyond the NAAQS programs. It would also significantly disrupt States' efforts to comply with EPA's Regional Haze Rule. States are in the process of completing their Regional Haze SIPs and are required to demonstrate reasonable progress toward the goal of achieving natural background visibility in all Federal Class I areas (National Parks and wilderness areas). Long term strategies to achieve emission reductions and demonstrate reasonable progress to improve visibility includes best available retrofit control technology (BART) on certain older power plants.

12. The majority of the CAIR states were planning to rely on CAIR reductions in either setting reasonable progress goals or satisfying the BART requirements (27 for setting reasonable progress goals and 20 to meet BART). Nine states have completed their regional haze SIPs and all rely on CAIR. Also, states without Class I areas are required to plan emission reductions in cases where they have impacts in states with Class I areas. Those states also rely on CAIR to achieve the required reductions. CAIR provides the bulk of the emission reductions necessary to improve visibility in the eastern Class I areas in the first phase of the SIPs. Without CAIR, states

will have to substantially revise their Regional Haze SIPs which will significantly delay the submission to EPA and further delay the planned emission reductions to reduce haze in the Class I areas.

SO2 Reductions Account for Vast Majority of Health Benefits From CAIR

13. As part of EPA's assessment of CAIR and the 2005 suite of legislative proposals to reduce multipollutant emissions from EGUs, EPA estimated the relative share of benefits associated with SO2 and NOx emissions reductions. In addition, EPA estimated the average benefits expected from reducing a ton of SO2 emissions relative to a ton of NOx emissions. The analysis showed that a ton of SO2 emissions reduced from EGUs has over seven times the benefit of a ton of NOx emissions reduced from EGUs in terms of reducing PM2.5 concentrations. This fact, combined with the smaller amount of NOx emission reductions relative to SO2 emissions required by CAIR means that NOx emissions reductions contributed only about 5 percent of the total PM benefits resulting from CAIR. SO2 emissions reductions accounted for the vast majority of overall benefits. NOx emissions reductions expected to result from CAIR during the summer season do provide additional benefits due to reductions in ozone concentrations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of September, 2008.

William T. Harnett

William T. Harnett
Director
Air Quality Policy Division
Office of Air Quality Planning
and Standards
United States Environmental Protection Agency

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH CAROLINA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 05-1244 and consolidated cases

DECLARATION OF BRIAN J. MCLEAN

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

1. I am the Director of the Office of Atmospheric Programs (OAP) within the Office of Air and Radiation (OAR) at EPA. OAP includes the Clean Air Markets Division (CAMD) which develops and manages cap-and-trade programs to control emissions and assists States and other countries with the development of such programs.

2. In my capacity as Director of OAP, I oversee EPA's implementation of major portions of the Clean Air Act (CAA or Act) including Titles IV and VI. In coordination with other OAR offices, I also oversee the promulgation of significant regulations pursuant to the CAA, such as the NOx SIP Call and the Clean Air Interstate Rule (CAIR). In addition, I serve as a national expert and global consultant on emissions trading programs. I have been the director of OAP

since 2002.

3. Prior to becoming Director of OAP, I directed CAMD (formerly the Acid Rain Division). I have been employed by EPA in various positions since 1972. I hold a Bachelor's degree in Electrical Engineering from Lafayette College, a Master's degree in City and Regional Planning from Rutgers University, and a Doctorate in City Planning from the University of Pennsylvania.

4. My office, in coordination with other OAR offices, developed the CAIR rule. My office is also responsible for implementation of the CAIR trading programs and CAIR Federal Implementation Plans. I am familiar with the CAIR emission reduction requirements including the cap levels and timing, the CAIR sulfur dioxide (SO_2) and nitrogen oxides (NOx) trading programs, the status of CAIR implementation, and the July 11, 2008 decision of the Court of Appeals for the D. C. Circuit in North Carolina v. EPA (No. 05-1244).

5. I was also involved in the development of the NOx SIP Call, which established the summer season NOx Budget Trading Program to assist multiple eastern states (20 plus the District of Columbia) in reducing regional transport of NOx emissions that contribute to ozone nonattainment. During my 36 year tenure at EPA, I have also worked on or supervised numerous other significant rulemakings.

6. This declaration is filed in support of EPA's Petition for Rehearing or Rehearing en Banc in the case of North Carolina, v. EPA.

Consequences of CAIR Vacatur

7. Data provided to EPA by power companies establishes that in the two calendar years following the promulgation of CAIR – 2006 and 2007 – coal-fired units with a total capacity of 21 gigawatts of power (8% of the total coal-fired capacity in the CAIR SO_2 region) have installed

advanced SO_2 controls (i.e., flue gas desulfurization). In the same time, coal-fired units with a total capacity of over 7 gigawatts of power (3% of the total coal-fired capacity in the CAIR NOx region) have installed advanced NOx controls (i.e., selective catalytic reduction).

8. Data provided to EPA by power companies establishes that before the decision in North Carolina v. EPA, coal-fired units with a total capacity of 71 gigawatts of power (27% of the total coal-fired capacity in the CAIR SO_2 region) had planned to install, between 2008 and 2012, advanced SO_2 controls (i.e., flue gas desulfurization). For the same time, coal-fired units with a total capacity of 24 gigawatts of power (9% of the total in the CAIR NOx region) had planned to install advanced NOx controls (i.e., selective catalytic reduction).

9. The majority of these controls were installed or planned to be installed to comply with the requirements of CAIR. Thus, vacatur of CAIR would remove the primary incentive for power companies to install and operate emission controls in many parts of the CAIR region. Other factors including judicial settlements and state regulations have influenced some of the control decisions, these other factors would not require the controls to be installed and operated until sometime after 2010. Furthermore, CAIR incentivizes significant reductions through other strategies such as fuel switching which are typically not incentivized by other forcing functions for emission reductions. Vacatur would certainly cause the installation of fewer controls, cancellation of planned control installations, reduced or foregone operation of some previously installed controls and less use of other reduction strategies such as fuel switching. It would thus significantly reduce both emission reductions and the associated health benefits.

10. Reductions from historical levels have been dramatic since CAIR passed in 2005. In 2005, SO2 emissions in the CAIR States were 9,350,000 tons. In 2007, they had been reduced to 8,170,000 tons, a reduction of nearly 1.2 million tons. These reductions have brought emission

levels below those required by Title IV. In 2006, SO_2 emissions were approximately 144,000 tons below the Title IV cap. In 2007, national SO_2 emissions were approximately 594,000 tons below the Title IV cap. With a vacatur, this downward trend would not just slow down, but until new regulatory actions could be put in place, SO2 emissions would actually rise.

11. Before the oral argument in North Carolina v. EPA the price of Title IV SO2 allowances was approximately $600. After the oral arguments the prices began a gradual decrease to about $300. Shortly after the July 11, 2008 decision in North Carolina v. EPA was released, the price of Title IV SO_2 allowances decreased sharply to below $100/ton. The price subsequently stabilized at roughly $150/ton, an overall 75% reduction. This decrease in allowance price reduced the value of banked SO_2 allowances held by firms by over $3 billion.[1]

12. EPA estimates that approximately $3.8 billion worth of SO_2 controls and nearly $1 billion of NOx controls were installed in CAIR states in 2006 and 2007. EPA further estimates that over $14 billion in SO_2 controls and $3 billion in NOx controls were committed for installation between 2008 and 2012 prior to the Panel decision. The value of controls which currently remain scheduled for completion remains unclear as power companies review their plans in light of the July 11, 2008 decision.

13. Companies that made early reductions and banked their unused SO_2 allowances were most negatively impacted by the decrease in allowance price.

14. For units with flue gas desulfurization (devices that can remove more than 95% of the SO_2 from a power plant's emissions), the cost of operating the device is generally between $100 and $200 per ton of SO_2 removed. When allowance prices fall below these levels, the economic incentive to operate these control devices is eliminated.

1 SO_2 allowance price data is from Evolution Markets (http://new.evomarkets.com/).

15. The price of a 2009 CAIR annual NOx allowance decreased from more than $5,000 before the Panel's decision to under $1000 currently, an 80% reduction and a decrease in value of over $6 billion for 2009 allowances alone.[2] These allowances have been actively trading for over a year, so this devaluation has had significant impact on sources that have made allowance trades.

16. If EPA is required to conduct a new rulemaking to reinstate the emission reductions required by CAIR, it would likely take 5-7 years for actual emission reductions to occur. This estimate is based on my experience developing rules regulating emissions from the power sector and takes into account the time required for EPA's rulemaking process, for State SIP development and submission processes, for implementation of program requirements, and for installation of controls.

Relationship between CAIR and the NOx SIP Call

17. The CAIR rulemaking revised the NOx SIP Call to discontinue the NOx Budget Trading Program after the 2008 ozone season and in preparation for that transition many States developed regulations to eliminate their NOx Budget Trading Program requirements. As of today, September 20, 2008, twelve States (more than half of the NOx SIP Call States) had finalized such regulations. Although EPA is committed to working with these States, there is no guarantee that these States will be able to reinstate their NOx Budget Trading Program requirements in time for the 2009 ozone season. This program has had dramatic results. Ozone season NO_x emission from affected sources fell 60% between 2000 and 2006 and ozone levels were reduced by 5% to 8%. This significantly contributed to the fact that 80% of the 104 areas designated as non-attainment for ozone by EPA in 2004 were seeing air quality better than the

2 NOx allowance price data is from Evolution Markets (http://new.evomarkets.com/).

NAAQS by the 2006 ozone season. If States cannot reinstate their rules many of these benefits will also be lost. Furthermore, CAIR would have achieved further ozone season reductions, giving areas that had not reached attainment under the NOx SIP Call additional assistance reaching attainment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of September, 2008.

BRIAN J. MCLEAN
Director, Office of Atmospheric Programs
U.S. Environmental Protection Agency

ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

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

No. 05-1244
(and consolidated cases)

STATE OF NORTH CAROLINA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Rules of
The United States Environmental Protection Agency

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC* OF NATIONAL MINING ASSOCIATION

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ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

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

STATE OF NORTH CAROLINA, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 05-1244 (and consolidated cases)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Mining Association submits this certificate as to parties, rulings, and related cases:

A. Parties and Amici

Petitioners

1. The State of North Carolina.
2. Minnesota Power, a Division of ALLETE, Inc.
3. ARIPPA.
4. South Carolina Public Service Authority and JEA.
5. Entergy Corporation.
6. Florida Association of Electric Utilities.

7. FPL Group, Inc.

8. Northern Indiana Public Service Company.

9. South Carolina Electric & Gas Company.

10. AES Corporation and its United States Subsidiaries, and AES Beaver Valley LLC, and AES Warrior Run, LLC, and Constellation Energy Group, Inc.

11. City of Amarillo, Texas; Occidental Permian Ltd.; and Southwestern Public Service Company, d/b/a Xcel Energy.

12. Duke Energy Carolinas, LLC.

13. Inter-Power/AhlCon Partners, L.P.

Respondent

The Respondent in these cases is United States Environmental Protection Agency.

Intervenors

1. Utility Air Regulatory Group.

2. Natural Resources Defense Council.

3. Ohio Environmental Council.

4. U.S. Public Interest Research Group.

5. Environmental Defense.

6. Midwest Generation, LLC.

7. National Mining Association.

8. Alabama Power Company.

Amici

Amici in this case are:

1. State of New York.
2. State of New Jersey.
3. State of Connecticut.
4. Commonwealth of Pennsylvania.
5. Tennessee Valley Authority.
6. Commonwealth of Massachusetts.

B. Rulings Under Review

The rulings under review in these cases are:

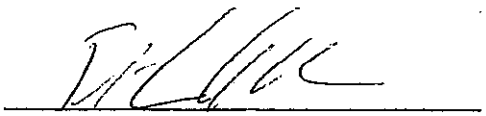
1. "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program: Revisions to the NOx SIP Call," published at 70 Fed. Reg. 25162 (May 12, 2005);
2. "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Reconsideration, Final Rule." Published at 71 Fed. Reg. 25304 (Apr. 28, 2006); and
3. "Air Pollution Control – Transport of Emissions of Nitrogen Oxides (NO_x) and Sulfur Dioxide (SO_2); Final Rule," published at 71 Fed. Reg. 25328 (Apr. 28, 2006).

C. Related Cases

To counsel's knowledge, there are no related cases pending before this Court or any other Court.

Dated: September 24, 2008

Respectfully submitted,



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ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

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

STATE OF NORTH CAROLINA, *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 05-1244 (and consolidated cases)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for the National Mining Association ("NMA") certifies that the NMA is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

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Dated: September 24, 2008

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* Authorities principally relied on.

Pursuant to Federal Rule of Appellate Procedure and Circuit Rule 35, Intervenor-Respondent National Mining Association ("NMA") petitions for panel or *en banc* rehearing of the panel decision.

RULE 35(B) STATEMENT

The panel decision conflicts with this Court's decision in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The panel decision also involves an issue of exceptional importance. By vacating the Clean Air Interstate Rule ("CAIR"), a rule widely supported by industry, environmental groups and federal and state regulators, the Court overturned one of the most important public health protection programs in the history of the Environmental Protection Agency ("EPA"), eliminated EPA's ability to use an interstate cap-and-trade program to remedy interstate pollution transport in this and future cases, and made it much more difficult for EPA to fashion equivalent protection on a cost-effective basis. [1]

The Court should grant panel or *en banc* rehearing on two questions:

- Whether Section 110(a)(2)(D)(i)(I) of the Clean Air Act ("CAA"), 42 U.S.C. § 7410(a)(2)(D)(i)(I), authorizes EPA to utilize an interstate cap-and-trade program to remedy interstate pollution transport; and

[1] The Petition for Panel Rehearing or Rehearing En Banc of the Environmental Protection Agency and the Petition for Panel Rehearing or Rehearing En Banc of Intervenor-Respondent Utility Air Regulatory Group ("UARG Petition") demonstrate why the panel's decision should be reheard on the ground that it involves an issue of exceptional importance. NMA endorses those arguments and does not repeat them here.

- If so, whether EPA, in utilizing a cost-effectiveness test in determining a state's "significant" contribution to downwind nonattainment as a part of a regional cap-and-trade program, may rely on principles of regional cost-effectiveness and equity, including in this case fuel factors, in allocating emission allowances.

STATEMENT OF THE CASE

I. NO_X SIP Call

CAIR was largely based on and superseded EPA's "NO_X SIP Call" program that was challenged in *Michigan v. EPA*. In the NO_X SIP Call, EPA determined that regionally transported nitrogen oxide ("NO_X") emissions prevented numerous eastern states from attaining EPA's National Ambient Air Quality Standards ("NAAQS") for ozone. As a result, under CAA § 110(a)(2)(D)(i)(I), EPA "called for" (required) the submission of State Implementation Plans ("SIPs") by upwind states to eliminate their "significant" contribution to downwind nonattainment of the ozone NAAQS. 63 Fed. Reg. 57,356 (Oct. 27, 1998).

EPA utilized a two-part test to determine each state's "significant" contribution that must be eliminated. First, it identified through air quality modeling each state that made a "measurable contribution" to ozone nonattainment in a downwind state. This threshold air quality test determined the states that would be subject to control requirements under the program. Second, EPA

determined the amount of NO_X emissions that each state that was included in the program would reduce if the region in general installed "highly cost-effective" NO_X controls. This cost-effectiveness test determined the amount of each state's NO_X emissions that contributed significantly to downwind nonattainment and that must therefore be eliminated. *Id.* at 57,375-79.

Based on this analysis, EPA established a NO_X emissions budget for each state in the program equal to the state's baseline (pre-CAIR) amount of NO_X emissions less its amount of NO_X emissions contributing significantly to downwind nonattainment. States were required to emit no more NO_X than the budgeted amount. EPA also authorized states to participate in a NO_X cap-and-trade program under which states could meet their NO_X budget obligations through in-state controls and/or the purchase of allowances created by a participating state's over-compliance with its budget. *Id.* at 57,378-79.

II. CAIR

CAIR addressed regional transport of both NO_X and sulfur dioxide ("SO_2") in the East. 70 Fed. Reg. 25,162 (May 12, 2005). The CAIR NO_X program was more stringent than the NO_X SIP Call, which was scheduled to sunset upon the CAIR program becoming effective at the beginning of 2009. *Id.* at 25,289-90.

CAIR's NO_X program generally followed the NO_X SIP Call's two-step approach under CAA § 110(a)(2)(D)(i)(I). EPA first used air quality modeling to

determine as a threshold matter the states that would be included in the CAIR program. It then applied its cost-effectiveness test to determine the amount of each state's contribution to downwind nonattainment that was "significant" and that must be eliminated under the program. Like the NO_X SIP Call, CAIR established NO_X budgets for each state that was required to install controls; it adopted an interstate cap-and-trade program modeled on the NO_X SIP Call program; and it required states to meet their NO_X budgets through in-state controls and/or the purchase of allowances created by a participating state's over-compliance with its budget. *Id.* at 25,166-68, 25,174-75.

CAIR changed one aspect of the NO_X budget process as compared to the NO_X SIP Call. In CAIR, EPA modified the budget allocation methodology used in the NO_X SIP Call by using fuel factors. In the NO_X SIP Call, as part of its cost-effectiveness test, EPA determined an overall regional NO_X budget based on regional highly cost-effective controls and then apportioned state budgets by each state's share of total regional heat-input into affected electric generating units. 63 Fed. Reg. at 57,410/3. In CAIR, EPA also determined an overall regional NO_X budget, but decided that the apportionment methodology used in the NO_X SIP Call would, if used in CAIR, produce an economic windfall for states that rely primarily on natural gas for electric generation, and whose generators would not be required by CAIR to make significant NO_X reductions. 70 Fed Reg. 72,268, 72,276-79

(Dec. 2, 2005). Under the cap-and-trade system, generators will make NO_X reductions where it is most cost-effective—predominately at coal rather than gas units. *Id.* at 72,277, Table 1. Despite the modest emission reductions CAIR imposed on the gas states, the straight heat-input approach would have allocated a substantial number of excess credits to the gas states that their generators could sell.

The straight heat-input approach further would have left states that rely primarily on coal for electric generation without sufficient credits to operate their own generation, even after these states made the significant CAIR-required NO_X reductions. *Id.* at 72,277-78, Tables 2-3. Thus, the coal states would have been forced to purchase potentially hundreds of millions of dollars of credits from the gas states annually—creating a large transfer of wealth without air quality justification.

Fuel factors mitigated this inequity. The fuel factor approach "generally provides additional allowances to States with large amounts of coal-fired units that are making the investments in emission controls measures and technologies. Conversely the simple heat-input approach provided more allowances to States with larger amounts of gas-fired units that are not making reductions." *Id.* at 72,277/2.

The fuel factor approach still left the gas states in an economically advantageous position vis-à-vis coal states. While fuel factors reduced allowances to gas states, gas units would still get the allowances they need to operate *without installing control equipment*, and they generally would receive NO_X allowances exceeding their projected emissions. *Id.* at 72,277-78 (Tables 1-3).

Conversely, using fuel factors, the mostly Midwest coal-fired utilities would still need to purchase allowances even *after installing the pollution controls that are supposed to meet CAIR requirements.* *Id.* at 72,278, Table 3. Thus, even with fuel factors, gas states generally would be net sellers of allowances.

ARGUMENT

I. The Panel Decision Conflicts with *Michigan v. EPA* as to Both the Validity of Interstate Trading and EPA's Discretionary Authority to Use Fuel Factors under the Cost-Effectiveness Test.

A. The Panel Decision on Interstate Trading Conflicts with *Michigan v. EPA*.

As demonstrated in the UARG Petition in this case, *Michigan* affirmed EPA's use of a two-part test, including both a threshold air quality test and a cost-effectiveness test, in implementing CAA § 110(a)(2)(D)(i)(I). Although the panel in the present case maintained that *Michigan* did not address the validity of an interstate cap-and-trade program because no party raised it, *North Carolina v. EPA*, 531 F.3d 896, 908 (D.C. Cir. 2008), UARG shows that, in fact, interstate trading was an integral element of the cost-effectiveness test affirmed in *Michigan*.

Thus, EPA did not examine in either the NO_X SIP Call or CAIR what the cost would be in any given state to eliminate its own significant contribution to downwind nonattainment through the application of in-state controls and therefore did not make individual state cost-effectiveness determinations. Instead, it examined the regionwide average cost of highly cost-effective controls under a regionwide cap-and-trade program. As the panel recognized for CAIR, "EPA evaluated whether its proposed emissions reductions were 'highly cost-effective,' at the regionwide level assuming a trading program." *Id.* at 908.

The panel nevertheless faulted the CAIR interstate trading program because it did not necessarily eliminate a state's significant contribution to another state's nonattainment. The panel correctly noted that, with trading, a state does not have to reduce its emissions but can instead purchase allowances from a different state. The panel found that, to fully satisfy the requirements of CAA § 110(a)(2)(D)(i)(I), EPA was required to actually eliminate the quantum of "significant contribution" that the upwind state made to downwind nonattainment, not purchase allowances from another state. *Id.* at 907-08.

As UARG's Petition shows, however, the panel's analysis fundamentally conflicts with *Michigan* and that Court's endorsement of the use of cost-effectiveness to determine the amount of a state's contribution to downwind nonattainment that is "significant" and that must be eliminated under CAA §

110(a)(2)(D)(i)(I). Because cost-effectiveness in the NO_X SIP Call was determined based on cost-effectiveness at a regional level *assuming trading*, a state's significant contribution under that program was the amount of emissions the state would reduce under the trading program. Thus, the use of an interstate cap-and-trade program was an explicit part of the NO_X SIP Call cost-effectiveness test, and the use of such a program was implicitly endorsed in *Michigan v. EPA*. The panel's condemnation of such a program under CAIR, therefore, represents a departure from this Court's past precedent and should be reconsidered and reversed.

B. The Panel Decision on Fuel Factors Conflicts with *Michigan v. EPA*.

The panel's decision on the fuel factors issue flows ineluctably from the panel's decision on interstate trading. The panel criticized EPA's statement that fuel factors are justified "because EPA did the analysis 'on a regionwide basis,'" which the panel found to be "a weakness of CAIR generally." *Id.* at 920. Just as it had in its discussion of trading generally, the panel criticized EPA's justification for fuel factors because the agency failed "to evaluate contributing emissions on a state-by-state-basis." Compare 531 F.3d at 920 with 531 F.3d at 908. Apparently failing to recognize that EPA utilized fuel factors in order to better match state NO_X budgets with the actual amounts of emissions the states would reduce under the trading system, the panel mistakenly ruled that the use of fuel factors would

require some states to eliminate more than their "significant" contributions. *Id.* at 920. In any event, the panel found that, by using fuel factors, EPA improperly relied on equitable principles not authorized under the statute. *Id.*

As was the case with its discussion of interstate trading in general, the panel's discussion of fuel factors is based on a mistaken reading of *Michigan*. The cost-benefit test endorsed by *Michigan* was not limited to a simple analysis of dollar-per-ton control costs but instead explicitly included "non-health tradeoffs." *Michigan,* 213 F.2d at 679. *Michigan's* discussion was thus framed in traditional cost-benefit terms, where the benefits of the regulation are weighed against the societal costs of achieving those benefits. *Id.* at 678-79. Such weighing inherently entails a broad exercise of discretion and comfortably accommodates EPA's consideration of regionwide equity as a part of its regional cost-effectiveness test.

Michigan relied on "the settled law of this circuit" that costs are precluded "only where there is a 'clear congressional intent to preclude consideration of cost.'" *Id.* at 678 (citing *NRDC v.EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)). Under this line of cases, an agency's consideration of costs necessarily rests on its discretionary exercise of judgment and equity. For instance, *Michigan* cited *George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-24 (D.C. Cir. 1998), where the Court found that EPA was justified in considering the effect of its reformulated gasoline program upon the price and supply of gasoline despite the

fact that the statute did not refer to either consideration or to cost. Obviously, weighing gasoline price and supply against the environmental benefit of using reformulated gasoline is not a mathematical calculation and requires an application of EPA judgment balancing the economic interests of affected groups with the environmental benefit to society at large. Similarly, in another case cited by the *Michigan* court, *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999), the Court upheld the FAA's consideration of costs to the air tourism industry in devising a plan for the "substantial restoration of the natural quiet" of the Grand Canyon area. Again, the determination of how "substantial" the restoration should be in light of cost factors depends on a fundamentally discretionary balancing of the economic interests of groups affected by the regulation with the environmental interest of the public at large.

Given the broad discretionary nature of the cost-benefit analysis approved in *Michigan,* the panel was wrong in holding that EPA exceeded its authority in considering regional equity as a part of regional cost-effectiveness. As this Court has said, where an agency is granted broad discretion by Congress:

> The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law.

Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153, 160 (D.C. Cir. 1967); *Adelphia Communs. Corp. v. FCC*, 88 F.3d 1250, 1257 (D.C. Cir. 1996).

Indeed, equitable considerations are unavoidable in controlling interstate pollution. For instance, ozone nonattainment in the District of Columbia could be mitigated by banning automobiles in the city—or by shuttering industrial operations in upwind states. Short of these extremes, a cost-effective combination of regional and local controls requires consideration of regional equity.

In fact, a decision *not* to utilize fuel factors would entail application of the same equitable factors as the panel condemned in EPA's decision to utilize fuel factors, because regional equity is inescapable in determining regional cost-effectiveness. As EPA explained in the NOX SIP Call, which did not utilize fuel factors, in a section entitled "Equity Considerations," "further justification for today's action is provided by overall considerations of fairness related to the control regimes of the downwind and upwind areas, including the extent of the controls required or implemented by those areas." 63 Fed. Reg. at 57,404/2. EPA explained that equity dictated its determination that the installation of "highly cost-effective" controls could eliminate an upwind state's "significant contribution" to downwind nonattainment. As EPA stated, given the upwind states' non-trivial contribution to downwind nonattainment, and the downwind states' long history of

increasingly stringent local controls, "[i]n EPA's judgment, it is fair to require the upwind sources to reduce at least the portion of their emissions for which highly cost-effective controls are available." *Id.* Similarly, EPA's CAIR Notice of Proposed Rulemaking, which did not include fuel factors, proposed "an emissions reductions program for SO_2 and NO_X that compliments State efforts to attain the $PM_{2.5}$ NAAQS in the most cost effective, *equitable* and practical manner possible." 69 Fed. Reg. at 4612/1 (emphasis supplied).

These same equitable considerations drove EPA's decisions in the final CAIR rule, although, in CAIR, unlike in the NO_X SIP Call, the agency's final weighing of the equities led it to conclude that the use of fuel factors to prevent an economic windfall was justified. EPA stated that "'[w]e are striving in this proposal to set up a reasonable balance of regional and local controls *to provide a cost effective and equitable governmental approach* to attainment with the NAAQS for fine particles and ozone.'" 70 Fed. Reg. at 25,175/-3 (quoting NOPR, emphasis supplied). EPA stated that "*we broadly incorporate the fairness concept* and relative-cost-of-control (regional costs compared to local costs) concepts *that we generally considered in the NO_X SIP Call.*" *Id.* (emphasis supplied).

Equity is unavoidable not just in apportioning emission reduction requirements between upwind and downwind areas but within the upwind emitting area itself. Determining that emission reduction requirements should be

apportioned within the upwind emitting area based on a cost-effectiveness test begs the question, cost-effective to whom? As EPA explained in CAIR, "in determining the appropriate level of controls, we considered feasibility issues–as we did in the NO_X SIP Call–specifically, 'the applicability, performance, and reliability of different types of pollution control technologies for different types of sources * * * and other implementation costs of a regulatory program *for any particular group of sources.*'" *Id.* at 25,175/2 (quoting CAIR NOPR, emphasis supplied).

Of course, an agency may not substitute its own sense of equity for that of Congress and may rely on equitable principles only if Congress has provided it with discretion to do so. That is the case here, where, as in *Michigan*, the phrase "significant contribution" confers extremely broad discretion on EPA in determining a cost-effective solution to regional air pollutant transport. *Michigan*, 213 F.3d at 680-681. In exercising this discretion, EPA properly considered equity. As this Court has said, "...when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion." *City of Chicago v. Federal Power Comm'n*, 385 F.2d 629, 642 (D.C. Cir. 1967). Indeed, EPA's decision to use fuel factors seems more aligned with the panel's concern that the program focus on air quality rather than economic factors than a decision not to use fuel factors. The use of fuel factors created a better match between state

NO_X budgets and the actual state emission reductions expected under CAIR trading. 70 Fed. Reg. at 72,277/2. In contrast, not using fuel factors would have resulted in the free allocation of allowances to certain states that would not have been used to reduce emissions but simply to realize an economic windfall through the sale of allowances to states that were making reductions.

In sum, EPA properly exercised its broad discretion by applying equitable principles to prevent CAIR from being transformed into an economic windfall for selected states. The panel's determination that the use of fuel factors violates CAA § 110(a)(2)(D)(i)(I) does not conform to the cost-effectiveness test set forth in *Michigan* and should be reconsidered and reversed.

CONCLUSION

For the foregoing reasons, Intervenor-Respondent NMA respectfully requests that panel rehearing or rehearing *en banc* be granted.

Dated: September 24, 2008

Respectfully submitted,

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ADDENDUM

LEXSEE

Analysis
As of: Sep 24, 2008

STATE OF NORTH CAROLINA, PETITIONER v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, UTILITY AIR REGULATORY GROUP, ET AL., INTERVENORS

No. 05-1244 Consolidated with 05-1246, 05-1249, 05-1250, 05-1251, 05-1252, 05-1253, 05-1254, 05-1256, 05-1259, 05-1260, 05-1262, 06-1217, 06-1222, 06-1224, 06-1226, 06-1227, 06-1228, 06-1229, 06-1230, 06-1232, 06-1233, 06-1235, 06-1236, 06-1237, 06-1238, 06-1240, 06-1241, 06-1242, 06-1243, 06-1245, 07-1115

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

531 F.3d 896; 2008 U.S. App. LEXIS 14733

March 25, 2008, Argued
July 11, 2008, Decided

PRIOR HISTORY: [**1]

On Petitions for Review of an Order of the Environmental Protection Agency.

North Carolina v. EPA, 2006 U.S. App. LEXIS 24597 (D.C. Cir., Sept. 28, 2006)

COUNSEL: Robin L. Juni argued the cause for petitioners on SO[2] Issues. Bart E. Cassidy argued the cause for petitioners on Title IV Exempt Units Issues. With them on the briefs were Peter H. Wyckoff, Jeffrey A. Knight, Lisa M. Jaeger, Brian J. McManus, William H. Lewis Jr., Steven J. Shimberg, Deborah E. Jennings, Meredith DuBarry Huston, Michael R. Barr, Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, Sam Kalen, Kyle W. Danish, and Alvin Bruce Davis. Carol F. McCabe entered an appearance.

Marc D. Bernstein, Special Deputies Attorney General, Attorney General's Office of State of North Carolina, argued the cause for petitioners on North Carolina Issues. With him on the briefs were Roy Cooper, Attorney General, James C. Gulick, Senior Deputy Attorney General, J. Allen Jernigan, Special Deputies Attorney General, and John C. Evans, Assistant Attorney General.

William M. Bumpers, Robert A. Manning, and Michael W. Steinberg argued the causes for petitioners on Border State Issues. With them on the briefs were David A. Savage, Michael B. Heister, William H. Lewis Jr., and Alvin Bruce Davis. James S. Alves and Winston [**2] K. Borkowski entered appearances.

Alvin B. Davis argued the cause for petitioners on Fuel-Adjustment Issues. With him on the briefs was David A. Savage. Joshua B. Frank entered an appearance.

Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, and Robert A. Manning were on the briefs of petitioners Northern Indiana Public Service Company and Florida Association of Electric Utilities on NO[x]-Related Claims.

Angeleno Purdy and Norman L. Rave, Jr., Attorneys, U.S. Department of Justice, argued the cause for respondents. With them on the brief were John C. Cruden, Deputy Assistant Attorney General, and Steven E. Silverman and Geoffrey Wilcox, Counsel, U.S. Environmental Protection Agency. Paul D. Tanaka, Attorney, U.S. Department of Justice, entered and appearance.

Andrew M. Cuomo, Attorney General, Attorney General's Office of the State of New York, Barbara D. Underwood, Solicitor General, Daniel Chepaitis, Assistant Solicitor General, J. Jared Snyder, Assistant Attorney General, Richard Blumenthal, Attorney General, Attorney General's Office of the State of Connecticut, Stuart Rabner, Attorney General, Attorney General's Office of

the State of New Jersey, Joseph R. Biden, III, Attorney [**3] General, Attorney General's Office of the State of Delaware, Lisa Madigan, Attorney General, Attorney General's Office of the State of Illinois, Douglas F. Gansler, Attorney General, Attorney General's Office of the State of Maryland, Martha Coakley, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, Kelly A. Ayotte, Attorney General, Attorney General's Office of the State of New Hampshire, Gary K. King, Attorney General, Attorney General's Office for the State of New Mexico, Patrick C. Lynch, Attorney General, Attorney General's Office of the State of Rhode Island, and Linda Singer, Attorney General at the time the brief was filed, Attorney General's Office for the District of Columbia, were on the brief of amici states in support of petitioner North Carolina. Michael J. Myers, Assistant Attorney General, Attorney General's Office of the State of New York, Matthew I. Levine, Assistant Attorney General, Attorney General's Office of the State of Connecticut, Jean P. Reilly, Ruth E. Carter, and Kevin P. Auerbacher, Assistant Attorneys General, Attorney General's Office of the State of New Jersey, and James R. Milkey, Assistant Attorney General, Attorney [**4] General's Office of the Commonwealth of Massachusetts, entered appearances.

Kristen M. Campfield, Attorney, was on the brief for amicus curiae Commonwealth of Pennsylvania, Department of Environmental Protection, in support of petitioner ARIPPA and seeking remand.

Sean H. Donahue, Vickie L. Patton, and John D. Walke were on the joint brief of intervenors in support of respondent.

Peter Glaser, Harold P. Quinn, Norman W. Fichthorn, C. Grady Moore III, P. Stephen Gidiere III, Claudia M. O'Brien, and Nathan H. Seltzer were on the brief for industry intervenors.

JUDGES: Before: SENTELLE, Chief Judge, and ROGERS and BROWN, Circuit Judges.

OPINION

[*901] *PER CURIAM:* These consolidated petitions for review challenge various aspects of the Clean Air Interstate Rule. Because we find more than several fatal flaws in the rule and the Environmental Protection Agency ("EPA") adopted the rule as one, integral action, we vacate the rule in its entirety and remand to EPA to promulgate a rule that is consistent with this opinion.

I. Background

A. Title I of the Clean Air Act

Title I of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, requires EPA to issue national ambient air quality standards ("NAAQS") for each air pollutant [**5] that "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare [and] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources . . . ," *id.* § 7408(a)(1)(A), (B). It also requires EPA to divide the country into areas designated as "nonattainment," "attainment," or "unclassifiable" for each air pollutant, depending on whether the area meets the NAAQS. *Id.* § 7407(c), (d). Title I gives states "the primary responsibility for assuring air quality" within their borders, *id.* [*902] § 7407(a), and requires each state to create a state implementation plan ("SIP") to meet the NAAQS for each air pollutant and submit it to EPA for its approval, *id.* § 7410. If a state is untimely in submitting a compliant SIP to EPA, EPA must promulgate a federal implementation plan ("FIP") for the state to follow. *Id.* § 7410(c)(1).

One provision of Title I requires SIPs to

> contain adequate provisions --(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--(I) contribute significantly to [**6] nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS] . . . .

42 U.S.C. § 7410(a)(2)(D)(i)(I) (statutory provision to which we refer throughout this opinion as "section 110(a)(2)(D)(i)(I)"). In 1998, EPA relied on this provision to promulgate the NO[x] SIP Call, which imposed a duty on certain upwind sources to reduce their NO[x] emissions by a specified amount so that they no longer "'contribute significantly to nonattainment in, or interfere with maintenance by,' a downwind State." Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998) ("NO[x] SIP Call"). The NO[x] SIP Call created an optional cap-and-trade program for nitrogen oxides ("NO[x]"). *Id.* at 57,359. Like the NO[x] SIP Call, the Clean Air Interstate Rule--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 Fed. Reg. 25,162 (May 12, 2005) ("CAIR")-which is the rule at issue in these consolidated petitions for [**7] review, also derives its statutory authority from section 110(a)(2)(D)(i)(I).

B. Title IV of the Clean Air Act

Title IV of the CAA, 42 U.S.C. §§ 7651-7651o, aims to reduce acid rain deposition nationwide and in doing so creates a cap-and-trade program for sulfur dioxide ("SO[2]") emitted by fossil fuel-fired combustion devices. Congress capped SO[2] emissions for affected units, or electric generating units ("EGUs"), at 8.9 million tons nationwide, *id.* § 7651b(a)(1), and distributed "allowances" among those units. One "allowance" is an authorization for an EGU to emit one ton of SO[2] in a year. *Id.* § 7651a(3). Title IV includes detailed provisions for allocating allowances among EGUs based for the most part on their share of total heat input of all Title IV EGUs during a 1985-87 baseline period. *Id.* §§ 7651a(4), 7651c, 7651d, 7651e, 7651h, 7651i. Whenever an EGU emits one ton of SO[2] in a year, it must surrender one allowance to EPA. *See id.* § 7651b(g). But Title IV also permits EGUs to transfer unused allowances to deficient EGUs throughout the nation or to "bank" excess allowances and use or sell them in future years. *Id.* § 7651b(b).

Title IV exempts EGUs that are "simple combustion [**8] turbines, or units which serve a generator with a nameplate capacity of 25 Mwe [megawatt electrical] or less," 42 U.S.C. § 7651a(8), those that are not fossil fuel-fired, *id.* § 7651a(15), those that do not sell electricity, *id.* § 7651a(17)(A)(i), and those that cogenerate steam and electricity unless they sell a certain amount of electricity, *id.* § 7651a(17)(C). It also provides that certain exempt units--"qualifying small power production facilities" and "qualifying cogeneration facilities," defined in 16 U.S.C. § 796(17)(C), (18)(B) (delegating power to FERC to define the terms), and certain "new independent power production facilities," defined in 42 U.S.C. § 7651o(a)(1)-- [*903] may elect to become a part of Title IV. 42 U.S.C. § 7651d(g)(6)(A); *see id.* § 7651i (detailing "electing-in" provisions).

C. Clean Air Interstate Rule

Pursuant to its Title I authority to ensure that states have plans in place that implement the requirements in section 110(a)(2)(D)(i)(I), EPA promulgated CAIR. CAIR, 70 Fed. Reg. at 25,165. CAIR's purpose is to reduce or eliminate the impact of upwind sources on out-of-state downwind nonattainment of NAAQS for fine particulate matter ("PM[2.5]"), a pollutant associated [**9] with respiratory and cardiovascular problems, and eight-hour ozone, a pollutant commonly known as smog. *Id.* at 25,162. For the most part, EPA defines sources at the state level. EPA determined that 28 states and the District of Columbia ("upwind states") contribute significantly to out-of-state downwind nonattainment of one or both NAAQS. *Id.* Because SO[2] "is a precursor to PM[2.5] formation, and NO[x] is a precursor to both ozone and PM[2.5] formation," CAIR requires upwind states "to revise their [SIPs] to include control measures to reduce emissions" of SO[2] and NO[x]. *Id.* CAIR requires upwind states to reduce their emissions in two phases. *Id.* at 25,165. NO[x] reductions are to start in 2009, SO[2] reductions are to start in 2010, and the second reduction phase for each air pollutant is to start in 2015. *Id.* at 25,162. To implement CAIR's emission reductions, the rule also creates optional interstate trading programs for each air pollutant, to which, in the absence of approved SIPs, all upwind sources are now subject. *Id.; see* Rulemaking on Section 126 Petition from North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to the Clean Air Interstate Rule; Revisions to the Acid Rain Program, 71 Fed. Reg. 25,328, 25,328 (Apr. 28, 2006) [**10] ("FIP") (in the absence of approved SIPs for CAIR, applying the rule's model trading programs via EPA's Federal Implementation Plan to all sources in upwind states). In addition, CAIR revises Title IV's Acid Rain Program regulations governing the SO[2] cap-and-trade program and replaces the NO[x] SIP Call with the CAIR ozone-season NO[x] trading program.

At issue in much of this litigation is the definition of the term "contribute significantly." In other words, in order to promulgate CAIR, EPA had to determine what amount of emissions constitutes a "significant contribution" to another state's nonattainment problem. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). CAIR uses several factors to define "contribute significantly," including one state's impact on another's air quality, the cost of "highly cost-effective" emissions controls, fairness, and equity in the balance between regional and local controls. CAIR, 70 Fed. Reg. at 25,174-75. The air quality factor is the threshold step in the analysis, determining whether an upwind state is subject to CAIR, and the other factors help EPA determine the quantitative level of emissions reductions required of upwind sources.

CAIR uses a different air [**11] quality threshold for each of the two pollutants it regulates. A state meets the air quality threshold for PM[2.5] (and is therefore subject to CAIR) if it contributes 0.2 micrograms per cubic meter ("[mu]g/m3") or more of PM[2.5] to out-of-state downwind areas that are in nonattainment. *Id.* at 25,174-75, 25,191. CAIR uses a more complicated process to define the air quality threshold for ozone NAAQS. CAIR first eliminates a state from inclusion in the CAIR ozone program if it has the following characteristics: [*904] (1) it contributes less than 2 parts per billion ("ppb") to a nonattainment area's ozone concentration as measured using either a "zero-out method" or a "source apportionment method," or (2) its relative contribution to

the nonattainment area's excess ozone concentration (the number of particles exceeding 85 ppb) is less than one percent. *Id.* at 25,191; *see also* Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule): Reconsideration, 71 Fed. Reg. 25,304, 25,320 (Apr. 28, 2006) ("Reconsideration"). States that survive the screening criteria are then assessed to determine if they contribute significantly to ozone nonattainment in another [**12] state using three metrics: (1) magnitude of contribution, (2) frequency of contribution, and (3) relative amount of contribution to the area's ozone concentration that exceeds attainment levels. CAIR, 70 Fed. Reg. at 25,191-92.

States that "contribute significantly" to nonattainment for ozone NAAQS are subject to CAIR's ozone-season limits for NO[x] and those that "contribute significantly" to nonattainment for PM[2.5] NAAQS are subject to CAIR's annual limits for NO[x] and SO[2]. The ozone-season NO[x] limits are a percentage reduction in the annual limits for NO[x] calculated for PM[2.5] contributors. In order to eliminate a state's significant contribution to PM[2.5] NAAQS, CAIR sets an annual cap on NO[x] and SO[2] emissions in the region. Each state participating in CAIR's allowance-trading programs receives a budget of allowances, calculated according to a different formula for SO[2] and NO[x]. If a state develops a SIP that opts out of the trading programs to which all its upwind sources are now subject in the absence of an approved SIP, *see* FIP, 71 Fed. Reg. at 25,328, the state must limit its emissions to a cap specified by CAIR.

CAIR sets each state's NO[x] emissions budget [**13] by allocating the regionwide NO[x] budget among CAIR states according to each state's proportion of oil-, gas-, and coal-fired facilities. CAIR, 70 Fed. Reg. at 25,230-31. The regionwide budget is equal to the upwind states' average annual heat input for EGUs from 1999 to 2002 multiplied by the uniform emissions rate if EGUs were to use "highly cost-effective" emissions controls. *Id.* at 25,231. For Phase One, which starts in 2009, the multiplier is 0.15 pounds per million British thermal units ("lb/mmBtu") and for Phase Two, which starts in 2015, the multiplier is 0.125 lb/mmBtu. *Id.* at 25,230. Even though EPA determined that emissions controls in both phases are "highly cost effective," it only deemed Phase Two to eliminate the upwind states' "significant contribution" to downwind nonattainment. *Id.* at 25,198. In 2009, EPA has supplemented the budget of 1.5 million tons of NO[x] emissions with a one-time Compliance Supplement Pool of 200,000 NO[x] allowances. *Id.* at 25,231-32. Like SO[2] allowances in Title IV, one CAIR NO[x] allowance permits an EGU to emit one ton of NO[x] in one year. State budgets are based on their average annual heat input, adjusted by fuel type (coal, gas, [**14] oil) during the 1999-2002 time period. *Id.* at 25,231. The use of fuel-adjustment factors means states with higher percentages of gas- and oil-fired facilities receive comparably fewer NO[x] allowances than states with higher percentages of coal-fired facilities. States have discretion to accomplish their NO[x] emissions caps as they see fit in their SIPs, but if a state takes part in the EPA-administered trading program for NO[x], it must follow EPA's rules for that program.

CAIR sets each state's SO[2] budget using a process similar to the one used for NO[x] budgets; it allocates the regionwide SO[2] budget among upwind states. However, EPA used a different method to determine the regionwide budget for SO[2]. Instead of using 1999-2002 data, the agency summed [*905] all the Title IV allowances allotted to EGUs in the covered states and reduced them by 50% for 2010 (Phase One) and 65% for 2015 (Phase Two). *Id.* at 25,229. As stated above, Title IV allocates allowances among EGUs based for the most part on their share of the total heat input of all Title IV EGUs during a 1985-87 baseline period, not the later time period used for NO[x] allowances in CAIR. 42 U.S.C. §§ 7651a(4), 7651c, 7651d, [**15] 7651e, 7651h, 7651i. States subject to CAIR may opt into the EPA-administered trading program for SO[2], but if they do not opt in and at the same time choose to regulate EGUs, their SIPs must include a mechanism for retiring Title IV SO[2] allowances in excess of the budget CAIR allocates to each state. CAIR, 70 Fed. Reg. at 25,259. A state not participating in CAIR's trading program but regulating other sources of SO[2] in addition to EGUs, does not need to surrender quite as many of its Title IV SO[2] allowances. *Id.* Any surrendered allowance may not be used for Title IV compliance purposes and is forever out of circulation. *Id.* at 25,291. A state does not have to surrender any Title IV SO[2] allowances if it adopts a SIP that regulates only non-EGUs to accomplish its SO[2] cap, *id.* at 25,295, but EPA notes that EGUs are projected to contribute 70% of SO[2] emissions in 2010, *id.* at 25,214, making such a scenario unlikely.

EPA issued two additional rules clarifying CAIR that are also under review in this proceeding. One rule responds to various petitions for reconsideration, which are discussed in more detail below. Reconsideration, 71 Fed. Reg. 25,304. Another rule, *inter alia,* [**16] sets forth a FIP to regulate EGUs until upwind states implement EPA-approved SIPs that conform with CAIR requirements. FIP, 71 Fed. Reg. 25,328.

D. Petitions for Review

Section 307 of the CAA requires petitions for judicial review of CAIR to be filed within 60 days of the rule's publication in the Federal Register. 42 U.S.C. § 7607(b)(1). On May 12, 2005, EPA published CAIR and

on April 28, 2006, EPA published its Reconsideration and FIP, which describes the Federal Implementation Plan required of sources while states formulate their SIPs. CAIR, 70 Fed. Reg. 25,162; Reconsideration, 71 Fed. Reg. 25,304; FIP, 71 Fed. Reg. 25,328. In the 60 days after EPA published CAIR and its Reconsideration, several petitions for review were filed in this Court.

Among those petitions are North Carolina's objections to EPA's trading programs, EPA's interpretation of the "interfere with maintenance" language in section 110(a)(2)(D)(i)(I), Phase Two's 2015 compliance date, the NO[x] Compliance Supplement Pool, EPA's interpretation of "will" in "will contribute significantly," and the air quality threshold for PM[2.5]. Several electric utility companies ("SO[2] Petitioners") contest EPA's authority under [**17] Title I and Title IV to limit the number of Title IV allowances in circulation, to set state SO[2] budgets as percentage reductions in Title IV allowances, and to require units exempt from Title IV to acquire Title IV allowances. Petitioners Entergy Corporation and FPL Group, to which we refer as "Entergy," contest EPA's authority to base state NO[x] budgets on the number of coal-, oil-, and gas-fired facilities a state has compared to other states in the CAIR region. Electric utilities operating in Texas, Florida, and Minnesota and one municipality argue against the inclusion of all or part of those States in CAIR. And Florida Association of Electric Utilities petitions for review of EPA's 2009 start date for Phase One of NO[x] restrictions. We consider these petitions below.

[*906] II. Analysis

Our jurisdiction derives from the CAA, which also establishes our standard of review. We "may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 42 U.S.C. § 7607(d)(9). We refer to the review standard in 42 U.S.C. § 7607(d) [**18] instead of the similar standard of review set forth in the Administrative Procedure Act ("APA") because the CAA directs that its review standard apply to "such . . . actions as the Administrator may determine." *Id.* § 7607(d)(1)(V); *see* Supplemental Proposal for the Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 69 Fed. Reg. 32,684, 32,686 (June 10, 2004) (applying section 307(d), 42 U.S.C. § 7607(d), "to all components of the rulemaking").

The petitions under review involve EPA's construction of the CAA, a statute it administers. Where the statute speaks to the direct question at issue, we afford no deference to the agency's interpretation of it and "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). But where the statute does "not directly address[] the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," and we only reverse that determination if it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. An action [**19] is "arbitrary and capricious" if it

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *see Motor Vehicle Mfrs. Ass'n. v. EPA*, 247 U.S. App. D.C. 268, 768 F.2d 385, 389 n.6 (D.C. Cir. 1985) (noting that "the standard we apply (i.e., whether the EPA's actions were in excess of statutory authority or arbitrary and capricious) is the same under" the CAA and the APA).

A. North Carolina Issues

Petitioner North Carolina challenges CAIR's programs for pollution-trading, EPA's interpretation of the "interfere with maintenance" provision in section 110(a)(2)(D)(i)(I), the 2015 compliance deadline for Phase Two of CAIR, the NO[x] Compliance Supplement Pool, EPA's interpretation of the word "will" that precedes "contribute significantly" in section 110(a)(2)(D)(i)(I), and EPA's use of a 0.2 [mu]g/m3 air quality threshold for including upwind states in CAIR's [**20] PM[2.5] program. We grant North Carolina's petition as to the trading programs, the "interfere with maintenance" language, and the 2015 compliance deadline, deny its petition as to its interpretation of "will" and the air quality threshold, and take no action on the NO[x] Compliance Supplement Pool issue.

1. Pollution-Trading Programs

North Carolina challenges the lawfulness of CAIR's trading programs for SO[2] and NO[x]. North Carolina contests the lack of reasonable measures in CAIR to assure that upwind states will abate their unlawful emissions as required by section 110(a)(2)(D)(i)(I), but does not submit that any trading is per se unlawful. EPA designed [*907] CAIR to eliminate the significant contri-

bution of upwind states, as a whole, to downwind nonattainment. CAIR, 70 Fed. Reg. at 25,195. EPA did not purport to measure each state's significant contribution to specific downwind nonattainment areas and eliminate them in an isolated, state-by-state manner. Reasoning that capping emissions in each state would not achieve reductions in the most cost-effective manner, EPA decided to take a regionwide approach to CAIR and include voluntary emissions trading programs.

> In modeling the CAIR . [**21] . . EPA assumes interstate emissions trading. While EPA is not requiring States to participate in an interstate trading program for EGUs, we believe it is reasonable to evaluate control costs assuming States choose to participate in such a program since that will result in less expensive reductions.

Id. at 25,196. In CAIR's trading system, states are given initial emissions budgets, but sources can choose to sell or purchase emissions credits from sources in other states. As a result, states may emit more or less pollution than their caps would otherwise permit.

Because EPA evaluated whether its proposed emissions reductions were "highly cost effective," at the regionwide level assuming a trading program, it never measured the "significant contribution" from sources within an individual state to downwind nonattainment areas. Using EPA's method, such a regional reduction, although equivalent to the sum of reductions required by all upwind states to meet their budgets, would never equal the aggregate of each state's "significant contribution" for two reasons. State budgets alone, without trading, would not be "highly cost effective." And although EPA has measured the "air quality factor" [**22] to include states in CAIR, it has not measured the unlawful amount of pollution for each upwind-downwind linkage. "As noted earlier in the case of SO[2], EPA recognizes that the choice of method in setting State budgets, with a given regionwide total annual budget, makes little difference in terms of the levels of resulting regionwide annual SO[2] and NO[x] emissions reductions." *Id.* at 25,230-31. Thus EPA's apportionment decisions have nothing to do with each state's "significant contribution" because under EPA's method of analysis, state budgets do not matter for significant contribution purposes.

But according to Congress, individual state contributions to downwind nonattainment areas do matter. Section 110(a)(2)(D)(i)(I) prohibits sources *"within the State"* from "contribut[ing] significantly to nonattainment *in . . . any other State . . . "* (emphasis added). Yet under CAIR, sources in Alabama, which contribute to nonattainment of PM[2.5] NAAQS in Davidson County, North Carolina, would not need to reduce their emissions at all. *See* CAIR, 70 Fed. Reg. at 25,247 tbl. VI-8. Theoretically, sources in Alabama could purchase enough N[x]O and SO[2] allowances to cover all their current [**23] emissions, resulting in no change in Alabama's contribution to Davidson County, North Carolina's nonattainment. CAIR only assures that the entire region's significant contribution will be eliminated. It is possible that CAIR would achieve section 110(a)(2)(D)(i)(I)'s goals. EPA's modeling shows that sources contributing to North Carolina's nonattainment areas will at least reduce their emissions even after opting into CAIR's trading programs. 71 Fed. Reg. at 25,344-45. But EPA is not exercising its section 110(a)(2)(D)(i)(I) duty unless it is promulgating a rule that achieves something measurable toward the goal of prohibiting sources "within the State" from contributing to nonattainment or interfering with maintenance "in any other State."

[*908] In *Michigan v. EPA,* 341 U.S. App. D.C. 306, 213 F.3d 663 (D.C. Cir. 2000), we deferred to EPA's decision to apply uniform emissions controls to all upwind states despite different levels of contribution of NO[x] to nonattainment areas caused by the differing quantities of emissions produced in upwind states and the varying distances of upwind sources to downwind nonattainment areas. *Id.* at 679. We did so because these effects "flow[] ineluctably from the EPA's decision [**24] to draw the 'significant contribution' line on a basis of cost differentials" and "[o]ur upholding of that decision logically entails upholding this consequence." *Id.* But the flow of logic only goes so far. It stops at the point where EPA is no longer effectuating its statutory mandate. In *Michigan* we never passed on the lawfulness of the NO[x] SIP Call's trading program. *Id.* at 676 ("Of course we are able to assume the existence of EPA's allowance trading program only because no one has challenged its adoption."). It is unclear how EPA can assure that the trading programs it has designed in CAIR will achieve section 110(a)(2)(D)(i)(I)'s goals if we do not know what each upwind state's "significant contribution" is to another state. Despite *Michigan's* approval of emissions controls that do not correlate directly with each state's relative contribution to a specific downwind nonattainment area, CAIR must include some assurance that it achieves something measurable towards the goal of prohibiting sources "within the State" from contributing to nonattainment or interfering with maintenance in "any other State."

Because CAIR is designed as a complete remedy to section 110(a)(2)(D)(i)(I) [**25] problems, as EPA claims, FIP, 71 Fed. Reg. at 25,340, CAIR must do more than achieve something measurable; it must actually re-

quire elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind nonattainment areas. To do so, it must measure each state's "significant contribution" to downwind nonattainment even if that measurement does not directly correlate with each state's individualized air quality impact on downwind nonattainment relative to other upwind states. *See Michigan,* 213 F.3d at 679. Otherwise, the rule is not effectuating the statutory mandate of prohibiting emissions moving from one state to another, leaving EPA with no statutory authority for its action. Whether EPA could promulgate a section 110(a)(2)(D)(i)(I) remedy that would bar alternate relief, such as would be available under section 126, 42 U.S.C. § 7426, is a question that is not before the court.

2. "Interfere With Maintenance"

Section 110(a)(2)(D)(i)(I) requires EPA to ensure that SIPs "contain adequate provisions" prohibiting sources within a state from emitting air pollutants in amounts which will "contribute significantly to nonattainment in, *or* interfere [**26] with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). North Carolina argues that EPA unlawfully ignored the "interfere with maintenance" language in section 110(a)(2)(D)(i)(I), divesting it of independent effect in CAIR. It contends that instead of limiting the beneficiaries of CAIR to downwind areas that were monitored to be in nonattainment when EPA promulgated CAIR *and* were modeled to be in nonattainment in 2009 and 2010, when CAIR goes into effect, CAIR, 70 Fed. Reg. at 25,244, EPA should have also included in CAIR upwind states, such as Georgia, that send pollution into downwind areas that are projected to barely meet attainment levels of NAAQS in 2010. North Carolina only contests EPA's interpretation of the "interfere with maintenance" prong as applied to EPA's determination of which [*909] states are beneficiaries of CAIR for the ozone NAAQS.

North Carolina explains that even though all of its counties are projected to attain NAAQS for ozone by 2010, several of its counties are at risk of returning to nonattainment due to interference from upwind sources. Specifically, it notes that Mecklenburg County, which projections [**27] show will have ozone levels of 82.5 ppb in 2010 2.5 ppb below the 85.0 ppb NAAQS) without help from CAIR, could fall back into nonattainment because of the historic variability in the county's ozone levels. Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling, at Appendix E (March 2005) ("Technical Support Document"). EPA has stated that "historical data indicates that attaining counties with air quality levels within 3 ppb of the standard are at risk of returning to nonattainment." EPA, Corrected Response to Significant Public Comments on the Proposed Clean Air Interstate Rule, at 148 (April 2005) ("Corrected Response"). "The information also indicates that even if CAIR receptors were to [be] 3-5 ppb below the standard, they would have a reasonable likelihood of returning to nonattainment." *Id.* And in the case of Fulton County, Georgia, EPA determined that the "interfere with maintenance" provision justified imposing controls on upwind states in 2015 even though it is projected to attain the NAAQS by a margin of 7 or 8 ppb because its ozone levels have varied by at least that margin several times in the recent past. *Id.* at 150. North Carolina argues [**28] that EPA must utilize this "historic variability" standard to determine which downwind areas suffer interference with their maintenance in 2010, not just 2015. If it did so, EPA would see that Mecklenburg County, North Carolina, has varied by at least 3 ppb (the relevant margin between attainment and nonattainment for that county in 2010) six times in the recent past and consequently would include in CAIR any state, such as Georgia, that is contributing an unlawful amount of pollution to this downwind area. *Id.* at 1042.

EPA contends that it interpreted "interfere with maintenance" just as it did in the NO[x] SIP Call, in which it gave the term a meaning "much the same as" the one given to the preceding phrase, "contribute significantly to nonattainment." CAIR, 70 Fed. Reg. at 25,193 n.45. EPA maintains that "the 'interfere with maintenance' prong may come into play only in circumstances where EPA or the State can reasonably determine or project, based on available data, that an area in a downwind state will achieve attainment, but due to emissions growth or other relevant factors is likely to fall back into nonattainment." *Id.* In the NO[x] SIP Call, it meant that areas monitored to [**29] be in attainment when that rule was promulgated but which were modeled to be in nonattainment in 2007, when the rule went into effect, were considered downwind areas with which upwind sources' emissions interfered. NO[x] SIP Call, 63 Fed. Reg. at 57,379. EPA states it gave effect to the "interfere with maintenance" prong in CAIR by using it as a basis for implementing further emissions reductions in Phase Two of CAIR, by which time some downwind states will have attained NAAQS. CAIR, 70 Fed. Reg. at 25,195.

First, we note that we did not consider EPA's interpretation of "interfere with maintenance" in *Michigan.* Thus any interpretation it used in that rulemaking cannot provide support for EPA's contention that its current interpretation, even if identical to that in the NO[x] SIP Call, comports with the statute. So we analyze EPA's interpretation of "interfere with maintenance" for the first time here. Despite using "interfere with maintenance" as a justification for imposing further [*910] emissions controls in 2015, CAIR gave no independent significance

to the "interfere with maintenance" prong of section 110(a)(2)(D)(i)(I) to separately identify upwind sources interfering with downwind maintenance. [**30] Under EPA's reading of the statute, a state can never "interfere with maintenance" unless EPA determines that at one point it "contribute[d] significantly to nonattainment." EPA stated clearly on two occasions "that it would apply the interfere with maintenance provision in section 110(a)(2)(D) in conjunction with the significant contribution to nonattainment provision and so did not use the maintenance prong to separately identify upwind States subject to CAIR." FIP, 71 Fed. Reg. at 25,337 (citing CAIR, 70 Fed. Reg. at 25,193); *see also* Corrected Response, at 63. EPA reasoned that this interpretation "avoid[s] giving greater weight to the potentially lesser environmental effect" and strikes "a reasonable balance between controls in upwind states and in-state controls." FIP, 71 Fed. Reg. at 25,337. EPA stated that an interpretation that permitted states that are able to attain NAAQS on their own to benefit from CAIR "could even create a perverse incentive for downwind states to increase local emissions." *Id.*

All the policy reasons in the world cannot justify reading a substantive provision out of a statute. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Areas that find [**31] themselves barely meeting attainment in 2010 due in part to upwind sources interfering with that attainment have no recourse under EPA's interpretation of the interference prong of section 110(a)(2)(D)(i)(I). 2010 is not insignificant because that is the deadline for downwind areas to attain ozone NAAQS. *See* 42 U.S.C. § 7511 (setting forth deadlines for attaining ozone NAAQS). An outcome that fails to give independent effect to the "interfere with maintenance" prong violates the plain language of section 110(a)(2)(D)(i)(I)). The provision at issue is written in the disjunctive: SIPs must "contain adequate provisions prohibiting . . . 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 . . . ." 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise . . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). There is no context in section 110(a)(2)(D)(i)(I) directing an alternate result; [**32] therefore EPA must give effect to both provisions in the statute.

EPA contends in its brief that CAIR is just one step in carrying out its section 110(a)(2)(D)(i)(I) duties, hinting that it may later choose to give independent effect to the "interfere with maintenance" language. There is some general language in the record to support this contention. *See* CAIR, 70 Fed. Reg. at 25,175 ("This overall plan is well within the ambit of EPA's authority to proceed with regulation on a step-by-step basis."). But more specific language in the rule belies this claim. "The [section 110(a)(2)(D)(i)(I)] violation is eliminated once a State adopts a SIP containing the CAIR trading programs (or a SIP containing other emission reduction options meeting the requirements specified in CAIR), or EPA promulgates a FIP to achieve those same reductions." FIP, 71 Fed. Reg. at 25,340. Because EPA describes CAIR as a complete remedy to a section 110(a)(2)(D)(i)(I) violation and does not give independent significance to the "interfere with maintenance" language to identify upwind states that interfere with downwind maintenance, it unlawfully nullifies that aspect of the statute and provides [*911] no protection for downwind [**33] areas that, despite EPA's predictions, still find themselves struggling to meet NAAQS due to upwind interference in 2010. For this reason, we grant North Carolina's petition on this issue. Although North Carolina challenged CAIR on the "interfere with maintenance" issue only with regard to ozone, the rule includes the same flaw with regard to PM[2.5]. The court does not address North Carolina's separate contention that EPA failed to comply with notice-and-comment requirements regarding its proposed test for an "interfere with maintenance" violation, or the propriety of the test itself.

3. 2015 Compliance Deadline

North Carolina argues that the 2015 deadline for upwind states to eliminate their "significant contribution" to downwind nonattainment ignores the plain language of section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), contradicts EPA's goal of "balanc[ing] the burden for achieving attainment between regional-scale and local-scale control programs," CAIR, 70 Fed. Reg. at 25,166, violates the Supreme Court's holding that EPA may not consider economic and technological infeasibility when approving a SIP, *Union Elec. Co. v. EPA*, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474 (1976), and departs from the contrary [**34] approach it took in the NO[x] SIP Call without explanation, NO[x] SIP Call, 63 Fed. Reg. at 57,449.

North Carolina challenges the 2015 Phase Two deadline for upwind states to come into compliance with CAIR as incompatible with section 110(a)(2)(D)(i)(I)'s mandate that SIPs contain adequate provisions prohibiting significant contributions to nonattainment "consistent with the provisions of [Title I]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). Title I dictates the deadlines for states to attain particular NAAQS. PM[2.5] attainment must be achieved "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . . except that the Administrator may

extend the attainment date . . . for a period no greater than 10 years from the date of designation as nonattainment . . . ." 42 U.S.C. § 7502(a)(2)(A). North Carolina, along with the rest of the CAIR states, must meet PM[2.5] NAAQS by 2010. *See* 40 C.F.R. § 81.301 *et seq.* Ozone nonattainment areas must attain permissible levels of ozone "as expeditiously as practicable," but no later than the assigned date in the table the statute provides. 42 U.S.C. § 7511. North Carolina's statutory deadline is June [**35] 2010, but it could be even sooner if EPA upon repromulgating its regulations sets an earlier deadline. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 374 U.S. App. D.C. 121, 472 F.3d 882 (D.C. Cir. 2006). North Carolina argues that despite the statutory mandate that section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), be consistent with the rest of Title I, which requires compliance with PM[2.5] and ozone NAAQS by 2010, CAIR gives states that "contribute significantly" to nonattainment until 2015 to comply based solely on reasons of feasibility. CAIR, 70 Fed. Reg. at 25,177; *see also* Corrected Response, at 58, 61; CAIR, 70 Fed. Reg. at 25,222-25 (citing feasibility restraints such as the difficulty of securing project financing and the limited amount of specialized boilermaker labor to install controls).

EPA contends that the phrase "consistent with the provisions of [Title I]" does not require incorporating Title I's NAAQS attainment deadlines into CAIR. It argues that section 110(a)(2)(D)(i)(I) does not mandate any particular time frame and that the language about consistency only requires EPA to make a rule consistent with *procedural* provisions in Title I, not substantive ones. It comes to this conclusion [**36] because the phrase "consistent with the provisions of this title" follows the word "prohibiting." Due to this placement, [*912] EPA argues that the phrase requiring consistency only modifies the word "prohibiting." EPA does not explain how it jumps from this observation to the conclusion that a phrase modifying the word "prohibiting" can only refer to procedural requirements. The word "procedural" is simply not in the statute. If there were any ambiguity as to Congress's intent in excluding the limiting language EPA proposes, an examination of the relevant language in the context of the whole CAA dispels any doubts as to its meaning. In the CAA, Congress differentiates between requiring consistency with provisions in a title and requiring consistency "with the *procedures* established" under a title. *Compare* 42 U.S.C. § 7410(a)(2)(D)(i), *with id.* § 7661b(c) (emphasis added). Section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), is not limited to procedural provisions in Title I; thus it requires EPA to consider all provisions in Title I--both procedural and substantive--and to formulate a rule that is consistent with them.

Despite section 110(a)(2)(D)(i)'s requirement that prohibitions on upwind [**37] contributions to downwind nonattainment be "consistent with the provisions of [Title I]," EPA did not make any effort to harmonize CAIR's Phase Two deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas. 42 U.S.C. § 7410(a)(2)(D)(i). As a result, downwind nonattainment areas must attain NAAQS for ozone and PM[2.5] without the elimination of upwind states' significant contribution to downwind nonattainment, forcing downwind areas to make greater reductions than section 110(a)(2)(D)(i)(I) requires. Because EPA ignored its statutory mandate to promulgate CAIR consistent with the provisions in Title I mandating compliance deadlines for downwind states in 2010, we grant North Carolina's petition challenging the 2015 Phase Two deadline. We need not address petitioner's other arguments against this provision.

EPA justified the deadline partly on the basis that additional reductions will be required through the year 2015 in order to satisfy the "interfere with maintenance" provision of the statute. Although this may be a valid reason to require maintenance-based emissions reductions beyond the year 2010, EPA does not explain [**38] why it did not coordinate the final CAIR deadline to provide a sufficient level of protection to downwind states projected to be in nonattainment as of 2010.

4. NO[x] Compliance Supplement Pool

North Carolina contends that the NO[x] Compliance Supplement Pool of 200,000 tons defies section 110(a)(2)(D)(i)(I)'s mandate to eliminate the significant contribution of upwind sources to downwind NAAQS nonattainment and that the Compliance Supplement Pool is an arbitrary exercise of power that contradicts EPA's own record findings.

Under CAIR without the Compliance Supplement Pool, states can only begin to bank CAIR NO[x] allowances in 2009, the year in which Phase One of the CAIR NO[x] limits go into effect. The Compliance Supplement Pool gives states an incentive make emissions cuts early; states that can show "surplus" NO[x] emissions reductions in 2007 and 2008 can receive bankable (and tradeable) credits for those reductions. CAIR, 70 Fed. Reg. at 25,285. The 200,000 NO[x] credits are apportioned to states in accordance with their share of the 2009 region-wide NO[x] budget. *Id.* at 25,286. States may distribute the credits to sources based on "(1) [a] demonstration by the source to the State [**39] of NO[x] emissions reductions in surplus of any existing NO[x] emission control requirements; or (2) a demonstration to the State that the facility [*913] has a 'need' that would affect electricity grid reliability." *Id.* EPA created the Compliance Sup-

plement Pool to "mitigat[e] some of the uncertainty regarding the EPA projections of resources to comply with CAIR" and to "provide[] incentives for early, surplus NO[x] reductions." *Id.*

North Carolina first argues that the Compliance Supplement Pool is unlawful because it permits states to emit NO[x] in excess of the 1.5 million ton annual regional NO[x] cap, which EPA measured to be the upwind states' significant contribution to downwind nonattainment in the years 2009 to 2014. *See* CAIR, 70 Fed. Reg. at 25,210. EPA contends that North Carolina's argument is flawed. EPA based its measurement of upwind states' "significant contribution" on the level of reductions that would be "highly cost effective" in 2015, not 2009. The Phase One deadline is simply EPA's measurement of the reductions that would be feasible by 2009; it is not an independent measurement of "significant contribution" in that year. *See id.* at 25,177. Thus any emissions that exceed [**40] the 1.5 million ton level due to the extra 200,000 allowances from the Compliance Supplement Pool do not affect the elimination of upwind states' "significant contribution." The elimination of upwind states' significant contribution will not happen until Phase Two's 2015 deadline.

Because we grant North Carolina's petition that CAIR's Phase Two deadline of 2015 is unlawful, we will not pass judgment on the lawfulness of the Compliance Supplement Pool. As EPA explains, it created the Compliance Supplement Pool under the assumption that 2015 was an appropriate deadline for CAIR compliance. It is not. EPA does not argue that it can set a level of emissions that is an upwind state's "significant contribution" and then allow that state to exceed it. On remand, 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.

5. EPA's Definition of "Will" in "Will Contribute Significantly"

North Carolina contends that EPA altered its definition of "will" from a term that meant [**41] certainty in the NO[x] SIP Call to one that denotes the future tense in CAIR and that EPA made this change without any explanation. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). North Carolina also argues that EPA's interpretation of "will" violates the plain text of the statute. As a result, EPA did not consider upwind states for consideration in CAIR that contributed to monitored (or "certain") nonattainment in North Carolina counties at the time EPA promulgated CAIR; EPA only included upwind states that contributed to projected nonattainment in 2010.

In the NO[x] SIP Call, EPA stated "that the term 'will' means that SIPs are required to eliminate the appropriate amounts of emissions that presently, or that are expected in the future [to], contribute significantly to nonattainment downwind." NO[x] SIP Call, 63 Fed. Reg. at 57,375. This isolated phrase provides some support for North Carolina's contention that EPA considered upwind states that contributed to monitored nonattainment at the time it was promulgating the NO[x] SIP Call to be subject to the rule even if those states did not contribute to projected nonattainment in 2007, the year the rule went into effect. However, EPA later in the [**42] same rulemaking explained its approach to measuring nonattainment in more detail:

> In determining whether a downwind area has a nonattainment problem under the 1-hour standard to which an upwind [*914] area may be determined to be a significant contributor, EPA determined whether the downwind area currently has a nonattainment problem, and whether that area would continue to have a nonattainment problem as of the year 2007 assuming that in that area, all controls specifically required under the CAA were implemented, and all required or otherwise expected Federal measures were implemented. If, following implementation of such required CAA controls and Federal measures, the downwind area would remain in nonattainment, then EPA considered that area as having a nonattainment problem to which upwind areas may be determined to be significant contributors.

Id. at 57,377. In the NO[x] SIP Call, EPA interpreted "will" to indicate sources that presently *and* at some point in the future "will" contribute to nonattainment. Because the NO[x] SIP Call was to go into effect in 2007, that rule used 2007 as the relevant future year for measuring nonattainment. This approach is identical to the one EPA took in [**43] CAIR. Because CAIR goes into effect in 2009 and 2010 respectively, those are the future years used in the measurement. *See* CAIR, 70 Fed. Reg. at 25,241. North Carolina's claims about an arbitrary change in EPA's interpretation of "will" are unfounded because there was no change. And because "will" can mean either certainty or indicate the future tense, it was reasonable for EPA to choose to give effect to both interpretations of the word. Simply because CAIR does not include states based upon present-day violations that will be cured by 2010 does not mean that

EPA may ignore present-day violations for which there may be another remedy, such as relief pursuant to section 126, 42 U.S.C. § 7426. Therefore we deny North Carolina's petition on this issue.

6. PM[2.5] Contribution Threshold

North Carolina argues that EPA acted arbitrarily by proposing an air quality threshold for PM[2.5] at 0.15 [mu]g/m3 but finally settling on an air quality threshold of 0.2 [mu]g/m3. The air quality threshold for PM[2.5] is the amount of PM[2.5] that sources in a state must contribute to a downwind nonattainment area to be regulated as an upwind state in CAIR's PM[2.5] program. North Carolina also challenges [**44] EPA's decision to truncate, rather than round, the numbers it compared to the threshold. As a result, states that contributed 0.19 [mu]g/m3 or less to a downwind nonattainment area were not linked with North Carolina by CAIR.

EPA contests North Carolina's standing to raise this issue. It notes that only two states would be affected if EPA were to use the 0.15 [mu]g/m3 threshold. Illinois, which is already subject to CAIR's requirements for PM[2.5] contributions, would be subject to the exact same requirements for an additional reason--its contributions to Catawba County, North Carolina. Technical Support Document, at Appendix H. This additional upwind-downwind "link" would not change any of Illinois's duties under CAIR; therefore it would not change any effects felt by Catawba County, North Carolina. The lower threshold would also subject Arkansas to CAIR's PM[2.5] controls. CAIR, 70 Fed. Reg. at 25,191; Technical Support Document, at 42 tbl. VII-1. EPA states that Arkansas does not contribute at threshold levels to nonattainment in North Carolina, but it cites no record support for this assertion.

North Carolina has standing to raise this issue for three reasons. First, if in repromulgating [**45] CAIR to comply with section 110(a)(2)(D)(i)(I), EPA removes or modifies its interstate trading options, Illinois would be barred outright from contributing significantly to North Carolina's [*915] nonattainment areas. Second, EPA does not provide support for its assertion that Arkansas does not contribute to nonattainment areas in North Carolina because it never modeled the State. North Carolina claims that models for sources in Louisiana, Missouri, and Texas, which are further from North Carolina than those in Arkansas, show that Arkansas contributes at the 0.15 [mu]g/m3 threshold to nonattainment areas in North Carolina. Third, because EPA designed CAIR to be a complete statutory remedy, whether North Carolina is linked with Illinois by CAIR under section 110(a)(2)(D)(i)(I) is likely to affect related remedies that North Carolina may have against Illinois, for example, pursuant to section 126, 42 U.S.C. § 7426. Although we cannot anticipate what a new rule will look like, there is a "substantial probability" that a favorable decision by this court would redress the injury North Carolina asserts.

Because North Carolina has demonstrated an injury-in-fact caused by the rule it is challenging [**46] which a favorable decision by this Court could likely remedy, we can turn to the merits of North Carolina's petition. North Carolina notes that EPA first considered a threshold of 0.1 [mu]g/m3. NPR, 69 Fed. Reg. at 4584. In the Notice of Proposed Rulemaking, EPA stated that a 0.1 [mu]g/m3 threshold "is the smallest one that can make the difference between compliance and violation of the NAAQS for an area very near the NAAQS . . . ." *Id.* EPA then decided that it is "on balance, more appropriate to adopt a small percentage value of the standard level" and chose the percentage of the NAAQS standard of 15.0 [mu]g/m3 that is closest to 0.1 [mu]g/m3, which was one percent. *Id.* One percent of 15.0 [mu]g/m<3> is 0.15 [mu]g/m<3>, so EPA initially chose that number as the threshold. *Id.* However, EPA then "request[ed] comments on the use of higher or lower thresholds for this purpose." *Id.* In CAIR, EPA finally settled on a threshold value of 0.2 [mu]g/m<3>. It did so because EPA was "persuaded by commenters[']arguments on monitoring and modeling that the precision of the threshold should not exceed that of the NAAQS," which only measure PM[2.5] concentration to the tenths column. CAIR, 70 Fed. Reg. at 25,191; [**47] *see id.* at 25,190 (commenters). North Carolina believes it was arbitrary for EPA to round 0.15 [mu]g/m<3> up to 0.2 [mu]g/m<3> instead of reverting to the earlier 0.1[mu]g/m<3> number that "is the smallest one that can make the difference between compliance and violation of the NAAQS." *See* NPR, 69 Fed. Reg. at 4584.

EPA did not explain why it chose the larger number instead of the smaller number in the final rule; it only explained why it chose a number that ended at the tenths column. CAIR, 70 Fed. Reg. at 25,191. Based on EPA's reasoning in the Notice of Proposed Rulemaking, it may have made more sense to return to the 0.1 [mu]g/m<3> threshold instead of "[r]ounding the proposal value of 0.15," which is what it did. *See id.* But EPA was concerned that the 0.15 [mu]g/m<3> threshold it originally proposed was too low, requesting comments on "the use of higher or lower thresholds." NPR, 69 Fed. Reg. at 4584. And in raising the threshold number, EPA was responding to comments citing concerns about the "measurement precision of existing PM[2.5] monitors." CAIR, 70 Fed. Reg. at 25,190. We cannot say in this circumstance that EPA's decision to round the 0.15 [mu]g/m<3> threshold to 0.2 [mu]g/m<3> [**48] instead of reverting to the original threshold considered of 0.1 [mu]g/m<3> was wholly unsupported by the record.

Likewise, we cannot say that EPA's decision to truncate rather than round the PM[2.5] contribution levels it compared to the 0.2 [mu]g/m<3> threshold was arbitrary. The parties dispute which C.F.R. provision applies to the number it compares to the [*916] threshold--one mandating rounding, 40 C.F.R. pt. 50, App. N, § 4.3(a) (preferred by petitioner), or another mandating truncating, 40 C.F.R. pt. 50, App. N § 3.0(b) (preferred by EPA). The number EPA compares to the threshold, which is measured as "the average of annual means [of PM[2.5] contribution] from three successive years," is the contribution of PM[2.5] from one upwind state to a nonattainment area. CAIR, 70 Fed. Reg. at 25,190. Section 4.3(a) applies to annual PM[2.5] standard design values. Design values "are the metrics (i.e., statistics) that are compared to the NAAQS levels to determine compliance." 40 C.F.R. pt. 50 App. N § 1.0(c). Design values are composed of the average of annual means of PM[2.5] for three consecutive years, 40 C.F.R. pt. 50 App. N § 4.1(b), but design values are measurements of PM[2.5] levels [**49] in a stationary area--not levels of PM[2.5] moving from one area to another. Because the contribution level is not a design value, section 4.3(a)'s rounding mandate does not apply. Similarly, section 3.0(b)'s truncation mandate applies to PM[2.5] hourly and daily measurement data and says nothing about the contribution level EPA is assessing in CAIR.

Without a rule mandating any particular method, EPA is free to round or truncate the numbers it is comparing to the 0.2 [mu]g/m<3> threshold as long as its choice is reasonable. EPA chose to truncate numbers because the "truncation convention for PM[2.5] is similar to that used in evaluating modeling results in applying the ozone significance screening criterion of 2 ppb in the NO[x] SIP call and the CAIR proposal, as well as today's final action." CAIR, 70 Fed. Reg. at 25,191 n.42 (internal citation omitted). EPA's choice to truncate the numbers is reasonable. As a result, we deny North Carolina's petition challenging the 0.2 [mu]g/m<3> threshold and EPA's choice to truncate the numbers compared to it.

B. SO[2] and NO[x] Budgets

SO[2] Petitioners and petitioner Entergy challenge CAIR's budgets for the SO[2] and NO[x] trading programs. EPA [**50] set states' SO[2] budgets for 2010 to 50% (35% in 2015) of the allowances the states' EGUs receive under Title IV. SO[2] Petitioners argue EPA never explained how these budgets related to section 110(a)(2)(D)(i)(I)'s mandate of prohibiting significant contributions to downwind nonattainment. Therefore, they claim, the budgets and the regionwide cap, are "arbitrary, capricious, . . . or otherwise not in accordance with law," 42 U.S.C. § 7607(d)(9)(A). As for NO[x], EPA reduced states' budgets to the extent their EGUs burned oil or gas. Entergy claims EPA made this adjustment purely in the interests of fairness--an improper reason under section 110(a)(2)(D)(i)(I). We grant the petitions, agreeing EPA chose the budgets for both pollutants in an improper manner. In short, the fact that SO[2] and NO[x] are precursors to ozone and PM[2.5] pollution does not give EPA plenary authority to reduce emissions of these substances. Section 110(a)(2)(D)(i)(I) obligates states to prohibit emissions that contribute significantly to nonattainment or interfere with maintenance downwind, and EPA must exercise its authority under this provision to make measurable progress towards those goals.

1. [**51] SO[2] Budgets

We first address EPA's choice of SO[2] budgets. EPA claims to have based state budgets for SO[2] and NO[x] on the amount of emissions sources can eliminate by applying controls EPA deems "highly cost-effective controls"--an approach EPA says we approved in *Michigan v. EPA*, 341 U.S. App. D.C. 306, 213 F.3d 663 (D.C. Cir. 2000). We observe initially that state SO[2] budgets are unrelated to the criterion (the "air quality factor") by which [*917] EPA included states in CAIR's SO[2] program. Significant contributors, for purposes of inclusion only, are those states EPA projects will contribute at least 0.2 [mu]g/m<3> of PM[2.5] to a nonattainment area in another state. While we would have expected EPA to require states to eliminate contributions above this threshold, EPA claims to have used the measure of significance we mentioned above: emissions that sources within a state can eliminate by applying "highly cost-effective controls." EPA used a similar approach in deciding which states to include in the NO[x] SIP Call, which *Michigan* did not disturb since "no one quarrel[ed] either with its use of multiple measures, or the way it drew the line at" the inclusion stage. 213 F.3d at 675. Likewise here, the [**52] SO[2] Petitioners do not quarrel with EPA drawing the line at 0.2 [mu]g/m<3> or its different measure of significance for determining states' SO[2] budgets. Again, we do not disturb this approach.

Even so, EPA's method in setting the SO[2] budgets is not what *Michigan* approved. In that case, the petitioners argued section 110(a)(2)(D)(i)(I) does not permit EPA to consider the cost of reducing ozone. After reconciling petitioners' shifting (and somewhat conflicting) arguments, we answered a well-defined question: Could EPA, in selecting the "significant" level of "contribution" under section 110(a)(2)(D)(i)(I), choose a level corresponding to a certain reduction cost? *Michigan*, 213 F.3d at 676-77. Answering that question in the affirmative, we held EPA may "after [a state's] reduction of all [it] could . . . cost-effectively eliminate[ ]," consider "any remaining 'contribution'" insignificant. *Id.* at 677, 679.

Michigan also rejected claims that applying a uniform cost-criterion across states was irrational because both smaller and larger contributors had to make reductions achievable by the same highly cost-effective controls. This, we said, "flow[ed] ineluctably from the EPA's decision [**53] to draw the 'significant contribution' line on a basis of cost." *Id.* at 679. Upholding that decision "logically entail[ed] upholding this consequence." *Id.* And while EPA's approach did not necessarily ensure "aggregate health benefits" at roughly the lowest cost, EPA researched alternatives, and found none that significantly improved air quality or reduced cost. *Id.* Since no one offered a "material critique" of this research, we did not upset EPA's judgment. *Id.*

Here, EPA did not use cost in the manner *Michigan* approved. Even worse, EPA's choice of SO[2] budgets does not track the requirements of section 110(a)(2)(D)(i)(I). That much is evident from EPA's decision to base the budgets on allowances states' EGUs receive under Title IV. Those allowances are not, as EPA asserts, a "logical starting point" for setting CAIR's SO[2] emissions caps, CAIR, 70 Fed. Reg. at 25,229. Congress designed the Title IV allowance scheme using EGU data from 1985 to 1987 to address the national acid rain problem. Nowhere does EPA explain how reducing Title IV allowances will adequately prohibit states from contributing significantly to downwind nonattainment of the PM[2.5] NAAQS. And while "Congress chose [**54] a policy of not revisiting and revising these allocations and, apparently, believed that its allocation methodology would be appropriate for future time periods," Reconsideration, 71 Fed. Reg. at 25,308, it is unclear how the quantitative number of allowances created by 1990 legislation to address one substance, acid rain, could be relevant to 2015 levels of an air pollutant, PM[2.5].

EPA also explains that it chose Title IV as a starting point "to preserve the viability and emissions reductions of the highly successful title IV program." *Id.* This goal [*918] may be valid, but it is not among the objectives in section 110(a)(2)(D)(i)(I). And if it is somehow compatible with states' obligations to include "adequate provisions" in their SIPs, prohibiting emissions "within the State from . . . contribut[ing] significantly" to downwind nonattainment, then EPA should explain how. It has failed to do so. Apart from the arbitrary Title IV baseline, EPA has insufficiently explained how it arrived at the 50% and 65% reduction figures. Though unclear, these numbers appear to represent what EPA thought would be "'a cost-effective and equitable governmental approach to attainment with the NAAQS for [PM[2.5]].'" [**55] CAIR, 70 Fed. Reg. at 25,199 (quoting Proposed CAIR, 69 Fed. Reg. 4566, 4612 (Jan. 30, 2004)). [1] As with the need to "preserve the viability" of the Title IV program, EPA's notions of what is an "equitable governmental approach to attainment" is not among the objectives of section 110(a)(2)(D)(i)(I). Nor does EPA even attempt to reconcile its choice of "equitable" emissions caps with those objectives.

1 EPA briefly summarized a series of analyses and dialogues with various stakeholder groups in which the participants considered "regional and national strategies to reduce interstate transport of SO[2] and NO[x]." *See* CAIR, 70 Fed. Reg. at 25,199. The most recent of these, EPA's analysis in support of the proposed Clear Skies Act, considered nationwide SO[2] caps of, coincidentally, "50 percent and 67 percent from . . . title IV cap levels." *Id.*

Having chosen these equitable caps for the CAIR region, EPA then "ascertained the costs of these reductions and . . . determine[d] that they should be considered highly cost effective." *Id.* at 25,176. EPA's use of cost in this manner is not what we approved in *Michigan.* Whereas *Michigan* permits EPA to draw the "significant contribution" line based [**56] on the cost of reducing that "contribution," here EPA did not draw the line at all. It simply verified sources could meet the SO[2] caps with controls EPA dubbed "highly cost-effective." Nor would EPA necessarily cure this problem merely by beginning its analysis with cost. While EPA may require "termination of only a *subset of each state's contribution,*" by having states "cut[ ] back the amount that could be eliminated with 'highly cost-effective controls,'" *Michigan,* 213 F.3d at 675 (emphasis added), EPA can't just pick a cost for a region, and deem "significant" any emissions that sources can eliminate more cheaply. Such an approach would not necessarily achieve something measurable toward the goal of prohibiting sources "within the State" from contributing significantly to downwind nonattainment.

Because EPA did not explain how the objectives in section 110(a)(2)(D)(i)(I) relate to its choice of SO[2] emissions caps based on Title IV allowances, we conclude that choice was "arbitrary, capricious, . . . or not otherwise in accordance with law," 42 U.S.C. § 7607(d)(9)(A).

2. NO[x] Budgets

Next, we address EPA's use of "fuel factors" to allocate the regional NO[x] cap among the CAIR [**57] states. EPA determined the cap by multiplying NO[x] emissions rates (0.15 mmBtu in 2010 and 0.125 mmBtu in 2015) by the heat input of states in the CAIR region. Then, EPA distributed to each state, as its budget of NO[x] emissions allowances, its proportionate share of the regional cap. But in determining these shares, EPA

adjusted each state's heat input for the mix of fuels its power plants used: while a coal-fired EGU contributed its full heat input to the state total, an oil-fired EGU counted for only 60% of its heat input and a gas-fired EGU only 40%. Entergy argues this fuel adjustment was irrational because EPA [*919] made it purely for the sake of sharing the burden of emissions reductions fairly. We agree EPA's notion of fairness has nothing to do with states' section 110(a)(2)(D)(i)(I) obligations to prohibit significant contributions to downwind nonattainment.

EPA's NO[x] analysis began, inauspiciously, in a manner similar to its SO[2] decisions. But instead of beginning with "the existing title IV annual SO[2] cap," it began with the existing NO[x] SIP Call emissions rate of 0.15 pounds of NO[x] emitted per mmBtu of heat input. CAIR, 70 Fed. Reg. at 25,205. It is not clear why [**58] EPA considered this rate a useful starting point beyond the fact that such an emissions rate had been "considered in the past." *Id.* So far as we can tell, these numbers represent, like the SO[2] caps, EPA's effort "'to set up a reasonable balance of regional and local controls to provide a cost-effective and equitable governmental approach to attainment.'" *Id.* at 25,199 (quoting Proposed CAIR, 69 Fed. Reg. at 4612). Thus, rather than explaining how its planned emissions rates related to states' significant contributions to downwind nonattainment, EPA simply asserted they would create an equitable balance of controls. As with the SO[2] caps, EPA did not draw the "significant contribution" line on the basis of cost, *Michigan,* 213 F.3d at 676-77, or, for that matter, draw the significance line at all. Instead, EPA "determin[ed] the regionwide control level" and then "evaluat[ed] it to assure that it is highly cost-effective." CAIR, 70 Fed. Reg. at 25,206.

Nevertheless, Entergy does not challenge the regional NO[x] emissions rate. It argues that if EPA thinks a certain rate reflects a state's level of "significant contribution" to downwind nonattainment, then section 110(a)(2)(D)(i)(I) [**59] requires EPA to assign each state a budget equal to the emissions rate times the state's heat input. The fuel adjustment reduces a state's budget below that level if, say, its power plants use gas instead of coal, without any justification besides fairness. Remarkably, EPA does not deny that fairness is the only reason for the fuel adjustment. According to EPA, "[t]he factors would reflect the inherently higher emissions rate of coal-fired plants, and consequently the greater burden on coal plants to control emissions," thereby creating "a more equitable budget distribution." *Id.* at 25,231. Instead, EPA criticizes Entergy's preferred method of distributing credits as being equally unjustified. In the EPA's view, assigning credits without the fuel adjustment is just one of "a number of ways that EPA could have distributed the regionwide NO[x] emissions budget," among which the fuel adjustment is another, equally valid method, and EPA reasonably chose the fuel adjustment as the fairest method. Resp't's Br. 105.

Not all methods of developing state emission budgets are equally valid, because an agency may not "trespass beyond the bounds of its statutory authority by taking other factors [**60] into account" than those to which Congress limited it, nor "substitute new goals in place of the statutory objectives without explaining how [doing so comports with] the statute." *Indep. U.S. Tanker Owners Comm. v. Dole,* 258 U.S. App. D.C. 6, 809 F.2d 847, 854 (D.C. Cir. 1987); *see also Lead Indus. Ass'n v. EPA,* 208 U.S. App. D.C. 1, 647 F.2d 1130, 1150 (D.C. Cir. 1980). Section 110(a)(2)(D)(i)(I) addresses emissions "within the State" that contribute significantly to downwind pollution. Naturally we defer to EPA's interpretation of the Clean Air Act so far as it is reasonable, *Chevron,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, and we have recognized that significance may include cost, *Michigan,* 213 F.3d at 677-79. However, EPA's interpretation cannot extend so far as to make one state's significant contribution [*920] depend on another state's cost of eliminating emissions.

Yet that is exactly what EPA has done. For example, Louisiana's EGUs use more gas and oil than most states' EGUs. Consequently, instead of the budget of 42,319 tons per year that would be Louisiana's proportional share of the regionwide cap without fuel adjustment, the State only received 29,593 tons per year. The rest of those credits went to states with more coal-fired EGUs than average, [**61] which necessarily received "larger NO[x] emissions budgets" than their unadjusted proportional shares. Resp't's Br. 103. EPA favored coal-fired EGUs in this way because they face a "greater burden . . . to control emissions" than gas- and oil-fired EGUs. CAIR, 70 Fed. Reg. at 25,231. In essence, a state having mostly coal-fired EGUs gets more credits because Louisiana can control emissions more cheaply.

EPA responds by suggesting that any allocation of the NO[x] cap would amount to equitable burden-sharing because EPA did the analysis "on a regionwide basis," and therefore not even the unadjusted shares have any relation to states' significant contributions. Resp't's Br. 104; CAIR, 70 Fed. Reg. at 25,231. [2] If so, that is a weakness of CAIR generally. Having chosen not to evaluate contributing emissions on a state-by-state basis, EPA cannot now rely on the resulting paucity of data to justify its *ad hoc* approach to spreading the burden of reducing them. When a petitioner complains EPA is requiring a state to eliminate more than its significant contribution, it is inadequate for EPA to respond that it never measured individual states' significant contributions.

2 To be sure, the unadjusted [**62] shares would not correspond much better to a state's downwind contribution in 2010 and 2015 because EPA based the regional cap on heat input data from 1999 to 2002 without accounting for the growth in states' economies. *See* CAIR, 70 Fed. Reg. 25,230-31. In any case, a budget allocation based on such shares would only be hypothetical at this point, so we express no opinion as to its propriety.

No doubt all this pother seems unnecessary to EPA, since it believed "the choice of method in setting State budgets . . . makes little difference in terms of the levels of resulting regionwide annual SO[2] and NO[x] emissions reductions." CAIR, 70 Fed. Reg. at 25,230-31. Since EPA planned a market for emissions credits, it assumed EGUs would trade credits as necessary to achieve the "least-cost outcome," which would not depend "on the relative levels of individual State budgets." *Id.* at 25,231. As we noted in *Michigan*, the market would only bear out that assumption if the transaction costs of trading emissions were small, which is hardly likely. 213 F.3d at 676 & n.3. But even if the state budgets affect only the distribution of the burden, not the regionwide aggregate of emissions, that distribution [**63] is important. [3] EPA contends the greatest reductions will take place where the greatest emissions are, because that is where most cost-effective reductions are available. Resp't's Br. 168. Of course, those states with the greatest emissions are those with mainly coal-fired EGUs, which are precisely the states that get extra credits under [*921] EPA's fuel-adjustment method. *See* CAIR, 70 Fed. Reg. at 25,231 n.88 ("States receiving larger budgets . . . are generally expected to be those having to make the most reductions."). Presumably those EGUs will make their greater reductions and sell them to other EGUs, in states the fuel-adjustment method docked, to recoup their investment in reductions. The net result will be that states with mainly oil- and gas-fired EGUs will subsidize reductions in states with mainly coal-fired EGUs. Again, EPA's approach contravenes section 110(a)(2)(D)(i)(I); the statute requires each state to prohibit emissions "within the State" that contribute significantly to downwind pollution, not to pay for other states to prohibit their own contributions.

3 In focusing on the beneficial regionwide results from trading, EPA completely ignores the fact that any state that elected [**64] not to participate in the NO[x] trading program would receive a maladjusted budget as a mandatory cap on its emissions. We do not focus on this problem because EPA had, by the time it promulgated CAIR, already found all the relevant states to have violated section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D), with respect to the CAIR pollutants, so that EPA's Federal Implementation Plan, incorporating the trading program, covers all of them until they submit SIPs complying with CAIR. FIP, 71 Fed. Reg. 25,328, 25,340 (Apr. 28, 2006); 70 Fed. Reg. 21,147 (Apr. 25, 2005) (finding of violation).

EPA's redistributional instinct may be laudatory, but section 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution. While CAIR should achieve something measurable towards that goal, it may not require some states to exceed the mark. Because the fuel-adjustment factors shifted the burden of emission reductions solely in pursuit of equity among upwind states--an improper reason--the resulting state budgets were arbitrary and capricious.

C. Title IV [**65] Allowances

SO[2] Petitioners and a trade association of waste-coal EGUs (together "SO[2] Petitioners") also challenge EPA's effort to "harmonize" CAIR's regulation of SO[2] with the existing program for trading SO[2] emissions allowances under Title IV of the CAA. Since EPA set states' SO[2] budgets for 2010 to 50% (35% in 2015) of the allowances the states' EGUs receive under Title IV, EGUs in the region would emit significantly less SO[2] under CAIR and could be expected to have substantial numbers of excess Title IV allowances to emit SO[2]. Concerned about this sudden excess, EPA structured CAIR so that EGUs in states electing to trade give up 2 allowances per ton in 2010, and 2.68 allowances per ton in 2015. (Recall, a Title IV allowance gives the holder the right to emit one ton of SO[2] within the Title IV program.) States electing not to trade must have SIP provisions for retiring excess allowances. In addition, CAIR regulates waste-coal EGUs that do not receive Title IV allowances because they are exempt from Title IV. Thus, waste-coal EGUs in trading states must acquire Title IV allowances by purchasing allowances from EGUs in the Title IV program, or, as EPA suggests, by [**66] opting into the program.

SO[2] Petitioners argue EPA lacks authority to terminate or limit Title IV allowances, either through a trading program under section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D), or by requiring that SIPs have allowance retirement provisions. We agree and grant the petition on this issue. We do not, however, consider whether CAIR unlawfully forces waste-coal EGUs into the Title IV program, or irrationally includes waste-coal units while excluding other waste-burning units. That argument assumes EPA has the authority to terminate or limit Title IV allowances.

In demonstrating EPA's absence of authority, the SO[2] Petitioners cite a variety of Title IV provisions supposedly showing that Title IV allowances are fixed currency, the value of which EPA may not manipulate. However, the allowances are "limited authorization[s] to emit sulfur dioxide" and "[n]othing . . . in any . . . provision of law shall be construed to limit the authority of the United States to terminate or limit" such authorizations. 42 U.S.C. § 7651b(f). While EPA and petitioners quibble over whether EPA is the "United States" to which § 7651b(f) applies, both [*922] agree that this section does not grant [**67] EPA any authority. [4]

4 In view of EPA's absence of authority to terminate or limit Title IV allowances, we express no opinion on the meaning of "United States" in this provision.

Thus, EPA claims section 110(a)(2)(D)(i)(I) gives it authority to set up a program for trading SO[2] emissions allowances, and to require EGUs to use Title IV allowances as currency. Once EGUs spend Title IV allowances in the CAIR market, EPA says it can terminate the authorization the allowances provide within the Title IV market. CAIR, 70 Fed. Reg. at 25,292. But whatever authority EPA may have to establish such a trading program, we find nothing in section 110(a)(2)(D)(i)(I) granting EPA authority to remove Title IV allowances from circulation in the Title IV market.

Environmental groups, intervening in support of EPA, argue section 301(a) of the CAA also provides EPA authority. That provision authorizes EPA "to prescribe such regulations as are necessary to carry out [its] functions under" the CAA. 42 U.S.C. § 7601(a). EPA does not rely on section 301(a), and for good reason: EPA cannot claim retiring excess Title IV allowances is "necessary" for EPA to ensure SIPs comply with section 110(a)(2)(D)(i)(I)). [**68] Nor does section 301(a), 42 U.S.C. § 7601(a), "provide [EPA] Carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the [EPA] wishes." *Citizens to Save Spencer County v. EPA*, 195 U.S. App. D.C. 30, 600 F.2d 844, 873 (D.C. Cir. 1979).

Lacking a statutory foundation, EPA appeals to "logic." Logically, says EPA, it was not "required to structure CAIR as a stand-alone program without taking account whatsoever of the effect this might have on the pre-existing" Title IV program. Resp't's Br. 82. Environmental intervenors add some legal flavoring here, analogizing EPA's action to a court's interpretative obligation to "fit, if possible, all parts" of a statute "into a harmonious whole," *FTC v. Mandel Bros.*, 359 U.S. 385, 389, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959). Although it may be reasonable for EPA, in structuring a program under section 110(a)(2)(D)(i)(I), to consider the impact on the Title IV market, it does not follow that EPA has the authority to remove allowances from that market. Nor can EPA cure its absence of authority by foisting onto SO[2] Petitioners the burden of explaining why "two independent programs . . . would produce a better result." Resp't's Br. 87. Lest EPA forget, [**69] it is "a creature of statute," and has "only those authorities conferred upon it by Congress"; "if there is no statute conferring authority, a federal agency has none." *Michigan v. EPA*, 348 U.S. App. D.C. 6, 348 U.S. App. D.C. 7, 268 F.3d 1075, 1081 (D.C. Cir. 2001). So too here: no statute confers authority on EPA to terminate or limit Title IV allowances, and EPA thus has none.

Similarly, EPA cannot require non-trading states to have SIP provisions for retiring excess Title IV allowances. Although such provisions are "related to harmonizing a State's choice of reduction requirements" with the Title IV program, Resp't's Br. 92, the CAA "gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which *satisfies* the standards of § 110(a)(2)." *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79, 95 S. Ct. 1470, 43 L. Ed. 2d 731 (1975) (emphasis added). SIPs prohibiting emissions within a state from contributing significantly to downwind nonattainment satisfy section 110(a)(2)(D)(i)(I). Because provisions retiring Title IV allowances are unrelated to achieving that goal, EPA cannot require states to adopt them.

[*923] D. Border State Issues

Under Title I of the CAA, there is a presumption of state-level regulation [**70] generally, *see, e.g.*, 42 U.S.C. § 7407(a); *Union Elec.*, 427 U.S. at 256, 267, and the text of section 110, 42 U.S.C. § 7410, establishes the state as the appropriate primary administrative unit to address interstate transport of emissions. To take action regarding a state pursuant to section 110(a)(2)(D)(i)(I) EPA need only have evidence that emissions "within the State" contribute significantly to another state's nonattainment or interfere with its maintenance of a national ambient air quality standard ("NAAQS"), unless there is evidence that exculpates part of the upwind state from that determination. *See Michigan*, 213 F.3d at 684. Thus, in developing a rule, EPA may select states as the unit of measurement. *Id.* The burden is on the party challenging inclusion of part of a state to present "finer-grained computations" showing that it is "innocent of material contributions" to the state's overall downwind pollution. *Id.*; *see Appalachian Power Co. v. EPA*, 346 U.S. App. D.C. 38, 249 F.3d 1032, 1050-51 (D.C. Cir. 2001). In response to such data, EPA must ensure that the contested area makes a "measurable contribution," *Michigan*, 213 F.3d at 684, such that it is "part of the problem" of the

state's aggregate [**71] downwind impact, *Appalachian Power,* 249 F.3d at 1050.

Various utilities and one municipality, [5] but not the States themselves, challenge inclusion in CAIR of the upwind States of Texas, Florida, and Minnesota. The court denies all except Minnesota Power's petition.

> 5 Southwestern Public Service Company d/b/a Xcel Energy, Occidental Permian Ltd., and the City of Amarillo, Texas petition regarding the State of Texas. The Florida Association of Electric Utilities and FPL Group, Inc. petition regarding the State of Florida. Minnesota Power petitions regarding the State of Minnesota. In this part, we refer to "petitioners" generally.

1. Texas

The final rule included the State of Texas due to its maximum downwind contribution of 0.29 [mu]g/m<3> to PM[2.5] nonattainment, which is above the air quality threshold of 0.2 [mu]g/m<3>. Petitioners unsuccessfully sought reconsideration of inclusion of that part of the State west of the north-south I-35/137 corridor ("West Texas"), submitting modeling that showed few emitting facilities were located in West Texas. Petitioners contend that under *Michigan,* 213 F.3d at 681-85, EPA, on its own initiative, should have excluded West Texas given the State's [**72] size, location, low emissions density, and logical intrastate dividing line, and that EPA's concern about "in-state pollution havens" developing in West Texas is unfounded. See Corrected Response, at 230. They also contend that EPA acted unreasonably in denying reconsideration in view of the modeling data showing that sources in West Texas "demonstrably were not significant contributors to nonattainment in downwind states." Pet'rs' Br. at 14. However, the record establishes that EPA appropriately included all of the State in CAIR.

The record includes data showing that the State of Texas makes a maximum downwind contribution greater than the 0.2 [mu]g/m<3> air quality threshold for inclusion. Petitioners have neither challenged this threshold nor presented data that would require EPA to determine whether West Texas makes a "measurable contribution." *See Michigan,* 213 F.3d at 684. Instead, their comments on the proposed rule and the August 2004 Notice of Data Availability speculated that West Texas's contribution level was likely to be less than [*924] 0.05 [mu]g/m<3>. Neither did petitioners claim that they were unable to present modeling without assistance from EPA and that such assistance [**73] was refused. After EPA released updated data in November 2004, petitioners did submit comments expressing concern about EPA's analysis, but again did not include any new modeling or indicate that they could not do so without EPA assistance that was denied. EPA effectively responded to petitioners' concerns by referring to the possibility that dividing the State could create "in-state pollution havens" in West Texas where exclusion from CAIR would lead to increased capacity with a consequent increase in emissions, Corrected Response, at 230; there is at least one western source connected to the eastern grid and a possibility that more could be integrated through the Electric Reliability Council of Texas. In these circumstances, EPA had no duty to divide the State or to model West Texas separately.

In seeking reconsideration, petitioners for the first time presented new modeling on West Texas. However, EPA found, as the record shows, that petitioners had already had a meaningful opportunity to comment on the inclusion of West Texas and had not shown that it was impracticable for them to present the new modeling sooner or that a new issue arose after the close of the comment period. *See* [**74] 42 U.S.C. § 7607(d)(7)(B). Although petitioners insist that they could not satisfy their evidentiary burden without receiving data from EPA, they do not explain why the data from August and November 2004 on which they commented was insufficient to allow them to do so. That they may have failed to realize that EPA had not already conducted more detailed, subregional modeling is beside the point; the lack of record discussion of West Texas should have alerted them to the need to present data to challenge its inclusion. Because petitioners did not request assistance duplicating EPA's modeling until after the final rule was promulgated, they fail to advance a reason for reconsideration or demonstrate prejudice due to EPA's late disclosure of data, *see, e.g., West Virginia v. EPA,* 360 U.S. App. D.C. 419, 362 F.3d 861, 869 (D.C. Cir. 2004); *see also Am. Radio Relay League v. FCC,* 524 F.3d 227, 237-38 (D.C. Cir. 2008), which they also have not shown was any more than "supplementary" as to the State, *see Solite Corp. v. EPA,* 293 U.S. App. D.C. 117, 952 F.2d 473, 484 (D.C. Cir. 1991). [6]

> 6 Although petitioners object that EPA has not defined the "measurable contribution" standard, they do so only in their reply brief and did not present this [**75] issue to EPA; therefore, the court does not address it. *See* 42 U.S.C. § 7607(d)(7)(B); *S. Coast Air Quality Mgmt. Dist.,* 472 F.3d at 891. In any event, West Texas contributes 0.05 [mu]g/m<3> of PM[2.5] to downwind areas, which is one-quarter of the amount of pollution needed for the State as a whole to meet the air quality threshold, and thus should qualify at least as a "material" amount "worthy of special concern." *See Michigan,* 213 F.3d at 682, 684; *Appalachian Power,* 249 F.3d at 1050.

2. Florida

The final rule included the State of Florida for ozone and PM[2.5]. However, the proposed rule had included the State only for PM[2.5]. Petitioners sought reconsideration contesting the inclusion of the State as a whole for ozone and the inclusion of southern subregions for ozone and for PM[2.5]. Upon granting reconsideration as to ozone only, EPA affirmed its determination that the State should be included in CAIR. Petitioners now object to EPA's use of rounding at an initial screening stage for including the State for ozone as arbitrary and capricious. *See* 42 U.S.C. § 7607(d)(9)(A). Alternatively they contend that under *Michigan,* 341 U.S. App. D.C. 306, 213 F.3d 663, EPA was required to exclude parts of [*925] Southern [**76] Florida (south of latitude 28.67 for ozone and south of latitude 29.2 for PM[2.5]) that do not make a significant contribution to nonattainment, or at least the area south of latitude 26 for both ozone and PM[2.5] because EPA initially had no data for this area. The record supports EPA's reasoned explanation for including the entire State for ozone and PM[2.5].

As an initial screening indicator of whether to include a state in CAIR for ozone, EPA considered whether the state's average contribution to ozone nonattainment in a downwind area was "less than one percent of total nonattainment in the downwind area." [7] CAIR, 70 Fed. Reg. at 25,191. If so, then EPA would not test the state further; if not, then EPA would perform additional analysis to determine whether the state should be included. EPA found the State of Florida's average percent of contribution to nonattainment in Fulton County, Georgia to be 0.81 percent. Upon rounding up to one percent, EPA determined after further analysis that the State makes "large and frequent contributions . . . to elevated ozone concentrations in Fulton Co[unty]" and should be included for ozone. Reconsideration, 71 Fed. Reg. at 25,320. Although petitioners [**77] characterize this rounding as "creating the nonsense result of transforming a number . . . that is clearly 'less than one percent' to one," Pet'rs' Br. at 28, the court owes substantial deference to EPA's technical expertise, *see Appalachian Power,* 249 F.3d at 1051-52, absent a showing of legal or factual error.

> 7 The average percent contribution of nonattainment metric is calculated by dividing the concentration of total ozone in the nonattainment area into the state's contribution. *See* Reconsideration, 71 Fed. Reg. at 25,320 n.14.

Because petitioners challenge only the initial screening indicator and not the record evidence showing that the State of Florida meets the air quality threshold, [8] they can hardly protest that rounding did not serve the appropriate purpose of identifying the State for further analysis. EPA treated this State no differently than others at the initial screening stage. Even assuming the rounding convention were flawed, it was not dispositive of the State's inclusion in CAIR. Hence, no prejudice could be shown on the basis of that error alone. EPA reasonably explained that its use of the rounding convention is "commonplace" and "customary" as well as a reasonable [**78] means of creating a "conservative" initial indicator that "cast[s] a wider net, with further winnowing to occur in subsequent steps when more detailed analysis is applied." Reconsideration, 71 Fed. Reg. at 25,320. Petitioners neither identify error resulting from use of rounding at the initial screening stage nor offer any persuasive reason to question EPA's choice of a technical convention that is reasonable on this record. *See* 42 U.S.C. § 7607(d)(9)(A).

> 8 Petitioners' additional reasons not to include the State of Florida are unpersuasive because they concede that the air quality threshold is a lawful basis for inclusion in CAIR. That Fulton County, Georgia may attain the ozone NAAQS by 2015 does not justify excluding the State of Florida as 2010 is the determinative year in CAIR to provide downwind relief.

Neither have petitioners shown that EPA should have excluded any part of Southern Florida. EPA was not obligated to measure pollution coming from each possible slice of the State. *See Michigan,* 213 F.3d at 684. The lack of information about a subregion conceivably might result in a miscalculation of the downwind contribution of the State as a whole, *see id.* at 682, but alone could [**79] not exonerate a subregion and does not undermine EPA's inclusion of the area south of latitude 26 for either ozone or PM[2.5]. Given the rulemaking record, EPA appropriately determined [*926] that the State of Florida as a whole should be included.

In regard to inclusion of the area south of latitude 29.2 for PM[2.5], petitioners submitted no modeling or data during the comment period to show that it was "innocent" of contributing to the State's collective downwind pollution impact. *See id.* at 684; *Appalachian Power,* 249 F.3d at 1050-51. Instead, their first request to EPA for assistance in duplicating EPA's modeling results came after the final rule was promulgated. They offer no reason why they could not present such modeling during the comment period. EPA thus properly denied reconsideration on inclusion of the State for PM[2.5]. *See* 42 U.S.C. § 7607(d)(7)(B). [9]

> 9 Petitioners did not present the issue of the "standard for a portion-of-a-state's contribution to nonattainment," Reply Br. at 20, to EPA; *see supra* note 6. In any event, their data does not show

that the area south of latitude 29.2 is "innocent of material contributions" for PM[2.5]. *See Michigan,* 213 F.3d at 684. The northern [**80] part of the State's contributions range from 0.11 to 0.20 [mu]g/m<3> and the contributions from the southern area appear to be quite similar, ranging from 0.09 to 0.15 [mu]g/m<3>, with even the minimum in the southern range almost half the threshold for inclusion of the entire State.

In regard to ozone, petitioners submitted data in support of their request for reconsideration of inclusion of the area south of latitude 28.67. EPA declined to exclude this area. First, EPA found that the data was unpersuasive inasmuch as it has authority to regulate an upwind area even if its "specific contribution may appear insubstantial" as long as it contributes a "measurable" amount of pollution to the State's "collective contribution to downwind nonattainment." Reconsideration, 71 Fed. Reg. at 25,321. The court agrees; EPA was not required to exclude an area that petitioners have drawn precisely in order to avoid the significance threshold. *See Michigan,* 213 F.3d at 684; *Appalachian Power,* 249 F.3d at 1050. Second, EPA found that the area south of latitude 28.67 is not "innocent of material contribution" but "contribute[s] [a] substantial portion[] of the total ozone loading from Florida to Fulton [**81] County[, Georgia]." Reconsideration, 71 Fed. Reg. at 25,321 (citing *Michigan,* 213 F.3d at 683-84). As the contested area contributes almost one-third of the State's entire downwind ozone contribution, petitioners' challenge to its inclusion fails. Petitioners' other concerns, such as the test for "measurable contribution" and the alleged departure from EPA precedent, were not presented to EPA and thus the court does not address them. *See supra* notes 6 & 9; 42 U.S.C. § 7607(d)(7)(B); *S. Coast Air Quality Mgmt. Dist.,* 472 F.3d at 891.

3. Minnesota

In the proposed rule, EPA included the State of Minnesota after determining that its downwind contribution of PM[2.5] was 0.39 [mu]g/m<3>, well above the air quality threshold of 0.2 [mu]g/m<3> needed for inclusion in CAIR. In the preamble to the final rule, however, EPA indicated that it had recalculated Minnesota's contribution to be 0.21 [mu]g/m<3>, and included the State in CAIR. Upon reconsideration, EPA again recalculated and determined that the State's contribution was actually 0.20 [mu]g/m<3>, the exact threshold for inclusion.

Minnesota Power challenges the inclusion of the State for PM[2.5] as resting on two types of unaddressed flawed [**82] data resulting in an overstatement of emissions: (1) projecting units' emissions as of 2010 to be at a significantly higher rate than as of 2001, with some above the permitted level, and (2) misallocating energy production or heat input projections between units. In view of these claimed errors, Minnesota Power contends that EPA has failed to provide a "complete analytic defense," *Appalachian* [*927] *Power,* 249 F.3d at 1054 (quotation omitted), of its model's treatment of Minnesota. The court grants the petition because EPA's failure to address the claimed errors was unjustifiable. Although EPA maintains that this concern was not timely presented or with sufficient specificity to satisfy CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and thus the issue has been forfeited, *see S. Coast Air Quality Mgmt. Dist.,* 472 F.3d at 891, the record is to the contrary.

Prior to the deadline for petitioning for reconsideration, Minnesota Power raised its emissions overstatement concern, and identified three units with disparities between 2001 actual and 2010 projected emissions. After EPA released additional analysis of the State that included changes based upon comments received about the Metropolitan Emission [**83] Reduction Proposal ("MERP"), Minnesota Power set forth by letter of May 10, 2005 to EPA claimed errors in the new analysis, including emissions measurements for the Boswell Energy Center, and the predominantly wood waste unit of Hibbard Energy Center. [10] The final rule was promulgated on May 12, 2005, and Minnesota Power timely petitioned for reconsideration to challenge the "moving target" of EPA's data and determination regarding the State, and referred to its May 2005 letter. Minn. Power, Pet. for Recon. at 7 (Aug. 5, 2005), docketed as EPA-HQ-OAR-2003-0053-2211. In granting reconsideration in December 2005, EPA again recalculated the State's contribution to be 0.20 [mu]g/m<3>, after removing about 16,500 tons of NO[x] and about 5,800 tons of SO[2] emissions, and requested comments on the corrected 2010 inputs. Minnesota Power submitted comments on January 13, 2006, again raising the measurement issue and attaching the May 10, 2005 letter describing as examples the claimed errors at the Boswell and Hibbard units and referring as well to error at the Sherco unit. Minnesota Power also met with EPA officials on February 2, 2006 regarding its measurement concerns.

10 The May 2005 letter [**84] stated that "[t]he total SO[2] emitted from Boswell unit 4 appears to be overstated by a factor of two or 4000 to 5000 tons" and that "SO[2] emissions from the Hibbard Energy Center appear to be significantly overstated, by over 2000 tons. This appears to be a result of how the units can burn a mix of wood waste, natural gas and coal . . . . 80% to 90% of energy input is from wood waste, making overstatement of emissions a prospect if coal combustion is presumed." Letter from Michael Cashin,

Sr. Env'tl Eng'r, Minn. Power, to Sam Napolitano, Ofc. of Air & Radiation, EPA (May 10, 2005), docketed as attachment to EPA-HQ-OAR-2003-0053-2284.2 (Jan. 13, 2006).

Nothing in the CAA requires a petitioner's comments to be more specific or to raise every potential explanation for claimed disparities in order to receive a response to timely concerns. *See Appalachian Power Co. v. EPA,* 328 U.S. App. D.C. 379, 135 F.3d 791, 817-18 (D.C. Cir. 1998). EPA thus lacked discretion not to address the claimed errors in view of the timely May 2005 letter, petition for reconsideration, and January 2006 comments. *See* 42 U.S.C. §§ 7607(d)(6)(B), (7)(B). EPA's suggestion that the May 2005 letter was part of a "data dump" in the reconsideration [**85] comments, Resp't's Br. at 53, ignores that the comments referred to the May 2005 letter on the first page. Even if EPA had previously overlooked the May 2005 letter, [11] as of January 2006 there was no need for EPA "to cull through" more than a few pages of comments to confront the claimed errors. *See Nat'l Ass'n of Clean Air* [*928] *Agencies v. EPA,* 376 U.S. App. D.C. 385, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (quotation omitted).

11 It is unclear why the May 2005 letter did not become part of the rulemaking record until January 13, 2006 as EPA has not stated that it did not receive the letter. Regardless, the letter was timely presented with the reconsideration comments.

EPA twice reanalyzed Minnesota's contribution to address the MERP issue, but never addressed the claimed measurement errors at the Boswell, Hibbard, or Sherco units. On reconsideration, EPA explained that it was not responding because it was "unable to find any [such] instances [of a double value]," i.e., overstated emissions. Reconsideration, 71 Fed. Reg. at 25,318. Yet a double value was identified by Minnesota Power at the Boswell unit and other substantial disparities were identified at the Hibbard and Sherco units in the May 2005 letter and January [**86] 2006 comments. EPA's suggestion that "many other factors . . . may change in the future" leading to greater projected than actual emissions, *id.,* is insufficient in view of the fact that these claimed errors, if confirmed by EPA, could affect inclusion of the State in CAIR. *See West Virginia v. EPA,* 362 F.3d at 869.

The inclusion of the State of Minnesota in CAIR was a borderline call, and the State's actual downwind contribution to PM[2.5] remains uncertain. EPA acknowledges on appeal that even after two recalculations it is still an open question "whether the information would . . . change[] [EPA's] determination" to include the State in CAIR. Resp't's Br. at 47. Minnesota Power estimates that corrected inputs could remove 25,911.4 tons of emissions and thus reduce the State's contribution below the threshold, to the amount of 0.1878 [mu]g/m<3>. Contrary to EPA's suggestion, Minnesota Power is not challenging the Integrated Planning Model itself, *see Appalachian Power,* 249 F.3d at 1052-53; rather, the claimed data disparities would require a response regardless of methodology. The claims of error involving the Boswell, Hibbard, and Sherco units, including the treatment of Hibbard [**87] as a coal rather than predominantly biomass unit, do not appear to be an improper request for a "selective[]" rather than "holistic[]" methodological approach. *See* Reconsideration, 71 Fed. Reg. at 25,318. Instead, Minnesota Power has presented these units as examples to illustrate that the overstatement objection requires a response from EPA. A remand is therefore appropriate. *See Appalachian Power,* 249 F.3d at 1054. On remand, EPA also should respond to Minnesota Power's concern about shifting of heat input allocations between units. *See* Pet'rs' Br. at 23-25.

E. Phase I Compliance Deadline

The Florida Association of Electric Utilities contends that EPA failed to provide adequate notice of the nullification of vintage 2009 NO[x] SIP Call allowances that resulted from its acceleration of the first-phase NO[x] compliance deadline from January 1, 2010 to January 1, 2009. However, in the NPRM EPA requested comments on the timing of each phase of CAIR, specifically asking "whether the first phase deadline should be as proposed, or adjusted earlier or later, in light of [] competing factors." 69 Fed. Reg. at 4623. EPA's Supplemental Proposal made the same request. *Id.* at 32,690. Because the [**88] issue of what allowances may be used in compliance with CAIR's NO[x] program is directly linked with the start of the program, *see* CAIR, 70 Fed. Reg. at 25,285, the resulting nullification was a "logical outgrowth" of changing the compliance deadline. *Ne. Md. Waste Disposal Auth. v. EPA,* 360 U.S. App. D.C. 129, 358 F.3d 936, 951 (D.C. Cir. 2004). Petitioner has not demonstrated that it was impracticable to raise such objection within the comment period or that the grounds for such objection arose afterward, much less that such objection is of central relevance. 42 U.S.C. § 7607(d)(7)(B). Although petitioner vaguely alludes to EPA's "incorrect factual assumptions" as a reason mandating [*929] reconsideration of the compliance deadline, NO[x] Br. at 8, it fails to support this assertion. Therefore, petitioner fails to demonstrate a statutory ground that would require reconsideration.

In any event, EPA's change to the NO[x] compliance deadline was not arbitrary. EPA explained that the earlier date is better coordinated with the ozone and fine particulate attainment dates mandated by the CAA. CAIR, 70 Fed. Reg. at 25,216. Having determined that the ear-

lier deadline is preferable, EPA concluded that the change is consistent [**89] with its CAA obligation "to require emission reductions for obtaining NAAQS to be achieved as soon as practicable." *Id.*

III. Remedy

The petitioners disagree about the proper remedy, with positions ranging from Minnesota Power's demand that we vacate CAIR with respect to Minnesota to North Carolina's request that we vacate only the Compliance Supplement Pool but remand most of CAIR for EPA to make changes to the compliance date, the set of included states, and the trading program. Unfortunately, we cannot pick and choose portions of CAIR to preserve. "Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA,* 323 U.S. App. D.C. 425, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Whether a regulation is severable "depends on the issuing agency's intent." *North Carolina v. FERC,* 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984). EPA has been quite consistent that CAIR was one, integral action. It developed both the SO[2] and NO[x] programs assuming all states would participate in the trading programs as implemented in CAIR's Model Rule, [**90] and it modeled the crucial cost-effectiveness of the caps "assum[ing] interstate emissions trading." CAIR, 70 Fed. Reg. at 25,196. The model also took into account "the use of the existing title IV bank of SO[2] allowances." *Id.* Moreover, EPA justified the SO[2] and NO[x] portions of CAIR as complementary measures to mitigate PM[2.5] pollution. *See id.* at 25,184. In sum, CAIR is a single, regional program, as EPA has always maintained, and all its components must stand or fall together.

Indeed, they must fall. We have, in reviewing EPA actions under 42 U.S.C. § 7607(d)(9), ordinarily applied the two-part test of *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n,* 300 U.S. App. D.C. 198, 988 F.2d 146, 150-151 (D.C. Cir. 1993), under which this answer "depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change.'" *See Davis County,* 108 F.3d at 1459 (applying *Allied-Signal* in § 7607(d)(9) review). We are sensitive to the risk of interfering with environmental protection, which is one potential disruptive consequence, *see Nat'l Lime Ass'n v. EPA,* 344 U.S. App. D.C. 97, 233 F.3d 625, 635 (D.C. Cir. 2000). But the threat of [**91] disruptive consequences cannot save a rule when its fundamental flaws "foreclose EPA from promulgating the same standards on remand," *Natural Res. Def. Council v. EPA,* 376 U.S. App. D.C. 414, 489 F.3d 1250, 1261-62 (D.C. Cir. 2007).

We must vacate CAIR because very little will "survive[ ] remand in anything approaching recognizable form." *Id.* at 1261. EPA's approach--regionwide caps with no state-specific quantitative contribution determinations or emissions requirements--is fundamentally flawed. Moreover, EPA must redo its analysis from the ground up. It must consider anew which states are included in CAIR, after giving some significance to the phrase "interfere with maintenance" in section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D). [*930] It must decide what date, whether 2015 or earlier, is as expeditious as practicable for states to eliminate their significant contributions to downwind nonattainment. The trading program is unlawful, because it does not connect states' emissions reductions to any measure of their own significant contributions. To the contrary, it relates their SO[2] reductions simply to their Title IV allowances, tampering unlawfully with the Title IV trading program. The SO[2] regionwide caps are [**92] entirely arbitrary, since EPA based them on irrelevant factors like the existence of the Title IV program. The allocation of state budgets from the NO[x] caps is similarly arbitrary because EPA distributed allowances simply in the interest of fairness. It is possible that after rebuilding, a somewhat similar CAIR may emerge; after all, EPA already promulgated the apparently similar NO[x] SIP Call eight years ago. But as we have explained, the similarities with the NO[x] SIP Call are only superficial, and CAIR's flaws are deep. No amount of tinkering with the rule or revising of the explanations will transform CAIR, as written, into an acceptable rule. Of course the Federal Implementation Plan EPA imposed is intimately connected to CAIR, and we vacate the FIP as well. [12]

12 EPA published its decision on North Carolina's petition under 42 U.S.C. § 7426 in the same notice as the FIP, but that decision is subject to challenge in a separate case still pending. Today's decision takes no action with respect to that petition.

Finally, we note that in the absence of CAIR, the NO[x] SIP Call trading program will continue, because EPA terminated the program only as part of the CAIR rulemaking. CAIR, 70 Fed. Reg. at 25,317 [**93] (codified at 40 C.F.R. § 51.121(r)). The continuation of the NO[x] SIP Call should mitigate any disruption that might result from our vacating CAIR at least with regard to NO[x]. In addition, downwind states retain their statutory right to petition for immediate relief from unlawful interstate pollution under section 126, 42 U.S.C. § 7426.

To summarize, we grant the petitions of Entergy, SO[2] Petitioners, and Minnesota Power. We grant North

Carolina's petition with respect to the "interfere with maintenance" language, CAIR's 2015 compliance date, and the unrestricted trading of allowances; we deny it with respect to EPA's definition of "will" in "will contribute significantly," and the PM[2.5] contribution threshold. We deny the petitions of the Florida and Texas petitioners, and the Florida Association of Electric Utilities. Accordingly, we vacate CAIR and its associated FIP and remand both to the EPA.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2008, two copies of the foregoing Petition For Panel Rehearing Or Rehearing *En Banc* Of National Mining Association were served by first-class mail, postage prepaid, on each of the following:

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

STATE OF NORTH CAROLINA, *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	No. 05-1244 (and consolidated cases

PETITION FOR REHEARING OR REHEARING EN BANC OF ENVIRONMENTAL INTERVENORS ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND U.S. PUBLIC INTEREST RESEARCH GROUP

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

PARTIES AND AMICI

Parties and amici curiae in this case are as follows:

Petitioners:

AES Corp. and its United States subsidiaries; AES Beaver Valley LLC; AES Warrior Run, LLC, and Consellation Energy Group, Inc. (Nos. 05-1259 and 06-1226)

Appalachian Mountain Club, Groups Against Smog and Pollution, Inc.; National Parks Conservation Association, and Natural Resources Defense Council, (No. 05-1261) (dismissed)

ARIPPA (Nos. 05-1249, 06-1342, and O6-1243)

City of Amarillo, Texas; Occidental Permian LTd; and Southwestern Public Service Co d/b/a Xcel Energy (Nos. 05-1260, 06-1228, 06-1230)

Duke Energy Corp. (No. 05-1262)

Duke Power Co LLC, d/b/a Duke Energy Carolinas, LLC (No. 06-1217)

Entergy Corp. (Nos. 05-1251, 06-1227, and 06-1229)

Florida Association of Electric Utilities (Nos. 05-1252 and 06-1235)

FPL Group, Inc (Nos. 05-1253, 06-1240 and 06-1241)

Inter-Power/AhlCon Partners (No. 16-1245)

Integrated Waste Serves Association (No. 05-1257) (dismissed)

Minnesota Power, a division of ALLETE, Inc. (Nos. 05-1246-06-1238)

Northern Indian Public Service Co. (No. 05-1254)

South Carolina Electric a& Gas Co. (Nos. 05-1256, 06-1222, 06-1224)

South Carolina Public Serve Authority and JEA (Nos. 05-1250, 06-1236, and 06-1237)

State of North Carolina (Nos. 05-1244, 06-1232 and 06-1233)

Respondent:

United States Environmental Protection Agency (all petitions)

Intervenors:

Environmental Defense Fund*

Midwest Generation, LLC

National Mining Association

Natural Resource Defense Council

Ohio Environmental Council

U.S. Public Interest Research Group

Utility Air Regulatory Group

Amici Curaie:

State of Connecticut

Commonwealth of Massachusetts

State of New Jersey

State of New York

Commonwealth of Pennsylvania

Tennessee Valley Authority

* Effective March 1, 2008, intervenor Environmental Defense changed its legal name to Environmental Defense Fund.

RULINGS UNDER REVIEW

Petitioners seek review of the following actions of the EPA:

1. 70 Fed. Reg. 25,162 (May 12, 2005)
2. 71 Fed. Reg. 25,304 (April 28, 2006)
3. 71 Fed. Reg. 25,328 (April 28, 2006)

RELATED CASES

The EPA final actions on review have not previously been before this Court or any other court. This matter is related to *Sierra Club, et al v. EPA*, Nos. 06-1221 and 06-1357.

CORPORATE DISCLOSURE STATEMENT

Environmental Defense Fund (formerly Environmental Defense), Natural Resources Defense Council and U.S. Public Interest Research Group state that none of them has any parent corporation and that no publicly held corporation owns 10% or more of the stock of any of them.

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TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

MISCELLANEOUS

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NOx	Nitrogen Oxides
SO_2	Sulfur Dioxide

INTRODUCTION AND REASONS FOR EN BANC REVIEW

The Panel's decision in this exceptionally important case conflicts with settled administrative law precedent and warrants review by the en banc Court. The Panel held unlawful and vacated EPA's Clean Air Interstate Rule (CAIR), adopted under Section 110(a)(2)(D) of the Clean Air Act (CAA), 42 U.S.C. § 7410(a)(2)(D). That "good neighbor" provision requires EPA to ensure that air pollution from upwind States does not significantly interfere with downwind States' ability to comply with health-based National Ambient Air Quality Standards (NAAQS). One of the most important rules EPA has ever promulgated in terms of health and economic benefits, CAIR will prevent 17,000 deaths annually by 2015. CAIR allows States to meet their obligations by emissions trading to minimize costs while addressing an intractable problem that has long frustrated the state-based system of CAA administration.

The Panel's ruling represents a major setback for public health, state and federal regulatory stability, and industry business planning. It creates serious difficulties for downwind States obligated to attain NAAQS despite their inability to regulate out-of-state sources – and, by the same token, compounds legal risks for upwind States. *See* 531 F.3d 896, 930 (2008) (Panel opinion, suggesting that States could respond to regulatory gap created by CAIR's vacatur by initiating petitions under CAA § 126). The decision creates uncertainty for sources, impairs planning and investment in pollution abatement, and calls into question many EPA and Court decisions specifically relying on CAIR, *see, e.g., UARG v. EPA*, 471 F.3d 1333, 1339 (D.C. Cir. 2006). The opinion's broad language leaves EPA with little guidance on how it may address

interstate pollution and undermines the agency's authority to employ emissions trading mechanisms.

The decision suffers from fundamental legal errors. In striking down CAIR's measures to harmonize electric generating units' Title I obligations to reduce interstate transport of SO_2 that contributes to particulate pollution, with their Title IV obligations to reduce interstate transport of SO_2 that produces acid rain, the Panel declared "the existence of the Title IV program" to be "irrelevant" to EPA's regulation of the same sources and pollutants under Title I, 531 F.3d at 930. The decision disregards settled precedent concerning the limits of federal judges' review role and agencies' obligation to harmonize interlocking provisions of a complex statute; imposes unwarranted limitations on EPA's authority to administer the CAA's complex provisions in the future; and is inconsistent with *Michigan v. EPA*, 213 F.3d. 663 (D.C. Cir. 2000), which upheld under Section 110(a)(2)(D) the methodology EPA used in CAIR.

The Court should grant en banc review to consider: Whether the Panel erred in holding that (1) the impacts of the rule on the integrity and continued existence of the statutory Acid Rain Program, which regulates the same pollutant and sources, were "irrelevant" to the interstate air pollution rulemaking; and (2) EPA lacked authority, as part of the Section 110(a)(2)(D) rulemaking, to impose limits on Acid Rain Program allowances in order to preserve a functioning emissions trading market, where failure to do so would have destroyed the Title IV emissions trading market established by Congress and led to emissions increases outside the CAIR region, and given that the Act expressly grants the government the "authority to limit or terminate" such allowances.

BACKGROUND

Interstate pollution has long posed a special challenge for the state-centered CAA regime and has been a major cause of nonattainment of NAAQS throughout much of the eastern United States. 70 Fed. Reg. 25,162, 25,169-70 (May 12, 2005). In Section 110(a)(2)(D) of the CAA, the "good neighbor" provision, Congress charged the EPA with ensuring that state implementation plans prohibit emissions that will "contribute significantly to [NAAQS] nonattainment in, or interfere with maintenance by, any other State." CAIR aims to reduce cross-boundary ozone and fine particulate pollution by restricting emissions of nitrogen oxides (NOx), and sulfur dioxide (SO_2), precursors of those pollutants, from sources located in upwind States.

A. The Rulemaking. EPA constructed CAIR on the foundation laid by this Court's 2000 decision in *Michigan*, which sustained a regional emissions trading program established under EPA's NOx SIP Call. *Michigan* upheld EPA's decision to identify "significant contribu[tion]s" under Section 110(a)(2) with reference to emissions that could be eliminated through "highly cost effective" controls. 213 F.3d at 677-80.

As in the NOx SIP Call, EPA used extensive modeling to identify downwind States projected to be in nonattainment and determine which upwind States make significant contributions to nonattainment. 70 Fed. Reg. at 25241-46. EPA determined that 28 states would contribute significantly to ozone or particulate nonattainment or both in the specified downwind States in 2010. States may achieve the necessary emissions reductions either by opting in to a regional emissions trading program, or by imposing emissions reductions on in-state sources. As in the NOx SIP

Call, EPA fixed emissions reductions requirements by identifying controls that were highly cost-effective for electric generating units under a range of federal and state pollution control programs. 70 Fed. Reg. at 25,195-229. CAIR requires regional emissions reductions of 50% by 2009 (for NOx) and 2010 (for SO_2), and reductions of 60% for both pollutants by 2015. 70 Fed. Reg. at 25,229-30.

In designing CAIR, EPA took account of the fact that these same pollutants and sources were regulated under other programs that also establish emissions trading programs to address interstate transport – including both the NOx SIP Call Rule and the Title IV Acid Rain Program, 42 U.S.C. §§ 7561-7651o. Sources subject to the Acid Rain Program are required to secure a number of emission allowances equal to their annual emissions and are permitted to trade unused allowances with other sources or bank them for use in future years – an approach that, for almost two decades, has yielded impressive emissions reductions while minimizing costs. They remain subject to the full range of air pollution control programs under Title I. *See* 42 U.S.C. § 7651b(f).

Implementing the Title I good neighbor rule to cut emissions from electric generating units, EPA recognized, could have severe and problematic consequences for the Title IV cap and allowance trading for those electric generating units. *See* 70 Fed. Reg. at 25,294-95; *id.* at 25,214 (noting that electric generating units would contribute 70 percent of the SO_2 emissions in the CAIR region in 2010). The reductions necessary to prevent significant contributions to downwind nonattainment would require capping SO_2 emissions at less than half of the 8.95 million tons per year permitted under the Acid Rain Program. The inevitable result would be a flooding of

the Title IV allowance market. This "large surplus of title IV allowances" would cause "a collapse of the price of title IV allowances," causing prices to "fall to zero," so that "as a practical matter" Title IV allowances "would not be transferable." 70 Fed. Reg. at 25,294. As a result, Title IV's "nationwide cap and trade program" would "lose all efficacy," and emissions outside the CAIR region would increase markedly. See *id.* at 25,294-95. These adverse effects would extend beyond the Acid Rain Program; a collapse of the Title IV trading market could "significantly erode confidence in cap and trade programs in general and the CAIR model cap and trade programs in particular." *Id.* at 25,295.

Mindful that companies had made "billions of dollars of investments in emissions controls in order to be able to sell excess title IV allowances and in purchasing title IV allowances for future compliance," the agency decided to "try, to the extent possible consistent with statutory requirements," to craft regulations that would "avoid . . . extensive disruption [of] the Acid Rain Program." 70 Fed. Reg. at 25,295. For this reason, EPA chose to incorporate Title IV allowances into CAIR's opt-in emissions trading program, and used Title IV allowance budgets as the baseline for CAIR emissions budgets. These choices would allow the two programs to operate in harmony, while dramatically reducing emissions pursuant to the "good neighbor" mandate. Under CAIR, Title IV allowances issued for years before 2010 may be used to offset SO_2 emissions for purposes of CAIR on a one-for-one basis; during Phase I (2010-2014), in order to achieve the regionwide 50% emissions reduction necessary under Section 110(a), two Title IV allowances must be relinquished for every ton of

emissions in the CAIR region; during Phase II (2015 and after), the ratio increases to achieve a 65 percent regionwide reduction. See 70 Fed. Reg. at 25,229-30.[1]

EPA made these choices after a detailed examination of other possible methodologies. *See, e.g.*, 70 Fed. Reg. at 25,277-91; 71 Fed. Reg. 25,304, 25,305-14 (April 28, 2006). The agency considered numerous "stand alone" SO_2 budgeting methodologies that would maintain separate allowances for CAIR and Title IV – but concluded that these methodologies were no better than a unitary approach as a matter of efficacy and equity and clearly worse with respect to their effect on the Title IV program. EPA concluded that "[t]he preservation of title IV allowances for use in CAIR" was "integral to the viability and effectiveness of both title IV and the CAIR trading programs." 71 Fed. Reg. at 25,308.

When fully implemented, CAIR will result in emissions reductions of 73 percent for SO_2 emissions and 63 percent for NOx (both from 2003 levels). EPA estimates that, in 2015, the *annual* health benefits of the rule will include 17,000 fewer premature fatalities, 22,000 fewer non-fatal heart attacks, 13,300 fewer hospitalization admissions for respiratory and cardiovascular disease, 8,700 fewer cases of chronic bronchitis, 1.7 million fewer lost work days, and 510,000 fewer days where children are absent from school due to illness. 70 Fed. Reg. at 25,166. Annual economic benefits would be $63-$73 billion in 2010 (in 1999 dollars), and $86-$101 billion in 2015.

[1] Sources in States that choose to participate in CAIR's optional cap-and-trade program will be required to hold sufficient allowances to offset their SO_2 emissions; States that do not will need to adopt other means to achieve the required reductions, and retire Title IV allowances in excess of their CAIR budgets. 70 Fed. Reg. at 25,229.

B. The Panel's Decision. Various parties petitioned for review. The State of North Carolina challenged CAIR as insufficiently protective of downwind states, and urged that EPA had failed to give independent effect to Section 110(a)(2)(D)'s reference to interference with "maintenance of" NAAQS. The State urged that CAIR *not* be vacated, if its challenge were sustained, noting that the Rule even as drafted provided needed pollution reductions. NC Br. 25. Other parties challenged CAIR's application to specific geographic areas or types of sources.

The only parties seeking wholesale vacatur of CAIR were the "SO_2 Petitioners," a group of utilities that argued that EPA's efforts to accommodate CAIR's new limitations on interstate SO_2 transport with the Title IV program were impermissible. They did not challenge the level of regionwide emissions EPA found necessary, or EPA's use of emissions trading, but claimed that the CAA required the EPA to structure CAIR as "a stand-alone program with unique SO_2 allowances," operating "parallel" to Title IV – and premised their standing to sue on the claim that such a program would have provided their companies with a greater number of SO_2 allowances. SO_2 Br. 8, 13.

The Panel held CAIR unlawful and vacated it in toto. The Panel sustained part of North Carolina's challenge – ruling, *inter alia*, that EPA's rules did not adequately give effect to the Section 110(a)(2)(D)'s requirement that SIPs safeguard against interference with "maintenance" of downwind States' NAAQS. 531 F.3d at 908-12.

The Panel sustained the SO_2 Petitioners' broad statutory challenge. EPA's use of Title IV allowances to establish CAIR SO_2 budgets was unlawful, the Panel concluded, because the agency's goals of preserving the viability of the Title IV

program and pursuing an "equitable governmental approach to attainment" were "not among the objectives" set forth in Section 110(a)(2)(D). 531 F.3d at 917-18. The Panel also took exception to EPA's decision to rely on Title IV allowances in CAIR: without disputing EPA's conclusion that a "stand alone" approach would render such allowances worthless, the decision treated as fatal EPA's "failure" to identify a specific grant of express authority "to terminate or limit Title IV allowances." *Id.* at 921-22.

Finally, the Panel concluded that the only proper remedy was complete vacatur of CAIR. It concluded that CAIR was intended to operate as an "integrated whole," and that EPA accordingly "must redo its analysis from the ground up." 531 F.3d at 930. "No amount of tinkering with the rule or revising of the explanations," the Panel concluded, "will transform CAIR, as written, into an acceptable rule." *Id.*

ARGUMENT

I. EPA'S MEASURES TO HARMONIZE CAIR WITH THE ACID RAIN PROGRAM WERE CONSISTENT WITH THE ACT AND REASONABLE

The Panel erred in ruling that EPA lacked authority to harmonize CAIR with the existing Title IV program. The Panel failed to identify any statutory text that speaks to the "precise question" whether EPA could impose conditions on Title IV allowances if necessary to prevent the wholesale elimination of the Title IV trading market due to Title I regulation of SO_2 on the same sources. *See Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984). EPA's approach was consonant with statutory text, structure, and history, and EPA's explanation for its policy choices was securely grounded in the CAA, exhaustively explained, and reasonable. *See Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) ("particular deference" is due EPA "when

it acts under unwieldy and science-driven statutory schemes like the [CAA]") (internal quotation omitted); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1084 (D.C. Cir. 1996).

EPA has undisputed authority, pursuant to the stationary source provisions in Title I of the Act, to subject Title IV sources to further pollution requirements beyond what Title IV imposes. *See* 42 U.S.C. 7651b(f) (Title IV allowance-holding requirements do not excuse compliance with "any other provision" of the CAA, including "provisions related to [NAAQS] and State Implementation Plans"). The Panel did not question EPA's judgment that imposing such requirements to satisfy Section 110(a)(2)(D) would effectively terminate the SO_2 emissions trading program by depriving Title IV allowances of any value. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 306-07 (D.C. Cir. 2006) (agency's predictive judgments entitled to "'particularly deferential' treatment") (citation omitted). Nor did the Panel ever dispute EPA's conclusion that destroying the Title IV market would have a range of adverse consequences. The real and serious policy consequences that prompted EPA to harmonize Title I and Title IV, and the absence of textual (or other clear statutory) support for the SO_2 Petitioners' argument against, made this a case for deference. *See Chevron*, 467 U.S. at 863-64.

A. The Panel Erred in Ruling that CAIR's SO_2 Budgeting Methodology Violates Section 110(a)(2)(D)

The Panel faulted EPA's decision to integrate the CAIR and Title IV allowance budgets on the basis that it "does not track the requirements" of Section 110(a)(2)(D). 531 F.3d at 917. However, as *Michigan* emphasized, that section's pivotal terms are ambiguous, with no detailed direction about *how* EPA is to control interstate pollution. 213 F.3d at 678. *Cf. Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1049-50 (D.C.

Cir. 2001) ("given § 126's silence on what it means for a stationary source to violate § 110(a)(2)(D)(i), EPA's approach is at least reasonable, and therefore entitled to deference under *Chevron*").

EPA exhaustively examined the various alternative budgeting methodologies proposed in the rulemaking, and explained that the difference between them was "distributional" because, whatever the allocation rule, trading would result in economically efficient and environmentally similar outcomes. *See* 70 Fed Reg. 25,279. *See also id.* at 25,307 (choice of allocation methodology "will have little effect on overall compliance costs or environmental outcome"); *id.* at 25,229. Relying on Title IV would produce one enormous advantage that the alternatives would not: It would avoid destruction of the Acid Rain Program's emissions trading market.

The Panel rejected this reasoning, on the ground that "preserve[ing] the viability" of the Title IV program was "not among the objectives of Section 110(a)(2)(D)(i)(I)," and pronounced that CAIR's regionwide emissions caps were "entirely arbitrary" because "EPA based them on *irrelevant factors like the existence of the Title IV program.*" 531 F.3d at 917-18, 930 (emphasis added)

This was a stark departure from basic *Chevron* principles. Section 110(a)(2)(D)(i)(I) does not prescribe how EPA is to give effect to the ban on interstate pollution that significantly contributes to nonattainment. *Michigan,* 213 F.3d at 678. Upending *Chevron*, the Panel understood that legislative silence as an administrative straightjacket. But absent some distinct textual prohibition, an agency is not straying into "irrelevant" territory when it endeavors to implement one provision of a statute so as to avoid harmful effects on programs under another provision of the same statute -

especially where, as here, the respective provisions regulated the same pollutant from the same entities, and have similar purposes. Such a rule would badly vex the administration of the CAA and other complex federal statutes, and cannot be reconciled with *Chevron*'s teachings.

Even when judges construe statutes afresh, "each part or section [of a statute] should be construed in connection with every other part or section to produce a harmonious whole," 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:5 (6th ed. 2000); *see United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[o]ver and over" Court has "stressed" attention "to the provisions of the whole law, and to its object and policy"), and courts and agencies alike have an obligation to interpret statutory provisions to comport with other provisions, *see American Federation of Government Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1328 (D.C. Cir. 2007) (agency interpretation upheld as a "not unreasonable way of harmonizing the two statutory provisions"); *Nat'l Ass'n of Mfrs. v. Dep't of Interior*, 134 F.3d 1095, 1107 (D.C. Cir. 1998) (approving agency's "resolution of potentially conflicting commands" as "'a reasonable accommodation of conflicting policies that are committed to the agency's care by the statute'") (citation omitted); *American Train Dispatchers Ass'n v. I.C.C.*, 54 F.3d 842, 849 (D.C. Cir. 1995) (court construing statutory provision must "examine the 'language and design of the statute as a whole,'" and agency's decision to take account of other statutory provisions merits "enhanced" deference) (citation omitted). Congress did not need to encode these hornbook principles into Section 110(a)(2)(D).

Nor should the Panel have faulted EPA (*see* 531 F.3d 918) for seeking to craft an "equitable" approach to SO_2 budgets. Section 110(a)(2)(D) addresses interstate pollution, a matter in which equity has always been a central consideration. *See Missouri v. Illinois.*, 200 U.S. 496, 520-21 (1906). *Michigan*'s emphasis on EPA's discretion to tailor remedies for interstate pollution stands against the Panel's narrow reading, *see* 213 F.3d at 678 ("petitioners do not explain how 'significance' can exclude cost but admit equity"); compare *id.* at 696 (Sentelle, J.) (arguing in dissent that provision allows only "one criterion").[2]

B. Nothing in the CAA Precludes EPA from Limiting Title IV Allowances Where Necessary to Preserve the Program

The Panel's ruling that EPA lacked authority under the Act to limit or require retirement of Title IV allowances violated bedrock *Chevron* principles. The Panel concluded that no provision of Title IV granted EPA the authority to limit or terminate allowances, then concluded that that silence precluded EPA from acting. But the Panel again failed to demonstrate any "direct statement" from Congress that would resolve this issue – and it never disputed EPA's concern that other approaches would spell the end of Acid Rain Program emissions trading.

Given that Congress expressly provided that EPA could impose additional obligations on Title IV sources under Title I, it would have taken a pointed congressional directive to prevent EPA from tailoring CAIR to prevent a complete

[2] The Panel also found that EPA had "insufficiently explained how it arrived at the 50% and 65% reduction figures," and that EPA had simply "pick[ed] a cost," arbitrarily, and then "deemed" the resulting emissions levels to trigger the statutory significance standard. 531 F.3d at 918. But it overlooked EPA's lengthy cost-effectiveness analysis, which was *unchallenged* by petitioners. *See e.g.*, 70 Fed Reg. at 25,195-229, *see also id.* at 25,200 (noting that EPA developed cost data beyond that used in NOx SIP Call).

breakdown of the Title IV program as a result of those obligations. The Panel's conclusion that such a result is not only permissible, but required by the Act's structure, implausibly "impute[s] to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947).

Title IV's text demonstrates that Congress did not intend rigidly to bar adjustments even to avoid total breakdown of the program. Section 403(f) makes explicit that Title IV allowances do not immunize the holder from compliance with requirements under Title I of the Act, and then provides that a Title IV allowance is a "limited authorization to emit sulfur dioxide," and that "[n]othing in this subchapter or any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization." 42 U.S.C. § 7651b(f). The Panel dismissed the significance of this language, stating that it does not "grant EPA any authority." 531 F.3d at 921-22 & n.4. But the provision plainly rules out arguments like the one the Panel proceeded to credit – that Title IV allowances may not be limited or terminated, even to prevent the outright collapse of the Title IV emissions trading program due to the operation of lawful regulatory action under Title I. While claiming that it did not need to rule on the SO_2 Petitioners' strained argument that the provision merely referred to the authority of *Congress* to limit allowances, *but see* 42 U.S.C. § 7651b(f) (separately making clear that allowances are not property rights), the Panel actually *did* decide the issue, and incorrectly: Section 403(f)'s *express* references to "limit[ing]" and "terminat[ing]" allowances plainly provide for adjustments in some circumstances; the Panel should have inquired whether EPA had demonstrated a sound

reason for doing so here. Avoiding the wholesale collapse of the Title IV trading program was certainly such a reason.

The Panel likewise dismissed (531 F.3d at 922) EPA's explicit authority under Section 301(a) to "prescribe such regulations as are necessary to carry out its [its] functions under [the CAA]," 42 U.S.C. § 7601(a), but failed to explain why, given the extraordinary circumstances EPA faced, CAIR's reliance on Title IV allowances was not "necessary" to sound CAA administration. The highly disruptive effects of the new reductions satisfied any reasonable test of "necessity." Had EPA required deep cuts in SO_2 emissions under Title I with no accommodation for the Acid Rain Program, the result would have been a vestigial Title IV program involving a perfunctory annual distribution of and accounting for valueless, untraded, allowances. That would have been a sufficiently dramatic and problematic result, one at odds with the basic goals and intended operation of Title IV. Threats to statutory policies far less extreme have prompted this Court to defer, even when there were stronger plain language arguments against deference. *E.g.*, *Engine Mfrs. Ass'n*, 88 F.3d at 1104.

The problem EPA faced – not uncommon with "technical and complex" statutes embodying "conflicting policies," *Chevron*, 467 U.S. at 865 – arose from the interaction of Title IV's program for combating acid rain with Title I's overlapping obligations for the same large, high-emitting sources. It was artificial to look for express authority "in" Title I or "in" Title IV to work harmonization, when the essence of the problem EPA faced was to deal with the *interaction* of the two sets of provisions. Had EPA promulgated CAIR without regard to the effect on Title IV, it would have worked a far more dramatic effect on the Acid Rain Program, by rendering its

allowances valueless – and this Court would likely have confronted a wave of industry petitions complaining that EPA had arbitrarily terminated a program established by Congress and defeated longstanding industry reliance interests.

The Panel's opinion condemned EPA's efforts at pragmatism and accommodation as if there were some clear statutory command that foreclosed such efforts, however well-intentioned. But there was no textual bar, and the plain language of the statute supported EPA's policy choices. The accommodation EPA worked between Title I and Title IV was reasonable, and was a classic case for judicial deference.

II. THE COURT SHOULD CALL FOR BRIEFING ON THE APPROPRIATE REMEDY

The Panel's decision to vacate CAIR, rather than remand to the agency, has serious impacts for public health and enormously disruptive consequences for the States and for regulated companies. It is a severe set-back for the nation's state-based system of air quality planning and management, which demands comprehensive federal action to address chronic cross-boundary pollution problems. The question of the appropriate remedy was not briefed in any depth before the Panel. On rehearing, the Court should direct the parties to brief the appropriate remedy.

CONCLUSION

Panel rehearing or rehearing en banc should be granted.

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September 24, 2008

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I hereby certify that on September 24, 2008, a copy of the foregoing **Petition for Rehearing or Rehearing en Banc of the Environmental Intervenors** was served via first class mail, postage prepaid, on each of the following attorneys:

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ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1244
(and consolidated cases)

STATE OF NORTH CAROLINA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Rules of
The United States Environmental Protection Agency

PETITION FOR PANEL REHEARING OR REHEARING EN BANC OF INTERVENOR-RESPONDENT UTILITY AIR REGULATORY GROUP

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ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

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

STATE OF NORTH CAROLINA, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**No. 05-1244 and**
	)	**consolidated cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

CERTIFICATE AS TO PARTIES AND *AMICI*

Pursuant to Circuit Rules 35(c) and 28(a)(1)(A), the following list of parties and *amici curiae* is provided as an addendum to the Petition for Panel Rehearing or Rehearing en Banc of Intervenor-Respondent Utility Air Regulatory Group, which is filed herewith together with a Corporate Disclosure Statement pursuant to Circuit Rule 26.1.

These cases involve petitions for review of agency action that were filed in this Court and were not before the District Court.

The Petitioners in these consolidated cases are:

AES Corp. and its United States subsidiaries; AES Beaver Valley, LLC; AES Warrior Run, LLC; and Constellation Energy Group, Inc.
ARIPPA

City of Amarillo, Texas; Occidental Permian Ltd.; and Southwestern Public Service Co. d/b/a Xcel Energy
Duke Energy Corp.
Duke Power Co. LLC, d/b/a Duke Energy Carolinas, LLC
Entergy Corp.
Florida Association of Electric Utilities
FPL Group, Inc.
Integrated Waste Services Association
Inter-Power/AhlCon Partners, L.P.
Minnesota Power, a Division of ALLETE, Inc.
Northern Indiana Public Service Co.
South Carolina Electric & Gas Co.
South Carolina Public Service Authority and JEA
State of North Carolina

The Respondent in these cases is the United States Environmental Protection Agency.

There are no Intervenors for Petitioners in these cases. The following are Intervenors for Respondent:

Alabama Power Company
Environmental Defense
Midwest Generation, LLC
National Mining Association
Natural Resources Defense Council, Inc.
Ohio Environmental Council
U.S. Public Interest Research Group
Utility Air Regulatory Group

Amici in these cases are:

Commonwealth of Massachusetts
Commonwealth of Pennsylvania
State of Connecticut
State of New Jersey
State of New York
Tennessee Valley Authority

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ORAL ARGUMENT HELD MARCH 25, 2008
DECISION ISSUED JULY 11, 2008

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

STATE OF NORTH CAROLINA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 05-1244 and consolidated cases

RULE 26.1 DISCLOSURE STATEMENT OF UTILITY AIR REGULATORY GROUP

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 35(c), Intervenor-Respondent Utility Air Regulatory Group ("UARG") files the following statement:

UARG is a not-for-profit association of individual electric generating companies and national trade associations that participate collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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GLOSSARY

The following is a glossary of acronyms and abbreviations used in this petition:

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
EPA	Environmental Protection Agency
NAAQS	National ambient air quality standards
NOx	Nitrogen oxides
$PM_{2.5}$	Fine particulate matter (particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers)
SIP	State implementation plan

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

The Court should grant Panel or *en banc* rehearing on its decision regarding the lawfulness of interstate emission allowance trading in the Clean Air Interstate Rule ("CAIR").[1] That decision adopts a construction of the relevant provision of the Clean Air Act ("CAA" or "Act") that conflicts with this Court's reasoning and decision regarding that same provision in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). Interstate trading is of exceptional importance to efficient implementation of the Act's requirements, but the decision jeopardizes the use of such trading in future CAA programs designed to remedy interstate pollution.

Similarly, the Panel's decision invalidating CAIR's "Phase 2" compliance date reflects a construction of the CAA that is at odds with the approach affirmed in *Michigan* and will complicate unnecessarily implementation of the Act's interstate pollution provisions.

In *Michigan*, the Court largely upheld the "NOx SIP Call rule" and affirmed the Environmental Protection Agency's ("EPA" or "Agency") two-step approach to implementing section 110(a)(2)(D)(i)(I) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7410(a)(2)(D)(i)(I). In the first step, EPA determines which states have emissions that make a "measurable contribution" to nonattainment air quality in another state. 213 F.3d at 683-84 (emphasis omitted). In the second step, for

[1] A copy of the slip opinion of the Panel is attached. Also attached for the Court's convenience is a copy of the decision as reported at 531 F.3d 896 (D.C. Cir. 2008).

states that are found to make such a contribution, EPA determines the amount of emissions that make "a 'significant' contribution" as described in section 110(a)(2)(D)(i)(I); the significantly contributing amount is the amount that can be reduced "if 'highly cost-effective controls' were implemented." *Id.* at 682, 683-84.

In the rule affirmed in *Michigan*, as in CAIR, EPA treated the availability of interstate trading as integral to a determination of what amount of emission reductions is highly cost-effective within the affected region and, thus, as a critical element of implementation of the "significant contribution" provision. Finding EPA's treatment of that issue unlawful, the Panel in this case held for the first time that EPA's significant contribution determination must be informed by notions of state-to-state "air quality" contribution that *Michigan* made clear the Agency properly rejected. In doing so, the Panel upset EPA's decade-old, judicially affirmed method of establishing cost-effective emission reduction requirements for addressing interstate pollution.

The Panel's decision on the compliance date likewise relies on the sort of air quality contribution theory that the Court in *Michigan* found EPA had no obligation to adopt. The Panel substituted its interpretation of a facially ambiguous statutory phrase (*i.e.*, "consistent with the provisions" of CAA Title I) for that of EPA and, on that basis, held that specific air quality objectives that the Panel discerned in some of those provisions must drive application of the significant

contribution test. Like the Panel's trading decision, this unwarranted intrusion into Agency decision-making threatens to disrupt efforts to address interstate pollution under the Act.

STATEMENT OF FACTS

EPA promulgated CAIR in 2005 (and the CAIR "federal implementation plans" in 2006) to address emissions from sources in a broad region, consisting of 28 "upwind" states in the eastern half of the country and the District of Columbia, that it found contribute to nonattainment of the national ambient air quality standards ("NAAQS") for ozone or fine particulate matter ("$PM_{2.5}$") in "downwind" states. 70 Fed. Reg. 25,162 (May 12, 2005); 71 Fed. Reg. 25,328 (Apr. 28, 2006); *see North Carolina v. EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008). EPA promulgated CAIR pursuant to section 110(a)(2)(D)(i)(I) of the CAA, which provides that state implementation plans ("SIPs") under the Act must

> contain adequate provisions ... prohibiting, consistent with the provisions of this title [Title I of the CAA], 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 ... national ... air quality standard.

See id. at 902.

Using state-to-state air quality metrics, EPA first determined whether a given state's emissions cause more than a threshold contribution to ozone or $PM_{2.5}$ nonattainment air quality in one or more other states. *Id.* at 903-04. For the

"contributing" states, EPA then considered what amount of emission reduction would be "highly cost-effective" for regulated sources to achieve by a 2015 compliance date, assuming interstate emission allowance trading; that reduction amount represents the amount that "significantly" contributes. Subtracting that amount from a "baseline" provided a basis for calculating state emission "budgets" under the rule. *See id.* at 904-05; 70 Fed. Reg. at 25,201-12, 25,225.

Interstate trading was a central element of EPA's methodology; the "availability of trading," it explained, is "part of the basis for EPA's findings that [emission] reductions are highly cost effective, and hence are an element of the finding that emissions contribute significantly to nonattainment." 71 Fed. Reg. at 25,336; 531 F.3d at 907 (quoting 70 Fed. Reg. at 25,196 ("In modeling the CAIR ..., EPA assumes interstate emissions trading.")). And EPA determined that requiring compliance with the full complement of CAIR's emission reductions before 2015 would be infeasible and thus, by definition, not highly cost-effective. 70 Fed. Reg. at 25,221-25; *see id.* at 25,175 ("feasibility issues" are intrinsic to "determining the appropriate level of controls"); *id.* at 25,178 (the significant contribution test "incorporates feasibility considerations in determining the implementation period for the upwind emissions controls"; "the pace of reductions ... [is] determined by the time within which they may feasibly be achieved").

North Carolina petitioned for review of CAIR on several grounds. While

disavowing any argument that "trading is *per se* unlawful," it urged remand of the rule for adoption of unspecified measures to avoid "more than *de minimis* budget overages" that may result from operation of a trading program. North Carolina Opening Br. at 33-34; *see* 531 F.3d at 906. North Carolina's apparent theory was that unrestricted interstate trading is incompatible with the statutory injunction to eliminate significantly contributing emissions "within the State." CAA § 110(a)(2)(D)(i). In addition, without regard to the infeasibility of accelerating the CAIR emission reductions, North Carolina argued EPA must do so to match a single NAAQS attainment deadline. The state based this argument on its view of the "consistent with the provisions of this title" phrase in section 110(a)(2)(D)(i) and on the fact that Congress in 1990 moved attainment deadline provisions from section 110 to other parts of Title I of the Act. North Carolina Reply Br. at 10.

In its opinion, the Panel granted North Carolina's petition for review on certain issues, including interstate trading and the compliance date. The Panel faulted EPA for evaluating emission reductions "at the regionwide level assuming a trading program"; it found this an unacceptable substitute for "measur[ing] the 'significant contribution' from sources within an individual state." 531 F.3d at 907. The Panel said that EPA "has not measured the unlawful amount of pollution for each upwind-downwind linkage" and that, "under EPA's method of analysis, state budgets do not matter for significant contribution purposes." *Id.*

While acknowledging that EPA's established method *did* give effect to "the 'air quality factor'" in the first-step determination of which states would be included in the rule, *id.*, the Panel nonetheless characterized that method as legally deficient because it does not necessarily give effect to that factor in its second step, *i.e.*, the determination of what amount of emissions significantly contribute:

> [U]nder CAIR, sources in Alabama, which contribute to nonattainment of $PM_{2.5}$ NAAQS in Davidson County, North Carolina, would not need to reduce their emissions at all. ... Theoretically, sources in Alabama could purchase enough ... allowances to cover all their current emissions, resulting in no change in Alabama's contribution to Davidson County['s] ... nonattainment.

Id. Such a result, the Panel suggested, would not necessarily "achieve section 110(a)(2)(D)(i)(I)'s goals." *Id.* Although, as the Panel recognized, the record demonstrated that sources contributing to North Carolina nonattainment air quality were projected to reduce their emissions even with trading, the Panel held that

> EPA is not exercising its section 110(a)(2)(D)(i)(I) duty unless it is promulgating a rule that achieves something measurable toward the goal of prohibiting sources "within the State" from contributing to nonattainment or interfering with maintenance "in any other State."

Id.

The Panel then discussed the Court's affirmance in *Michigan* of "EPA's decision to apply uniform emissions controls to all upwind states despite different levels of [air quality] contribution [among those states] ... to nonattainment" and "*Michigan*'s approval" of EPA's decision to set emission control requirements at a

level "that do[es] not correlate directly with each state's relative [air quality] contribution." *Id.* at 908 (citing *Michigan*, 213 F.3d at 679). The Panel observed that the Court in *Michigan* upheld EPA's methodology

> because these effects "flow[] ineluctably from the EPA's decision to draw the 'significant contribution' line on a basis of cost differentials" and "[o]ur upholding of that decision logically entails upholding this consequence."

Id. (quoting 213 F.3d at 679). The Panel said, however, that in *Michigan*, the Court "never passed on the lawfulness of the NOx SIP Call's trading program." *Id.* The Panel then suggested that permitting interstate trading conflicted with a new test enunciated for the first time in its decision, *i.e.*, that EPA's rule

> must include some assurance that it achieves something measurable towards the goal of prohibiting sources "within the State" from contributing to nonattainment or interfering with maintenance in "any other State."

Id. But the Panel went further: "Because CAIR is designed as a complete remedy to section 110(a)(2)(D)(i)(I) problems, ... CAIR must do more than achieve something measurable; it must actually require elimination of emissions from sources that contribute significantly." *Id.*

Regarding the compliance date, the Panel held that CAIR's 2015 date conflicts with "the rest of Title I," which it said "requires compliance with $PM_{2.5}$ and ozone NAAQS by 2010." *Id.* at 911. It rejected EPA's argument that "section 110(a)(2)(D)(i)(I) does not mandate any particular time frame" and that the

"consistent with" phrase should be construed to refer only to procedural provisions of Title I. *Id.* The Panel said that Congress could have referred in section 110(a)(2)(D)(i) specifically to "procedural" provisions and held that, even if the phrase had "any ambiguity," examining it "in the context of the whole CAA dispels any doubts"; the Panel read it as "requir[ing] EPA to consider all provisions in Title I – both procedural and substantive – and to formulate a rule that is consistent with them." *Id.* at 912. According to the Panel, EPA's failure to "harmonize" the CAIR deadline with the 2010 NAAQS attainment date "forc[ed] downwind areas to make greater reductions than section 110(a)(2)(D)(i)(I) requires." *Id.* In other words, in the Panel's view, the CAIR deadline did not "provide a sufficient level of [air quality] protection to downwind states projected to be in nonattainment as of 2010." *Id.*

ARGUMENT

The Panel's Decisions on Interstate Trading and the Compliance Date – Issues of Exceptional Importance in Implementation of the Act – Conflict with the Statutory Construction Affirmed by This Court in *Michigan*.

I. Interstate Trading

The Panel's decision undermines the ability of EPA, states, and sources to use cost-effective interstate emission allowance trading in rules to implement section 110(a)(2)(D)(i)(I) of the Act – trading that for the last decade has been a central element in CAA programs to address interstate pollution. The Panel's

rationale departs from this Court's holding in *Michigan* affirming EPA's two-step test for implementing section 110(a)(2)(D)(i). *See Michigan*, 213 F.3d at 674-80.

In another decision construing the Act's interstate transport provisions, this Court has described "the two-step method ... that [it] upheld in *Michigan*":

> EPA first perform[s] computer modeling to determine whether a state's manmade ... emissions perceptibly hindered a downwind state's attainment .... For any state exceeding EPA's threshold [air quality] criteria, EPA then define[s] as "significant" those emissions that could be eliminated through application of "highly cost-effective" controls....

Appalachian Power Co. v. EPA, 249 F.3d 1032, 1048-49 (D.C. Cir. 2001) (citing *Michigan*, 213 F.3d at 675). Thus, as the Court has long recognized, the first step in EPA's section 110(a)(2)(D)(i) analysis is to determine interstate *air quality contributions* that define which "upwind" states meaningfully contribute to other states' nonattainment. In other words, that first, air-quality-based step determines the rule's geographic coverage. *Michigan*, 213 F.3d at 675. Air quality, however, does not drive the second step, in which EPA determines an amount of emissions that "significantly" contributes to nonattainment, *id.* at 677; that determination turns on EPA's assessment of what amount of emission reduction is "highly cost-effective" – an economic and engineering assessment categorically different from the first-step air quality assessment. Further, as noted above, that economic and engineering assessment evaluates what degree of emission reduction is highly cost-effective *assuming interstate trading* – making interstate trading part and parcel of

the determination of what amount of emission reductions is highly cost-effective, and thus what amount of emissions significantly contributes to nonattainment. *See, e.g.*, 63 Fed. Reg. 57,356, 57,459-60 (Oct. 27, 1998) (preamble to NOx SIP Call rule) (describing that rule's unrestricted interstate trading program).

Michigan held that EPA could properly implement section 110(a)(2)(D)(i) in this way. The Court specifically recognized that the implementation approach it was approving, including the interstate trading component, does *not* consider the effects, if any, of an upwind state's reduction of its "significantly contributing" emissions on other states' air quality. Thus, for example, the Court said:

> While EPA's cost-effectiveness standard *and emissions trading* seem to mean that EPA will secure the resulting aggregate [emission] reduction at roughly the lowest possible cost, they do not necessarily mean that it will have secured the resulting aggregate health benefits [from improved air quality] at the lowest cost.

213 F.3d at 679 (emphasis added). Yet the Court upheld this result as consistent with the statute, rejecting, for example, arguments that EPA ought, "by one means or another" – such as through adjustments "in the emissions trading system" – to have "ma[d]e [emission] reductions from sources near the nonattainment areas (or otherwise more damaging, molecule for molecule) more valuable than ones from distant sources." *Id.; see also, e.g., id.* at 679-80 (declining to disturb EPA's judgment that a different methodology that would involve "non-uniform" approaches over the multi-state control region offered no substantial advantage).

Such arguments were made by states (including North Carolina) and industry petitioners in *Michigan* challenging EPA's use of a Clean Air Act significant contribution test that, in a seeming paradox, does not take air quality into account. Whatever their appeal as a matter of logic, those arguments failed with the Court. *See id.* at 697 (Sentelle, J., dissenting) (dissenting from the majority's acceptance of "the agency's scurrilous 'second-step' cost effectiveness analysis" on the grounds that it fails to consider air quality). Although the Panel's opinion here does not on its face reverse *Michigan*'s endorsement of EPA's two-step approach, at least in its basic outlines, the Panel emphasized that, in its view, that endorsement did not extend to "the lawfulness of the NOx SIP Call's trading program." 531 F.3d at 908. Yet, as the above-quoted discussion illustrates, the Court in *Michigan* not only was aware that the implementation mechanism it was approving included interstate "emissions trading" as an integral element in the disputed cost-effectiveness step, it rejected suggestions that EPA be required "by one means or another" to make adjustments to "the emissions trading system" to account for air quality effects on downwind states. 213 F.3d at 679. Moreover, the Court pointedly noted that acceptance of the "petitioners' proposed reading of § 110(a)(2)(D)(i)(I)" – a reading that the Court rejected – would have entailed invalidation of "EPA's allowance trading program," as "th[at] program seems to have no rationale other than cost reduction." *Id.* at 676.

These passages make clear that the Court in *Michigan* gave meaningful consideration to the existence and purpose of interstate trading as one of the bases for affirming EPA's two-step method of implementing section 110(a)(2)(D)(i)(I). Just as interstate trading was an inextricable element of the basis for the EPA rule at issue there, it was integral to the Court's evaluation and affirmance of that rule.

In this light, it is clear that the Panel's holding effects a substantial alteration of EPA's cost-effectiveness test for significant contribution – an alteration driven by perceived air quality considerations that *Michigan* held were properly excluded from EPA's significant contribution determination. The Panel's opinion invalidates the result that *Michigan* refused to disturb: that *whatever amount of emissions in a state is reduced as a result of operation of the interstate trading program is that state's "significantly contributing" emissions amount.* In short, the Panel's opinion revises the settled understanding of EPA's "statutory mandate" by creating a new "significant contribution" test that bars or limits interstate trading due to air quality considerations of the kind that *Michigan* held were properly excluded.[2] 531 F.3d at 907, 908. Given the exceptional importance of emission trading in implementation of the Act, rehearing should be granted to conform the decision here to the principles established by the Court in *Michigan.*

[2] The Panel recognized, however, that the existing budgets "would not be 'highly cost effective'" absent interstate trading. 531 F.3d at 907. Thus, if interstate trading is barred or limited, recalculation of the budgets will be needed to ensure that they can be met in a highly cost-effective way. *See, e.g.*, EPA Br. at 151.

II. The Compliance Date

Considerations similar to those that animate the Panel's opinion on the trading issue underlie its decision on the compliance date. As *Michigan* and *Appalachian Power* make clear, and as discussed above, a determination of the amount of required emission reductions under section 110(a)(2)(D)(i)(I) is based on an assessment of highly cost-effective emission reductions. That assessment, in turn, may proceed only in the context of a given timeframe for achieving those reductions, as an amount of emissions may be reduced highly cost-effectively if one period of time is allowed for compliance but may not be reduced highly cost-effectively if a different, shorter period is allowed. *See, e.g.*, 70 Fed. Reg. at 25,221-25 (analyzing factors to determine when controls could be implemented); *see id.* at 25,175 ("feasibility issues" are intrinsic to "determining the appropriate level of controls"); *id.* at 25,178 (the significant contribution test "incorporates feasibility considerations in determining the implementation period for the upwind emissions controls"; "the pace of reductions ... [is] determined by the time within which they may feasibly be achieved"). Because, as shown above, EPA's significant contribution determination, under the approach *Michigan* found lawful, does not require achievement of any specific result in terms of air quality, it also does not require imposition of any specific air-quality-related compliance deadline.

Yet the Panel again departed from *Michigan* by compelling EPA to tailor

that non-air-quality-based determination to match the air quality attainment deadline for an individual downwind area. And, beyond the inconsistency it creates with *Michigan*, the Panel's opinion rests on a faulty premise and threatens unnecessary implementation difficulties.

The Panel viewed 2010 as *the* relevant attainment date, even though $PM_{2.5}$ and ozone NAAQS attainment dates in fact vary considerably and can extend well beyond 2010. 72 Fed. Reg. 20,586, 20,601 (Apr. 25, 2007) (discussing 40 C.F.R. § 51.1004(a), (b)) ($PM_{2.5}$ attainment dates may include 2015); 69 Fed. Reg. 23,951, 23,967 (Apr. 30, 2004) (discussing 40 C.F.R. § 51.903) (ozone attainment dates can include dates later than 2010). That 2010 is only one of several potentially relevant dates contradicts, even under the terms of the Panel's opinion, its invalidation of EPA's "assumption that 2015 was an appropriate deadline for CAIR compliance." 531 F.3d at 913. And, in striking out in its new direction, the Panel ignored the confounding problems that would arise – for EPA and states as well as for sources – from imposing a series of compliance deadlines in a section 110(a)(2)(D)(i)(I) rule in an attempt to match an array of attainment deadlines.

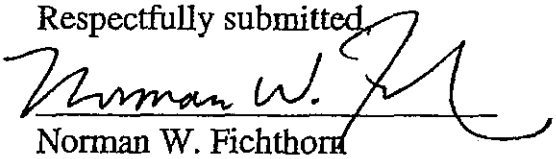
The Panel rejected the Agency interpretation of the section 110(a)(2)(D)(i) "consistent with" clause, *see id.* at 911-12, that avoided these problems and that, unlike the Panel's opinion, was fully consonant with *Michigan*'s holding that significant contribution determinations may properly be governed by cost-

effectiveness analysis. If it stands, the Panel's decision on this issue will require reconsideration and recalculation of emission budgets with new compliance dates geared to attainment deadlines.[3] The recalculation would be to ensure that the various sets of emission reductions that would be required can be achieved in a highly cost-effective way during the various periods before those attainment dates occur. In contrast, rehearing and reversal of the Panel's decision on this issue would allow orderly implementation of section 110(a)(2)(D)(i)(I)'s requirements under the statutory construction endorsed by this Court in *Michigan*.

CONCLUSION

For these reasons, the Court should grant Panel or *en banc* rehearing of the Panel's decision with respect to the interstate trading and compliance date issues.

Respectfully submitted,



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Dated: September 24, 2008

[3] While the Panel rejected EPA's analysis of the section 110(a)(2)(D)(i) "consistent with" language, nothing in its opinion calls into question the correctness of EPA's view that (1) any determination of the amount of emissions that is highly cost-effective to reduce – and, thus, the amount that significantly contributes – must reflect the compliance period permitted, and therefore (2) acceleration of CAIR's 2015 compliance date to match certain attainment dates would necessitate "a new determination of the level ... of required emission reductions." EPA Br. at 151.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2008, one copy of the foregoing Petition for Panel Rehearing or Rehearing en Banc of Intervenor-Respondent Utility Air Regulatory Group was served by first-class mail, postage prepaid, on each of the following:

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