EXHIBIT LIST

2R Map of the DMG power stations superimposed on map of the Illinois air monitoring stations.

3R Table containing information about power stations (number of employees, emissions, controls, etc.).

4R Illinois Environmental Protection Agency, *Illinois Annual Air Quality Report 2012* (December 2012), pp. 34-43 (information regarding air monitoring stations in Illinois).

8R Table containing supporting calculations regarding reductions from outages.

9R Table containing estimated 2015-2016 emissions based upon the MPS emission rates applied to 2011-2014 average heat input

13 *Approval and Promulgation of Air Quality Implementation Plans; Illinois; Regional Haze*, 77 Fed. Reg. 39,943 (Final Rule July 6, 2012).

14 *EME Homer City Generation, L.P. v. Environmental Protection Agency*, 696 F.3d 7 (D.C. Cir. 2012).

15 *Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard*, 78 Fed. Reg. 47,191 (Aug. 5, 2013).

16 *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2013).

17 *In re Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring)*, R09-10, Opinion and Order, pp. 1, 42 (June 18, 2009).

Exhibit 2R

A – Vermilion
B – Wood River
C – Havana
D – Hennepin
E – Baldwin

Statewide Air Monitoring Site Locations - 2012

See the 2012 Site Directory (Table A3) for additional information.

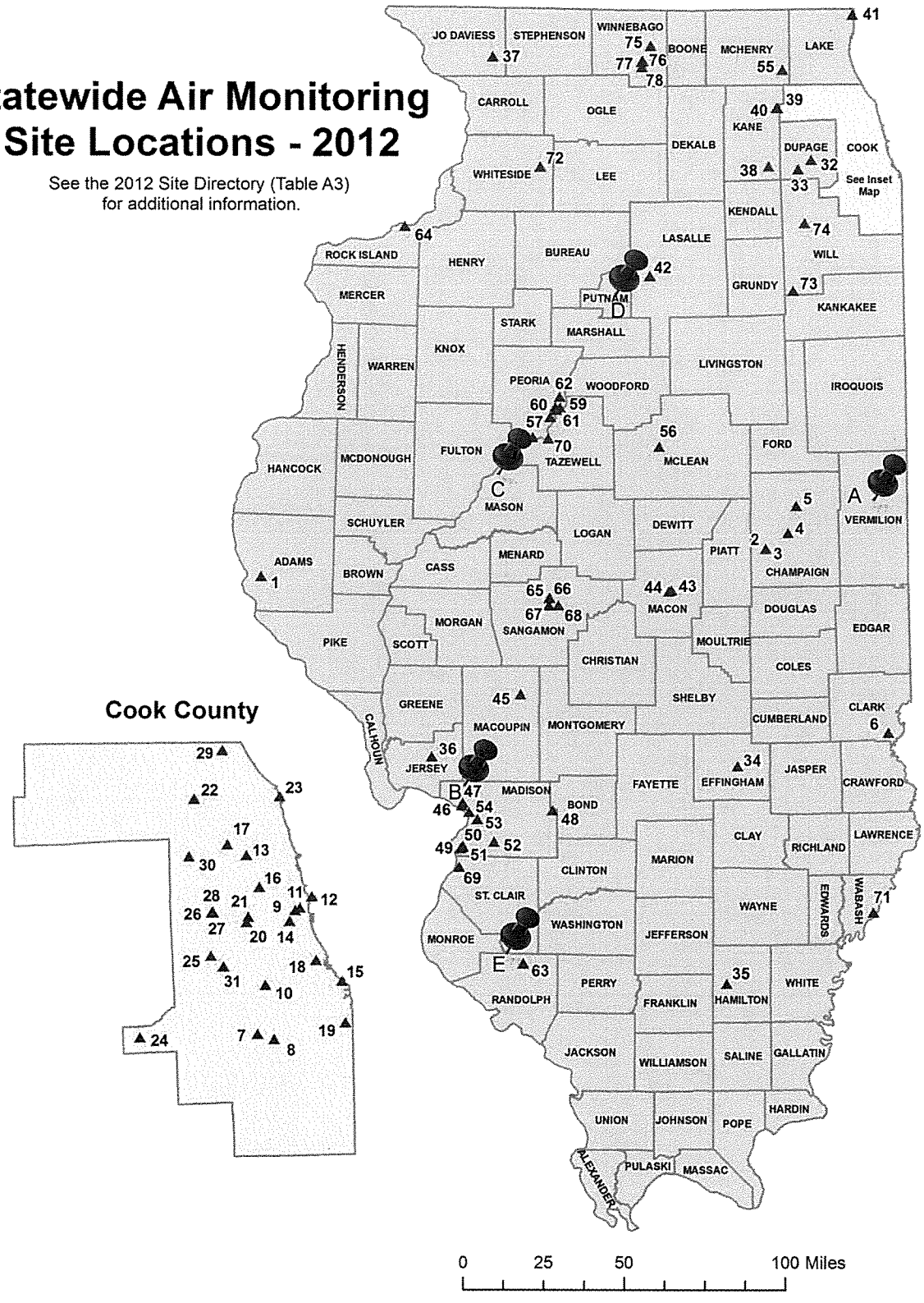

Exhibit 3R

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes			Pollution Control Equipment[1,4]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Baldwin Energy Complex (Site I.D. No. 157851AAA)						
10901 Baldwin Road Baldwin, IL 62217 Randolph County Baldwin Township 255 employees	Unit 1 Net Load 600 MW Cyclone Fired Boiler w/ Wet Bottom (7/13/1970)	Unit 2 Net Load 600 MW Cyclone Fired Boiler w/ Wet Bottom (5/21/1973)	Unit 3 Net Load 600 MW Tangentially Fired Boiler w/ Dry Bottom (6/20/1975)	Units 1 and 2 OFA, SCR, ESP, SDA (scrubber), Baghouse, and ACI. Unit 3 Low-NO_x Burners, OFA, ESP, SDA (scrubber), Baghouse, and ACI.	Unit 1 SO_2: 0.076 lb/mmBtu, 1,363 tpy. NOx: 0.071 lb/mmBtu, 1,288 tpy. PM: 0.0025 lb/mmBtu, 45 tpy. Hg: 0.9687 lb/TBtu, 0.017 tpy. Unit 2 SO_2: 0.072 lb/mmBtu, 1,602 tpy. NOx: 0.071 lb/mmBtu, 1,573 tpy. PM: 0.003 lb/mmBtu, 67 tpy. Hg: 0.43 lb/TBtu, 0.009 tpy.	State Operating Permits: Unit 1 Issued August 17, 2000 Application No. 73010750 Unit 2 Issued August 11, 2000 Application No. 73010751 Unit 3 Issued June 26, 1997 Application No. 75040091 Construction Permits: Issued March 3, 2008 Application No. 07110065 Baghouse, Scrubber, and Sorbent

[1] OFA – Over Fire Air, SCR – Selective Catalytic Reduction, ESP – Electrostatic Precipitator, FGC – Flue Gas Conditioning, SDA – Spray Dryer Absorber, ACI – Activated Carbon Injection

[2] Calculations are based on January 1, 2013 through December 31, 2014 averaging. Heat inputs were measured by the unit's continuous emission monitoring system. [Mercury and PM emission rates were taken from 2013 and 2014 DAPC Annual Emission Reports.] SO2 – sulfur dioxide, NOx – nitrogen oxides, PM – particulate matter, Hg – mercury.

[3] Only the significant air permits for the main boilers are identified. DMG has received other operating permits and construction permits for the Stations for projects and equipment not relevant to the petition.

[4] All units use Refined Coal which applies a mercury oxidizing chemical to aid mercury capture and a material to lower NOx emissions.

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes			Pollution Control Equipment[1,4]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Baldwin Energy Complex (Site I.D. No. 157851AAA)						
					Unit 3 SO_2: 0.076 lb/mmBtu, 1,641 tpy. NOx: 0.092 lb/mmBtu, 1,971 tpy. PM: 0.004 lb/mmBtu, 88 tpy. Hg: 0.72 lb/TBtu, 0.015 tpy.	Injection Systems for Unit 3; Appealed April 9, 2008 (PCB 08-66) Partial Stay Granted May 15, 2008 Issued June 19, 2008 Application No. 08020075 Baghouse, Scrubber, and Sorbent Injection Systems for Units 1 and 2; Appealed July 29, 2008 (PCB 09-9) Partial Stay Granted August 21, 2008 CAAPP Permit: Submitted September 6, 1995 Application No. 95090026 Issued September 29, 2005 Expires September 29, 2010 Appealed November 3, 2005 (PCB 06-063) Stayed February 16, 2006

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes	Pollution Control Equipment[1]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Havana Power Station (Site I.D. No. 125804AAB)				
15260 North State Route 78 Havana, IL 62644 Mason County Havana Township 92 employees	Unit 6 (Boiler 9) Net Load 424 MW Opposed Horizontally Fired Boiler w/ Dry Bottom (6/22/1978)	Unit 6 Low-NO_x Burners, OFA, SCR, Hot-side ESP w/ FGC, SDA (scrubber), Baghouse, and ACI.	Unit 6 SO_2: 0.067 lb/mmBtu, 1,099 tpy. NOx: 0.076 lb/mmBtu, 1,259 tpy. PM: 0.008 lb/mmBtu, 132 tpy. Hg: 0.636 lb/TBtu, 0.01 tpy.	State Operating Permit: Unit 6 (Boiler 9) Issued March 22, 2000 Application No. 78110004 Construction Permits: Issued April 16, 2007 Application No. 07010031 Baghouse, Scrubber, and Sorbent Injection Systems for Unit 6; Appealed August 22, 2007 (PCB 07-115) Partial Stay Granted October 4, 2007 CAAPP Permit: Submitted September 7, 1995 Application No. 95090053 Issued September 29, 2005 Expires September 29, 2010 Appealed November 3, 2005 (PCB 06-071) Stayed February 16, 2006

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes		Pollution Control Equipment[1]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Hennepin Power Station (Site I.D. No. 155010AAA)					
13498 E. 800 St. Hennepin, IL 61327 Putnam County Hennepin Township 71 employees	Unit 1 Net Load 70 MW Tangentially Fired Boiler w/ Dry Bottom (6/1/1953)	Unit 2 Net Load 221 MW Tangentially Fired Boiler w/ Dry Bottom (5/14/1959)	Unit 1 Low-NOx Burners, OFA, ESP, Baghouse, and ACI. Unit 2 Low-NO_x Burners, OFA, ESP, Baghouse, and ACI.	Unit 1-2 SO_2: 0.45 lb/mmBtu, 4,120 tons/yr. NOx: 0.144 lb/mmBtu, 1,307 tpy. PM: 0.0021 lb/mmBtu, 19 tpy. Hg: 0.56 lb/TBtu, 0.005 tpy.	State Operating Permit: Unit 1 Issued September 30, 2002 Application No. 73010752 Unit 2 Issued September 30, 2002 Application No. 73010721 Construction Permits: Issued May 29, 2007 Application No. 07020036 Baghouse and Sorbent Injection Systems for Units 1 and 2; Appealed October 4, 2008 (PCB 07-123) Partial Stay Granted November 1, 2007 CAAPP Permit: Submitted September 7, 1995 Application No. 95090052 Issued September 29, 2005 Expires September 29, 2010 Appealed November 3, 2005 (PCB 06-072) Stayed February 16, 2006

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes		Pollution Control Equipment[1]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Vermilion Power Station (Site I.D. No. 183814AAA) -- Vermilion Power Station was permanently retired in November 2011 and the permits identified below have been withdrawn					
10188 East 2150 North Road Oakwood, IL 61858 Crawford County Pilot Township 0 employees	Unit 1 Net Load 65 MW Tangentially Fired Boiler w/ Dry Bottom (5/19/1955)	Unit 2 Net Load 99 MW Tangentially Fired Boiler w/ Dry Bottom (11/25/1956)	Unit 1 Rotating OFA, ESP, Baghouse, and ACI. Unit 2 Low-NO_x Burners, OFA, ESP, Baghouse, and ACI.	Unit 1-2 SO_2: 00 lb/mmBtu, 0 tpy NOx: 0 lb/mmBtu, 0 tpy. PM: 0. lb/mmBtu, 0 tpy. Hg: 0 lb/TBtu, 0 tpy.	State Operating Permit: Unit 1 Issued November 25, 1997 Application No. 73020064 Unit 2 Issued November 25, 1997 Application No. 73020063 Construction Permits: Issued May 30, 2006 Application No. 06030002 Baghouse and Sorbent Injection Systems for Units 1 and 2; Appealed October 3, 2006 (PCB 06-194) Partial Stay Granted October 19, 2006 CAAPP Permit: Submitted September 7, 1995 Application No. 95090050 Issued September 29, 2005 Expires September 29, 2010 Appealed November 3, 2005 (PCB 06-073) Stayed February 16, 2006

No emissions from Vermilion since March, 2011

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

Address Number of Employees	Boilers and Sizes		Pollution Control Equipment[1]	Emissions in Rate and Tons Per Year (tpy)[2]	Permits issued, issuance dates, application numbers, and other relevant information[3]
Wood River Power Station (Site I.D. No. 119020AAE)					
#1 Chessen Lane Alton, IL 62002 Madison County Alton Township 91 employees	Unit 4 Net Load 85 MW Tangentially Fired Boiler w/ Dry Bottom (6/1/1954)	Unit 5 Net Load 372 MW Tangentially Fired Boiler w/ Dry Bottom (7/31/1964)	Unit 4 Low-NO_x Burners, OFA, and ESP w/ FGC (as needed). Unit 5 Low-NO_x Burners, OFA, ESP, and ACI.	Unit 4 SO_2: 0.45 lb/mmBtu, 1,477 tpy. NOx: 0.127 lb/mmBtu, 412 tpy. PM: 0.0224 lb/mmBtu, 72 tpy. Hg: 0.72 lb/TBtu, 0.002 tpy. Unit 5 SO_2: 0.45 lb/mmBtu, 5,964 tpy NOx: 0.143lb/mmBtu, 1,889 tpy. PM: 0.01 lb/mmBtu, 132 tpy. Hg: 0.88 lb/TBtu, 0.011 tpy	State Operating Permit: Unit 4 Issued April 19, 2002 Application No. 73020062 Unit 5 Issued March 10, 1997 Application No. 73010719 Construction Permits: Issued August 4, 2012 Application No. 12050055 Sorbent Injection System for Unit 4; Appealed Sept. 21, 2012 (PCB 13-013) Partial Stay Granted Nov. 15, 2012 Issued June 12, 2008 Application No. 08020011 Sorbent Injection System for Unit 5; Appealed July 21, 2008 (PCB 09-6) Partial Stay Granted August 21, 2008CAAPP Permit: Submitted September 7, 1995 Application No. 95090096 Issued September 29, 2005 Expires September 29, 2010 Appealed November 3, 2005 (PCB 06-074) Stayed February 16, 2006

Power Stations and Units Comprising the MPS Group
(§ 104.204(b))

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Exhibit 4R

Statewide Air Monitoring Site Locations - 2012

See the 2012 Site Directory (Table A3) for additional information.

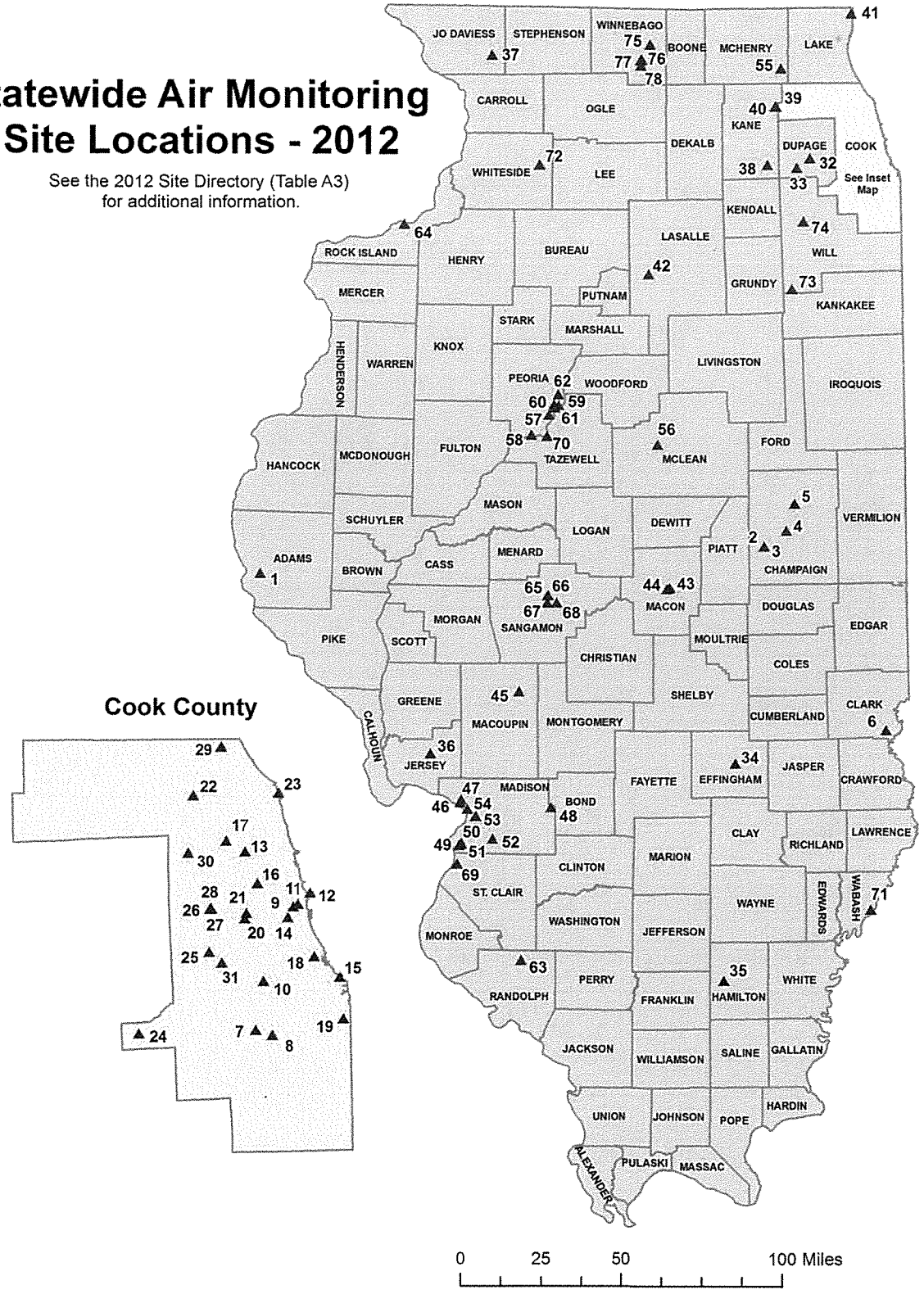

Table A3
2012 Site Directory

Site Map ID	AQS ID	County	City	Address	MSA / Area Represented	Latitude Longitude	Owner / Operator
1	17-001-0007	Adams	Quincy	John Wood Comm. College 1301 South 48th St.	Quincy, IL-MO	+39.91540937 -91.33586832	IL EPA
2	17-019-1001	Champaign	Bondville	State Water Survey Township Rd. 500 E.	Champaign-Urbana, IL	+40.05224171 -88.37254916	IL EPA & State Water Survey
3	17-019-9991	Champaign	Bondville	1173 County Rd. 500 E.	Champaign-Urbana, IL	+40.0518 -88.3723	US EPA
4	17-019-0006	Champaign	Champaign	Ameren Substation 904 N. Walnut	Champaign-Urbana, IL	+40.1237962 -88.229531	IL EPA
5	17-019-0007	Champaign	Thomasboro	North Thomas St.	Champaign-Urbana, IL	+40.244913 -88.188519	IL EPA
6	17-023-0001	Clark	West Union	416 S. State Highway 1 & West Union	Non-MSA County	+39.210883 -87.668416	Indiana Dept. of Environmental Management
7	17-031-0001	Cook	Alsip	Village Garage 4500 W. 123rd St.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.6709919 -87.7324569	Cook County Dept. of Environmental Control
8	17-031-2001	Cook	Blue Island	Eisenhower High School 12700 Sacramento	Chicago-Naperville-Michigan City, IL-IN-WI	+41.66210943 -87.69646652	Cook County Dept. of Environmental Control
9	17-031-0026	Cook	Chicago	Cermak Pump Station 735 W. Harrison	Chicago-Naperville-Michigan City, IL-IN-WI	+41.87372041 -87.64532569	Cook County Dept. of Environmental Control
10	17-031-0076	Cook	Chicago	Com Ed Maintenance Bldg. 7801 Lawndale	Chicago-Naperville-Michigan City, IL-IN-WI	+41.75139998 -87.71348815	Cook County Dept. of Environmental Control
11	17-031-0063	Cook	Chicago	CTA Building 320 S. Franklin	Chicago-Naperville-Michigan City, IL-IN-WI	+41.877628 -87.635027	IL EPA
12	17-031-0072	Cook	Chicago	Jardine Water Plant 1000 E. Ohio	Chicago-Naperville-Michigan City, IL-IN-WI	+41.89581227 -87.60768329	IL EPA
13	17-031-0052	Cook	Chicago	Mayfair Pump Station 4850 Wilson Ave.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.96548483 -87.74992806	Cook County Dept. of Environmental Control
14	17-031-0110	Cook	Chicago	Perez Elementary School 1241 19th St.	H.G. Kramer	+41.855771 -87.657932	Cook County Dept. of Environmental Control
15	17-031-0032	Cook	Chicago	South Water Filtration Plant 3300 E. Cheltenham Pl.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.75583241 -87.54534967	Cook County Dept. of Environmental Control
16	17-031-0057	Cook	Chicago	Springfield Pump Station 1745 N. Springfield Ave.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.912526 -87.722667	Cook County Dept. of Environmental Control

Table A3
2012 Site Directory

Site Map ID	AQS ID	County	City	Address	MSA / Area Represented	Latitude Longitude	Owner / Operator
17	17-031-1003	Cook	Chicago	Taft High School 6545 W. Hurlbut St	Chicago-Naperville-Michigan City, IL-IN-WI	+41.98433233 -87.7920017	Cook County Dept. of Environmental Control
18	17-031-0064	Cook	Chicago	University of Chicago 5720 S. Ellis Ave.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.79078688 -87.60164649	Cook County Dept. of Environmental Control
19	17-031-0022	Cook	Chicago	Washington High School 3535 E. 114th St.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.68716544 -87.53931548	Cook County Dept. of Environmental Control
20	17-031-4002	Cook	Cicero	Cook County Trailer 1820 S. 51st Ave	Chicago-Naperville-Michigan City, IL-IN-WI	+41.85524313 -87.7524697	Cook County Dept. of Environmental Control
21	17-031-6005	Cook	Cicero	Liberty School 13th St. & 50th Ave.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.86442642 -87.74890238	Cook County Dept. of Environmental Control
22	17-031-4007	Cook	Des Plaines	Regional Office Building 9511 W. Harrison St	Chicago-Naperville-Michigan City, IL-IN-WI	+42.06028469 -87.86322543	IL EPA
23	17-031-7002	Cook	Evanston	Water Pumping Station 531 E. Lincoln	Chicago-Naperville-Michigan City, IL-IN-WI	+42.06185724 -87.67416716	IL EPA
24	17-031-1601	Cook	Lemont	Cook County Trailer 729 Houston	Chicago-Naperville-Michigan City, IL-IN-WI	+41.66812034 -87.99056969	Cook County Dept. of Environmental Control
25	17-031-1016	Cook	Lyons Township	Village Hall 50th St & Glencoe	Chicago-Naperville-Michigan City, IL-IN-WI	+41.80116701 -87.8319447	IL EPA
26	17-031-6003	Cook	Maywood	4th District Court Building 1500 Maybrook Dr.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.87220158 -87.8261648	Cook County Dept. of Environmental Control
27	17-031-6006	Cook	Maywood	4th District Court Building 1500 Maybrook Dr.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.8728972 -87.82587249	Cook County Dept. of Environmental Control
28	17-031-6004	Cook	Maywood	Com Ed Maintenance 1505 S. First Ave	Chicago-Naperville-Michigan City, IL-IN-WI	+41.87211684 -87.82908025	Cook County Dept. of Environmental Control
29	17-031-4201	Cook	Northbrook	Northbrook Water Plant 750 Dundee Rd.	Chicago-Naperville-Michigan City, IL-IN-WI	+42.13999619 -87.79922692	IL EPA
30	17-031-3103	Cook	Schiller Park	IEPA Trailer 4743 Mannheim Rd.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.96519348 -87.87626473	IL EPA
31	17-031-3301	Cook	Summit	Graves Elementary School 60th St. & 74th Ave.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.78276601 -87.80537679	Cook County Dept. of Environmental Control
32	17-043-6001	DuPage	Lisle	Morton Arboretum Route 53	Chicago-Naperville-Michigan City, IL-IN-WI	+41.81304939 -88.0728269	IL EPA

Table A3
2012 Site Directory

Site Map ID	AQS ID	County	City	Address	MSA / Area Represented	Latitude Longitude	Owner / Operator
33	17-043-4002	DuPage	Naperville	City Hall 400 S. Eagle St.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.77107094 -88.15253365	IL EPA
34	17-049-1001	Effingham	Effingham	Central Junior High School Route 45 South	Effingham, IL	+39.06715932 -88.54893401	IL EPA
35	17-065-0002	Hamilton	Knight Prairie	Ten Mile Creek DNR Office State Route 14	Mt. Vernon, IL	+38.08215516 -88.6249434	IL EPA
36	17-083-1001	Jerseyville	Jerseyville	Illini Junior High School Liberty St. & County Rd.	St. Louis, MO-IL	+39.11053947 -90.32407986	IL EPA
37	17-085-9991	Jo Daviess	Stockton	10952 E. Parker Rd.	Non-MSA County	+42.2869 -89.9997	US EPA
38	17-089-0007	Kane	Aurora	Health Department 1240 N. Highland	Chicago-Naperville-Michigan City, IL-IN-WI	+41.78471651 -88.32937361	IL EPA
39	17-089-0005	Kane	Elgin	Larsen Junior High School 665 Dundee Rd.	Chicago-Naperville-Michigan City, IL-IN-WI	+42.04914776 -88.27302929	IL EPA
40	17-089-0003	Kane	Elgin	McKinley School 258 Lovell St.	Chicago-Naperville-Michigan City, IL-IN-WI	+42.050403 -88.28001471	IL EPA
41	17-097-1007	Lake	Zion	Camp Logan Illinois Beach State Park	Chicago-Naperville-Michigan City, IL-IN-WI	+42.4675733 -87.81004705	IL EPA
42	17-099-0007	La Salle	Oglesby	308 Portland Ave.	Ottawa-Streator, IL	+41.29301454 -89.04942498	IL EPA
43	17-115-0013	Macon	Decatur	IEPA Trailer 2200 N. 22nd	Decatur, IL	+39.866933 -88.925452	IL EPA
44	17-115-0110	Macon	Decatur	Mueller 1226 E. Garfield	Mueller	+39.862576 -88.940748	IL EPA
45	17-117-0002	Macoupin	Nilwood	IEPA Trailer Heaton & Dubois	St. Louis, MO-IL	+39.39607533 -89.80973892	IL EPA
46	17-119-0008	Madison	Alton	Clara Barton School 409 Main St.	St. Louis, MO-IL	+38.89018605 -90.14803114	IL EPA
47	17-119-2009	Madison	Alton	SIU Dental Clinic 1700 Annex St.	St. Louis, MO-IL	+38.90308534 -90.14316803	IL EPA
48	17-119-9991	Madison	Highland	5403 State Rd. 160	St. Louis, MO-IL	+38.8690 -89.6228	US EPA
49	17-119-0010	Madison	Granite City	Air Products 15th & Madison	St. Louis, MO-IL	+38.69443831 -90.15395426	IL EPA
50	17-119-1007	Madison	Granite City	Fire Station #1 23rd & Madison	St. Louis, MO-IL	+38.70453426 -90.13967484	IL EPA
51	17-119-0024	Madison	Granite City	Gateway Medical Center 2100 Madison Ave.	St. Louis, MO-IL	+38.7006315 -90.14476267	IL EPA

Table A3
2012 Site Directory

Site Map ID	AQS ID	County	City	Address	MSA / Area Represented	Latitude Longitude	Owner / Operator
52	17-119-1009	Madison	Maryville	Southwest Cable TV 200 W. Division	St. Louis, MO-IL	+38.72657262 -89.95996251	IL EPA
53	17-119-1010	Madison	South Roxana	South Roxana Elementary School Michigan St.	St. Louis, MO-IL	+38.82830334 -90.05843262	IL EPA
54	17-119-3007	Madison	Wood River	Water Treatment Plant 54 N. Walcott	St. Louis, MO-IL	+38.86066947 -90.10585111	IL EPA
55	17-111-0001	McHenry	Cary	Cary Grove High School 1st St. & Three Oaks Rd.	Chicago-Naperville-Michigan City, IL-IN-WI	+42.22144166 -88.24220734	IL EPA
56	17-113-2003	McLean	Normal	ISU Physical Plant Main & Gregory	Bloomington-Normal, IL	+40.51873537 -88.99689571	IL EPA
57	17-143-0110	Peoria	Bartonville	Pump Station Sanitation Rd.	Keystone Steel & Wire	+40.653703 -89.643375	IL EPA
58	17-143-0210	Peoria	Mapleton	Residential 9725 W. Wheeler Rd.	Caterpillar-Mapleton Plant	+40.562633 -89.747114	IL EPA
59	17-143-0037	Peoria	Peoria	City Office Building 613 N.E. Jefferson	Peoria, IL	+40.697007 -89.58473722	IL EPA
60	17-143-0036	Peoria	Peoria	Commercial Building 1005 N. University	Peoria, IL	+40.70007197 -89.61341375	IL EPA
61	17-143-0024	Peoria	Peoria	Fire Station #8 MacArthur & Hurlburt	Peoria, IL	+40.68742038 -89.60694277	IL EPA
62	17-143-1001	Peoria	Peoria Heights	Peoria Heights High School 508 E. Glen Ave.	Peoria, IL	+40.74550393 -89.58586902	IL EPA
63	17-157-0001	Randolph	Houston	IEPA Trailer Hickory Grove & Fallview	Houston, IL	+38.17627761 -89.78845862	IL EPA
64	17-161-3002	Rock Island	Rock Island	Rock Island Arsenal 32 Rodman Ave.	Davenport-Moline-Rock Island, IA-IL	+41.51472697 -90.51735026	IL EPA
65	17-167-0012	Sangamon	Springfield	Agricultural Building State Fair Grounds	Springfield, IL	+39.83192087 -89.64416359	IL EPA
66	17-167-0014	Sangamon	Springfield	Illinois Building State Fair Grounds	Springfield, IL	+39.831522 -89.640926	IL EPA
67	17-167-0008	Sangamon	Springfield	Federal Building 6th St. & Monroe	Springfield, IL	+39.7993092 -89.64760789	IL EPA
68	17-167-0006	Sangamon	Springfield	Sewage Treatment Plant 3300 Mechanicsburg Rd.	Springfield, IL	+39.80061377 -89.59122532	IL EPA

Table A3
2012 Site Directory

Site Map ID	AQS ID	County	City	Address	MSA / Area Represented	Latitude Longitude	Owner / Operator
69	17-163-0010	St. Clair	East St. Louis	RAPS Trailer 13th & Tudor	St. Louis, MO-IL	+38.61203448 -90.16047663	IL EPA
70	17-179-0004	Tazewell	Pekin	Fire Station #3 272 Derby	Peoria, IL	+40.55643203 -89.65402083	IL EPA
71	17-185-0001	Wabash	Mount Carmel	Division St.	Gibson County, IN-Mt. Carmel, IL	+38.397276 -87.773631	Indiana Dept. of Environmental Management
72	17-195-0110	Whiteside	Sterling	Sauk Medical Clinic 705 West 3rd St.	Sterling Steal Co.	+41.788383 -89.706728	IL EPA
73	17-197-1011	Will	Braidwood	Com Ed Training Center 36400 S. Essex Rd.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.22153707 -88.19096718	IL EPA
74	17-197-1002	Will	Joliet	Pershing Elementary School Midland & Campbell Sts.	Chicago-Naperville-Michigan City, IL-IN-WI	+41.52688509 -88.11647381	IL EPA
75	17-201-2001	Winnebago	Loves Park	Maple Elementary School 1405 Maple Ave.	Rockford, IL	+42.33498222 -89.0377748	IL EPA
76	17-201-0011	Winnebago	Rockford	City Hall 425 E. State	Rockford, IL	+42.26767353 -89.08785092	IL EPA
77	17-201-0013	Winnebago	Rockford	Health Department 201 Division St.	Rockford, IL	+42.26308105 -89.09276716	IL EPA
78	17-201-0110	Winnebago	Rockford	J. Rubin & Company 305 Peoples Ave.	Gunite Corporation	+42.240867 -89.091467	IL EPA

Table A4
2012 Monitoring Directory

AQS ID	City	CO	CO2	NO2	Ozone	PM10	PM2.5	PM2.5 AQI	PM2.5 Speciation	SO2	VOC	Toxics	TSP Pb, Metals	Wind System	Solar	Meteorological
17-001-0007	Quincy															
17-019-0006	Champaign N. Walnut															
17-019-0007	Thomasboro															
17-019-1001	Bondville															
17-019-9991	Bondville															
17-023-0001	West Union															
17-031-0001	Alsip															
17-031-0022	Chicago Washington High School					C										
17-031-0026	Chicago Cermak Pump Station															
17-031-0032	Chicago South Water Filtration															
17-031-0052	Chicago Mayfair Pump Station															
17-031-0057	Chicago Springfield Pump Station															
17-031-0063	Chicago CTA Building															
17-031-0064	Chicago University of Chicago															
17-031-0072	Chicago Jardine Water Plant			1,2												
17-031-0076	Chicago Com Ed Maintenance															
17-031-0110	Chicago Perez Elementary															
17-031-1003	Chicago Taft High School															
17-031-1016	Lyons Township					C										
17-031-1601	Lemont															
17-031-2001	Blue Island															
17-031-3103	Schiller Park															

Active Monitor | Site/Monitor Installed | Site/Monitor Removed

C = Continuous PM10
1 = Operates only during June, July and August
2 = Instrumentation problems in 2012, no data available

Table A4
2012 Monitoring Directory

AQS ID	City	CO	CO2	NO2	Ozone	PM10	PM2.5	PM2.5 AQI	PM2.5 Speciation	SO2	VOC	Toxics	TSP Pb, Metals	Wind System	Solar	Meteorological
17-031-3301	Summit															
17-031-4002	Cicero Cook County Trailer															
17-031-6005	Cicero Liberty School															
17-031-4007	Des Plaines															
17-031-4201	Northbrook	T								T						
17-031-6003	Maywood 4th District Court															
17-031-6004	Maywood Com Ed Maintenance															
17-031-6006	Maywood 4th District Court															
17-031-7002	Evanston															
17-043-4002	Naperville															
17-043-6001	Lisle															
17-049-1001	Effingham															
17-065-0002	Knight Prairie															
17-083-1001	Jerseyville															
17-085-9991	Stockton															
17-089-0003	Elgin McKinley School															
17-089-0005	Elgin Larsen Jr. High School															
17-089-0007	Aurora															
17-097-1007	Zion															
17-099-0007	Oglesby															
17-111-0001	Cary															
17-113-2003	Normal															
17-115-0013	Decatur IEPA Trailer															

Active Monitor | Site/Monitor Installed | Site/Monitor Removed | T = Trace level monitor

Table A4
2012 Monitoring Directory

AQS ID	City	CO	CO2	NO2	Ozone	PM10	PM2.5	PM2.5 AQI	PM2.5 Speciation	SO2	VOC	Toxics	TSP Pb, Metals	Wind System	Solar	Meteorological
17-115-0110	Decatur Mueller												■			
17-117-0002	Nilwood		■		■					■				■		
17-119-0008	Alton Clara Barton Elementary				■											
17-119-2009	Alton SIU Dental Clinic						■									
17-119-0010	Granite City Air Products					■							■			
17-119-0024	Granite City Gateway Medical Center						■		■							
17-119-1007	Granite City Fire Station #1					C,2	■	■								
17-119-1009	Maryville				■											
17-119-1010	South Roxana									■						
17-119-3007	Wood River				■		■			■						
17-119-9991	Highland				■											
17-143-0024	Peoria Fire Station #8				■					■						
17-143-0036	Peoria Commercial Building	■														
17-143-0037	Peoria City Office Building						■	■						■		
17-143-0110	Bartonville												■			
17-143-0210	Mapleton												■			
17-143-1001	Peoria Heights				■											
17-157-0001	Houston				■		■			■						
17-161-3002	Rock Island				■		■							■		
17-163-0010	East St. Louis	■		■	■		■	■		■				■		
17-167-0006	Springfield Sewage Treatment Plant									■						
17-167-0008	Springfield Federal Building	■														
17-167-0012	Springfield Agricultural Building						■									

Active Monitor | Site/Monitor Installed | Site/Monitor Removed

C = Continuous PM10
2 = Instrumentation problems in 2012, no data available

Table A4
2012 Monitoring Directory

AQS ID	City	CO	CO2	NO2	Ozone	PM10	PM2.5	PM2.5 AQI	PM2.5 Speciation	SO2	VOC	Toxics	TSP Pb, Metals	Wind System	Solar	Meteorological
17-167-0014	Springfield Illinois Building															
17-179-0004	Pekin															
17-185-0001	Mount Carmel															
17-195-0110	Sterling															
17-197-1002	Joliet Pershing Elementary															
17-197-1011	Braidwood															
17-201-0011	Rockford City Hall															
17-201-0013	Rockford Health Department															
17-201-0110	Rockford J. Rubin & Company															
17-201-2001	Loves Park															

Active Monitor | Site/Monitor Installed | Site/Monitor Removed

Exhibit 8R

Exhibit 8R - SO2 Reductions from Outages to Install Air Pollution Controls

Baldwin 3 SDA/Baghouse Outage: March 6 - May 29, 2010

Jan-Feb SO2 Rate	Jan-Feb Monthly HI	March HI	HI Below Monthly Ave.	April HI	HI Below Monthly Ave.	May HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.427	4,063,950	747,224	3,316,726	0	4,063,950	2,156	4,061,794	11,442,470	2,443

Baldwin 1 SDA/Baghouse Outage: September 3 - October 21, 2011

Jan-Aug SO2 Rate	Jan-Aug Monthly HI	September HI	HI Below Monthly Ave.	October HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.401	3,609,367	230,219	3,379,148	926,257	2,683,110	6,062,258	1,215

Baldwin 2 SDA/Baghouse Outage: September 14 - November 3, 2012

Jan-Aug SO2 Rate	Jan-Aug Monthly HI	September HI	HI Below Monthly Ave.	October HI	HI Below Monthly Ave.	November HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.363	3,805,730	1,676,443	2,129,287	0	3,805,730	2,887,172	918,558	6,853,575	1,244

SO2 Reductions from Early Operation of Spray Dryer Absorbers

Baldwin 3 SDA Early Reductions: May 29 - December 31, 2010

2009 Annual Average SO2 Rate	May 29 - December 31, 2010 SO2 Rate	SO2 Rate Below Prior Year Average	May 29 - December 31, 2010 HI	SO2 Early Reduction
0.441	0.259	0.182	25,136,956	2,287

Baldwin 1 SDA Early Reductions: October 22 - December 31, 2011

2010 Annual Average SO2 Rate	October 22 - December 31, 2011 SO2 Rate	SO2 Rate Below Prior Year Average	October 22 - December 31, 2011 HI	SO2 Early Reduction
0.407	0.194	0.213	8,214,421	875

Baldwin 2 SDA Early Reductions: November 3 - December 31, 2012

2011 Annual Average SO2 Rate	November 3 - December 31, 2012 SO2 Rate	SO2 Rate Below Prior Year Average	November 3 - December 31, 2012 HI	SO2 Early Reduction
0.442	0.304	0.139	6,345,032	439

SO2 Reduction due to Extended Unit Outages

Wood River 4 Outage: November 14, 2012 - January 9, 2013

Jan-Oct SO2 Rate	Jan-Oct Monthly HI	November HI	HI Below Monthly Ave.	December HI	HI Below Monthly Ave.	January HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided

0.459	614,683	259,059	355,624	26	614,657	450,923	163,760		1,134,041	260

Wood River 5 Outage: March 30 - June 1, 2012

Jan-Feb SO2 Rate	Jan-Feb Monthly HI	March HI	HI Below Monthly Ave.	April HI	HI Below Monthly Ave.	May HI	HI Below Monthly Ave.	June HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.484	2,357,624	2,086,086	271,538	0	2,357,624	0	2,357,624	2042816	314,808	5,301,594	1,283

Baldwin 3 Outage: March 16 - May 7, 2013

Jan-Feb SO2 Rate	Jan-Feb Monthly HI	March HI	HI Below Monthly Ave.	April HI	HI Below Monthly Ave.	May HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.076	4,094,995	1,930,046	2,164,949	0	4,094,995	3,114,427	980,568	7,240,512	275

Hennepin 1-2 Outage: April 4 - June 9, 2013

Jan-Mar SO2 Rate	Jan-Mar Monthly HI	April HI	HI Below Monthly Ave.	May HI	HI Below Monthly Ave.	June HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.472	1,603,963	166,282	1,437,681	0	1,603,963	1170576	433,387	3,475,031	820

Baldwin 1 Outage: September 19 - November 15, 2014

Jan-Aug SO2 Rate	Jan-Aug Monthly HI	September HI	HI Below Monthly Ave.	October HI	HI Below Monthly Ave.	November HI	HI Below Monthly Ave.	Total HI Below Ave. Due to Outage	Tons SO2 Avoided
0.072	3,213,691	1,326,912	1,886,779	0	3,213,691	1,539,835	1,673,856	6,774,326	244

Total 11,386

ANNUAL SO2 REDUCTIONS ASSOCIATED WITH UNIT RETIREMENTS

	Lbs. SO2/mmBtu Allowable Limit	Max. Permitted mmBtu/hour	Permitted Hours per Year	Annual SO2 Reductions (tons)	Year of Retirement [1]
Wood River Units 1-3	0.3	1,800	8,760	2,365	10/10/2011
Havana Units 1-5	1	3,456	8,760	15,137	1/12/2012
Vermilion Units 1-2				2,212 [2]	11/17/2011
Total				19,714	

[1] Acid Rain permit retirement date

[2] Based on 2008-2010 Actual SO2 Emissions

Annual SO2 Incremental Difference (IL SIP Limit - Consent Decree Limit)

	IL SIP SO2 Limit (#SO2/mmBtu)	Consent Decree SO2 Limit (#SO2/mmBtu)	Incremental SO2 (#SO2/mmBtu)	Max. Permitted mmBtu/hour	Permitted Hours per Year	Tons SO2 per Year
Wood River Unit 4	1.8	1.2	0.6	1,050	8,760	2,759
Wood River Unit 5	1.8	1.2	0.6	3,500	8,760	10,249
Total						13,008

Exhibit 9R

Exhibit 9R - Estimated 2015-2016 Emissions based on 2011-2014 Average Heat Input and MPS Rates

	Historic Heat Inputs					Annual SO2			
	2011	2012	2013	2014	2011-2014 4-year Ave.	2015 MPS SO2 Rate Limit	2016 MPS SO2 Rate Limit	4-year Ave. Heat Input X 2015 MPS Rate Limit	4-year Ave. Heat Input X 2016 MPS Rate Limit
Plant-Unit	**HI (mmBtu)**	**HI (mmBtu)**	**HI (mmBtu)**	**HI (mmBtu)**	**HI (mmBtu)**	**#/mBtu**	**#/mBtu**	**Tons SO2/yr**	**Tons SO2/yr**
Baldwin - 1	37,783,602	43,725,329	39,629,830	32,456,230	38,398,748				
Baldwin - 2	45,092,055	38,467,311	46,281,963	42,613,958	43,113,822				
Baldwin - 3	50,791,868	48,467,692	41,921,039	44,089,200	46,317,450				
Havana - 6	36,833,552	32,957,601	34,312,338	31,583,549	33,921,760				
Hennepin - 1&2	24,216,627	23,559,779	17,629,701	18,729,018	21,033,781				
Wood River - 4	7,177,274	6,405,915	6,755,251	6,215,851	6,638,573				
Wood River - 5	28,003,679	21,994,482	27,191,237	25,622,461	25,702,965				
TOTAL	**229,898,657**	**215,578,109**	**213,721,360**	**201,310,267**	**215,127,098**	**0.190**	**0.190**	**20,437**	**20,437**

EXHIBIT 13

States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 4, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to Maryland's Regional Haze Plan for the first implementation period, through 2018 may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2) of the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 13, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

Therefore, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (e) is amended by adding the entry for the Maryland Regional Haze Plan at the end of the table to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
Maryland Regional Haze Plan	Statewide	2/13/12	7/6/2012 [*Insert page number where the document begins*].	

[FR Doc. 2012–16417 Filed 7–5–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0598; FRL–9683–6]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to the Illinois State Implementation Plan, submitted on June 24, 2011, addressing regional haze for the first implementation period. EPA received comments disputing its proposed finding regarding best available retrofit technology, but EPA continues to believe that Illinois' plan limits power plant emissions as well as would be achieved by directly requiring best available retrofit technology. Therefore, EPA finds that the Illinois regional haze plan satisfactorily addresses Clean Air Act section 169A and Regional Haze Rule requirements for states to remedy any existing and prevent future anthropogenic impairment of visibility at mandatory Class I areas. EPA is also approving two state rules and incorporating two permits into the state implementation plan.

DATES: This final rule is effective on August 6, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2011–0598. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 AM to 4:30 PM, Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays, Environmental Scientist, at (312) 886–6067 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6067, *summerhays.john@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. Synopsis of Proposed Rule

Illinois submitted a plan on June 24, 2011, to address the requirements of Clean Air Act section 169A and the Regional Haze Rule, as codified in Title 40 Code of Federal Regulations Part 51.308 (40 CFR 51.308).

EPA published a notice of proposed rulemaking evaluating Illinois' submittal on January 26, 2012, at 77 FR 3966. This notice described the nature of the regional haze problem and the statutory and regulatory background for EPA's review of Illinois' regional haze plan. The notice provided a lengthy delineation of the requirements that Illinois intended to meet, including requirements for mandating BART, consultation with other states in establishing goals representing reasonable progress in mitigating anthropogenic visibility impairment, and adoption of limitations as necessary to implement a long-term strategy for reducing visibility impairment.

Of particular interest were EPA's findings regarding BART. States are required to address the BART

requirements for sources with significant impacts on visibility, which Illinois defined as having at least 0.5 deciview impact on a Class I area. Using modeling performed by the Lake Michigan Air Directors Consortium (LADCO), Illinois identified 10 power plants and two refineries as having sufficient impact to warrant being subject to a requirement representing BART.[1]

Seven of the power plants that were identified as being subject to the requirement for BART are addressed in one of two sets of provisions of Illinois' rules known respectively as the Combined Pollutant Standards (CPS), 35 Ill. Administrative Code 225.233, and the Multi-Pollutant Standards (MPS), 35 Illinois Administrative Code 225.293–225.299. These provisions are included in Illinois' mercury rules. These rules offer the affected utilities (Midwest Generation, Dynegy, and Ameren) a choice of limitations, either to include 1) specific mercury emission limitations effective in 2015 with no limits on emissions of sulfur dioxide (SO_2) or nitrogen oxides (NO_X) or 2) work practice requirements for installation of mercury control equipment in conjunction with limits on SO_2 and NO_X emissions. Illinois' submittal includes letters from the affected companies choosing the option that includes SO_2 and NO_X emission limits, which pursuant to Illinois' rules establishes these limits as enforceable limits. In the case of Midwest Generation, three of its power plants meet the criteria for being subject to BART, and six plants are governed by the SO_2 and NO_X limits in the Multi-Pollutant Standards. In the case of Dynegy, one of its power plants meets the criteria for being subject to BART, and four coal-fired power plants are governed by the SO_2 and NO_X limits in the (CPS). In the case of Ameren, three of its power plants meet the criteria for being subject to BART, and five coal-fired plants are governed by the SO_2 and NO_X limits in the (CPS). In the notice of proposed rulemaking, EPA proposed to conclude that the emission reductions from the (MPS) and the (CPS) would be greater than the reductions that would occur with unit-specific implementation of BART on the subset of these sources that meet the criteria for being subject to BART. Therefore, EPA proposed to find that the (MPS) and the (CPS) suffice to address the BART requirement for the power plants of these three utilities.

Illinois also developed source-specific limits to mandate BART for three additional power plants. These limits are adopted into two permits, one for Kincaid Generation's Kincaid Station and one for City Water, Light, and Power's (CWLP) Dallman Station and Lakeside Station. CWLP shutdown Lakeside Station in 2009, and the CWLP permit requires that the Lakeside Station never resume operation. Finally, Illinois found that Federal consent decrees regulating emissions from the two refineries with units subject to BART (facilities owned by ExxonMobil and Citgo) mandate control at the refineries in Illinois at least as much as would be required as BART. EPA proposed to conclude that Illinois satisfied BART requirements for the affected Illinois power plants and refineries.

As stated in the notice of proposed rulemaking, Illinois did not rely on the Clean Air Interstate Rule (CAIR) for its BART determinations. Illinois is in the CAIR region. However, it used its state rules, permits, and consent decrees to achieve emission reductions that satisfy BART. This means that Illinois is not reliant on CAIR and, thus, it has avoided the issues of other CAIR region states that relied on CAIR. For similar reasons, Illinois' satisfaction of regional haze rule requirements is not contingent on the Cross-State Air Pollution Rule (CSAPR) and thus is not affected by the stay of that rule.

II. Comments and Responses

EPA received comments from three commenters on its proposed rulemaking on the Illinois regional haze plan. These commenters included ExxonMobil, the U.S. Forest Service, and the Environmental Law and Policy Center (ELPC).

ExxonMobil comments that section 169A(b)(2)(A) requires sources to implement BART *as determined by the state* (emphasis in the original), and agrees with Illinois' and EPA's conclusion that "emission limits established by the consent decrees may be relied upon by Illinois for addressing the BART requirement for these facilities." While EPA has the responsibility to evaluate whether it believes that states have made appropriate determinations as to what restrictions constitute BART, EPA appreciates the comment supporting its position, which EPA has no reason to change, that the Federal consent decrees for ExxonMobil and Citgo adequately mandate BART for the two Illinois refineries.

The U.S. Forest Service wrote to express its appreciation to Illinois for addressing prior Forest Service comments and to express support for EPA's proposed approval of Illinois' plan.

ELPC sent extensive comments objecting that control requirements for power plants in Illinois do not suffice to meet the BART requirements and leave Illinois short of meeting reasonable progress requirements. These comments are addressed in detail in the discussion that follows.

Comment: ELPC argues that "the plain language of the Clean Air Act precludes alternatives to BART." Since the Illinois plan establishes limits that govern the collective emissions of multiple power plants owned by pertinent utilities, the plan relies on an alternative to BART as described in 40 CFR 51.308(e)(2) rather than mandating BART on a source-specific basis. ELPC states that BART at BART-eligible sources is expressly mandated in Clean Air Act section 169A(b)(2)(A). ELPC acknowledges that the Clean Air Act authorizes limited exemptions from BART, in cases which EPA determines pursuant to section 169A(c)(1) that "the source does not either by itself or in combination with other sources 'emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I federal area.'" ELPC observes that "[n]owhere in Section 169A did Congress contemplate or sanction sweeping alternative programs" such as Illinois uses to address BART for many of its BART-subject power plants "in lieu of source specific BART."

ELPC acknowledges that EPA promulgated regulations reflecting its interpretation that BART requirements may be satisfied by alternative programs, and ELPC acknowledges that "the DC Circuit Court of Appeals has upheld [these] regulations." Nevertheless, "because these [court rulings] cannot be reconciled with the plan language of the Clean Air Act," ELPC urges that "EPA should not rely on [this interpretation] to exempt Illinois from implementing BART."

Response: In several previous rules, EPA has concluded that Clean Air Act section 169A may reasonably be interpreted to provide that the requirement for BART may be satisfied by an alternative program that provides greater visibility protection in lieu of limitations that directly mandate BART for individual sources determined to be subject to the BART requirement. See 40 CFR 51.308(e), 64 FR 35741–35743 (July 1, 1999), and 70 FR 39136 (July 6, 2005).

[1] The notice of proposed rulemaking lists 10 EGUs as being subject to BART (including two facilities owned by City Water Light and Power (CWLP)) but states that only 9 EGUs are subject to BART. This is because CWLP shut down the Lakeside plant that was subject to BART in 2009.

As ELPC acknowledges, the Court of Appeals for the District of Columbia Circuit supports that interpretation, *Center for Energy and Economic Development* v. *EPA,* 398 F.3d 653, 660 (D.C. Cir. 2005) (*"CEED"*) (finding reasonable EPA's interpretation of CAA section 169(a)(2) as requiring BART only as necessary to make reasonable progress), as has the Ninth Circuit, *Central Arizona Water Conservation District* v. *EPA,* 990 F.2d 1531, 1543 (9th Cir. 1993) Therefore, EPA views Illinois' approach as an acceptable means of addressing the BART requirement in section 169A.

Comment: ELPC comments that "Illinois was required, but failed, to make a BART determination for each source subject to BART in the state." ELPC lists the elements of a BART analysis that a state "*must submit*" (emphasis in original) pursuant to 40 CFR 51.308(e)(2), and ELPC states that Illinois has failed to make the BART determination based on source-specific information that EPA's regulations require. "Rather than make a BART determination for each individual source subject to BART that would be covered by Illinois' proposed alternative," ELPC objects that the state "simply compared projected emissions reductions [from the adopted restrictions] to presumptive BART emissions." ELPC comments that "[b]ecause Illinois entirely failed to use source-specific information or undertake a comprehensive five factor analysis to determine BART, its proposed Regional Haze State Implementation Plan (SIP) may not be approved.

Response: The primary requirement, as specified in Clean Air Act section 169A, is for sources to procure, install, and operate BART. In some cases this requirement is met with an analysis of potential controls considering five factors set out in EPA's regional haze rule (a "five-factor analysis"). 40 CFR 51.308(e)(1)(ii)(A). As noted above, EPA has determined that this requirement can be met by a state establishing an alternative set of emission limits which mandate greater reasonable progress toward visibility improvement than direct application of BART on a source-by-source basis.

In promulgating the 1999 regional haze regulations, EPA stated that to demonstrate that emission reductions of an alternative program would result in greater emission reductions, "the State must estimate the emission reductions that would result from the use of BART-level controls. To do this, the State could undertake a source-specific review of the sources in the State subject to BART, or it could use a modified approach that simplifies the analysis." 64 FR 35742 (July 1, 1999).

In guidance published on October 13, 2006, EPA offered further clarification for states for assessing alternative strategies, in particular regarding the benchmark definition of BART to use in judging whether the alternative is better. See 71 FR 60612. In this rulemaking, EPA stated in the preamble that the presumptive BART levels given in the BART guidelines would be a suitable baseline against which to compare alternative strategies where the alternative has been designed to meet a requirement other than BART. 71 FR at 60619; *see also* 40 CFR 51.308(e)(2)(i)(C). Illinois' analysis is fully consistent with EPA's conclusions in this rulemaking.

Nevertheless, EPA undertook further analysis comparing Illinois' strategy against more stringent definitions of BART. In brief, EPA found that the alternative restrictions imposed by Illinois can be demonstrated to provide greater emission reductions and greater visibility improvement than even very conservative definitions of BART, even without a full analysis of the emission levels that constitute BART. The demonstration is discussed below, in the context of response to comments addressing the magnitude of controls at Illinois power plants.

Comment: ELPC believes that the pertinent requirements in Illinois' plan "will not achieve greater reasonable progress toward natural visibility conditions than BART." Furthermore, "the MPS/CPS contains absolutely no requirements for specific control equipment to be installed or operated at any source subject to BART in Illinois." ELPC identifies several examples of BART units that are expected to comply with the MPS or CPS with controls that are less effective than BART-level controls. ELPC also finds it problematic that "requirements for 2017 for Ameren exceed presumptive BART requirements for NO_X at one of the three plants subject to BART, and far exceed presumptive SO_2 BART limits at *all three* (emphasis in original) Ameren plants subject to BART." ELPC raises similar concerns in relation to specified Midwest Generation (MWG) plants. For this reason, "and because Ameren and MWG need not meet even those weak requirements at their plants subject to BART, the MPS/CPS is not 'better' than presumptive BART limits."

Response: ELPC appears to misunderstand the applicable test for alternate strategies for addressing BART. In particular, ELPC appears to believe that under the alternative approach, Illinois must require BART-level controls at each unit subject to BART. In fact, the underlying principle of EPA's guidance on alternative measures is to offer states the flexibility to require less control at BART units than BART-level control, provided the states provide additional control at non-BART units that more than compensates for any degree to which control at BART units falls short of BART. Illinois is using precisely this flexibility. Irrespective of the degree to which control at individual power plant BART units may be less stringent than the limits that for those particular units would be defined as BART, Illinois is requiring control across a universe of sources that includes many sources that are not subject to BART, thereby providing reductions that under EPA's rules and BART guidelines on alternative measures can compensate for any shortfall in control at BART units.

In response to these comments, EPA conducted further analysis of whether Illinois' requirements, addressing a substantial number of sources, can be expected to provide greater reasonable progress toward visibility protection than application of BART to the more limited number of units subject to a requirement for BART. EPA's analysis did not rely on a full five-factor analysis of BART at each BART-subject unit. Instead of using presumptive limits, EPA used emission limits described in EPA's RACT/BACT/LAER Clearinghouse as being applied to new sources. These limits, namely 0.06 pounds per million British Thermal Units (#/MMBTU) for NO_X and also 0.06 #/MMBTU for SO_2, are as stringent and are probably more stringent than would generally be expected to be met at existing power plants, due to the design constraints that are sometimes inherent in controlling emissions at an existing facility.

A more complete description of EPA's analysis is provided in the technical support document being placed in the docket for this rule. Table 1 provides a summary of the results of this analysis.

TABLE 1—EMISSION REDUCTIONS MANDATED BY ILLINOIS' PLAN AND CONSERVATIVE ESTIMATES OF BART REDUCTIONS

Company	BART units	Total units	NO_X reductions (tons/year)		SO_2 reductions (tons/year)	
			IL Plan	Lowest BART	IL Plan	Lowest BART
Ameren	5	24	24,074	23,849	111,997	74,349
Dynegy	3	10	23,867	18,551	47,378	22,444
MWG	9	19	37,819	28,061	61,292	38,963
CWLP	3	3	5,375	5,560	4,875	5,619
Kincaid	2	2	16,874	18,970	12,827	15,730
Totals	22	58	108,009	94,991	238,369	157,105

This table shows that the reductions from Illinois' plan, including reductions from the MPS, the CPS, and the permits for CWLP and Kincaid Generation, provide significantly greater emission reductions, especially for SO_2 but also for NO_X, than even very conservative definitions of BART for the BART-subject units. While Illinois' limits for the CWLP and Kincaid facilities viewed individually are subject to limits at approximately presumptive levels, and thus mandate less reduction than would be mandated by conservative definitions of BART, this analysis indicates that the collective emission reductions from Illinois power plants are greater than those that would be achieved by requiring achievement of even very conservative limits at the units that are subject to a BART requirement.

An additional point to be addressed is whether Illinois' plan, achieving greater emission reductions overall than application of BART on BART-subject units, can be expected also to achieve greater visibility protection than application of BART on BART-subject units. In general, Illinois' power plants are substantial distances from any Class I area. The least distance from any BART-subject Illinois power plant to any Class I area is from Dynegy's Baldwin power plant to the Mingo Wilderness Area, a distance of about 140 kilometers. The CWLP and Kincaid facilities are in the middle of the State; for example, Kincaid Station is about 300 kilometers from the Mingo Wilderness Area. Given these distances, and given that the averaging in Illinois' plan (averaging among Illinois plants of an individual company) is only authorized within the somewhat limited region within which each utility's plants are located, a reallocation of emission reductions from one plant to another is unlikely to change the impact of those emission reductions significantly. Consequently, in these circumstances, EPA is confident that the significantly greater emission reductions that Illinois mandates will yield greater progress toward visibility protection as compared to the benefits of a conservative estimate of BART.

Comment: ELPC comments that the "MPS/CPS does not require that all necessary emissions reductions take place during the first long-term strategy for regional haze."

Response: EPA does not prohibit reductions after the BART compliance deadline (in 2017); Illinois is only required to mandate at least measures that will achieve greater reasonable progress by the BART compliance deadline. While the MPS and the CPS establish a series of progressively more stringent limits extending to 2017 and beyond, both Illinois' analysis and the EPA analysis discussed above (summarized in Table 1) evaluate satisfaction of BART requirements by considering the emission limits in effect in 2017. The conclusion of that analysis is that the reductions necessary to meet BART requirements occur by the deadline for such reductions to occur. The fact that Illinois' plan requires additional reductions after 2017 is not a shortcoming of Illinois' plan.

Comment: ELPC expects the affected utilities to use the reductions mandated here to comply with CSAPR. ELPC concludes that these reductions cannot be considered surplus and thus are not creditable for meeting BART requirements.

Response: Under 40 CFR 51.308(e)(2), the alternative measures need only be surplus to reductions from measures adopted to meet requirements of the Clean Air Act as of the baseline date of the SIP, i.e. 2002. (See 40 CFR 51.308(e)(2)(iv).) In addition, 40 CFR 51.308(e) expressly provides that the BART requirements may be met by compliance with a trading program of adequate stringency even without establishment of state-specific limits. Therefore, the existence of a trading program, and influence that the state limits have on a utility's strategy for complying with the trading program requirements, cannot be grounds for disapproving a state plan that satisfies alternative BART requirements without reliance on the trading program.

Comment: ELPC expresses a number of concerns about the BART analysis for Kincaid Station. ELPC particularly expresses concern that the company analyzes wet flue gas desulfurization for a scenario based on a relatively high sulfur Illinois coal but analyzes dry sorbent injection based on a low sulfur western coal, biasing the comparison toward a conclusion that use of the control that is least effective at removing SO_2 nevertheless achieves the lowest emissions of SO_2.

Response: EPA agrees that use of higher sulfur coal in the scenario of wet flue gas desulfurization creates a mismatch in comparing this control to the other control options. However, ELPC does not demonstrate that a more appropriate comparison would yield a different result. Indeed, given how much more expensive wet flue gas desulfurization has been estimated to be for this facility as compared to dry sorbent injection (company estimates of annualized costs of $125 million versus $25 million), EPA believes that a revised BART analysis that used the same fuel for all scenarios, and thus achieved lower emissions with wet flue gas desulfurization, would still show that wet flue gas desulfurization is not cost-effective for this facility. Therefore, EPA continues to believe that Illinois made the appropriate BART determination for this facility.

Comment: ELPC objects to the use of annual average limits, expressing concern that annual average limits allow individual days of concern to have excessive visibility impairment.

Response: EPA's BART guidance establishes presumptive averaging times of 30 days or shorter, but EPA also finds Illinois' limits to be approvable. While a limit expressed as an annual average is inherently less stringent than the same limit expressed as a 30-day average, EPA believes that Illinois provides adequate compensation in part by setting some limits below presumptive levels and in part by

limiting several units that are not subject to a BART requirement.

A useful perspective is to examine the metrics by which regional haze is evaluated. These metrics are averages of visibility across 20 percent of the days of the year, in particular across the 20 percent of days with the worst visibility and across the 20 percent of days with the best visibility. (See 64 FR 35734) Twenty percent of 365 days in a year is 73 days. Furthermore, the days that have better or worse visibility are distributed throughout the year, so that allowance of greater variability in daily or monthly emissions would not necessarily yield worse (or better) visibility. Thus, while a 30-day average limit would be better suited to assuring appropriate mitigation of visibility impairment, EPA finds Illinois' annual average limitations to be adequately commensurate with the averaging time inherent in the visibility metrics being addressed.

Another facet of the use of annual rather than 30-day or shorter averages is stringency. Given normal variability in emissions, an annual average limitation is by definition less stringent than a 30-day or shorter average limitation set at the same level. In some contexts, especially those involving short-term air quality standards, EPA would not accept an annual average limitation without a demonstration that the limitation suffices to mandate that short-term average emission levels must remain below some definable, adequate level. However, different criteria are warranted in the context of regional haze, for which the relevant emissions are the emissions on the 20 percent of days with worst visibility and the 20 percent of days with best visibility. Examining the stringency of the particular limitations that Illinois has adopted, and considering degree of variability in 73-day average emissions that might be expected with an annual average emission limit, EPA finds that Illinois' annual average limitations are sufficiently stringent to conclude that emissions on a 30-day average basis can be expected to provide the visibility improvement that Illinois is required to provide.

Comment: ELPC comments that Illinois' long-term strategy must be disapproved. ELPC expresses particular concern that Illinois' plan does not mandate emission reductions for two power plants, specifically Ameren's Joppa plant and Southern Illinois Power Company's Marion plant, which ELPC believes must be mandated "to achieve the reasonable progress goals for Class I areas affected by the state." ELPC notes that "Illinois claimed that existing or soon-to-be-implemented regulatory program"—in particular, the MPS/CPS and CSAPR—"would require sufficient emissions reductions on the 15 most significant sources so as to ensure achievement of reasonable progress goals in impacted Class I areas." ELPC acknowledges that the Joppa Plant is addressed to the extent that Ameren's plants are collectively limited under the MPS, but ELPC observes that Ameren has the choice to comply with the MPS "without making any reductions at Joppa," even though the plant has "a Q/D ratio" (dividing emissions by distance to the nearest Class I area) that is "nearly three times larger than any other evaluated source." ELPC also objects that CSAPR "also does not ensure emission reductions at either Joppa or Marion, because (1) the rule is under legal challenge, is currently stayed, and may never go into effect, (2) "does not require emission reductions at particular plants," and (3) by restricting annual emissions does not necessarily limit emissions in seasons when the most degradation in visibility may occur.

Response: Achievement of the applicable reasonable progress goals is not contingent on Illinois limiting emissions from the Joppa or Marion plants in particular. Given the distances of the sources in Illinois from affected Class I areas, the least of which is about 120 kilometers from the Joppa plant to Mingo Wilderness Area, the impact on visibility is primarily dependent on the total emission reductions and not on the geographical distribution of those reductions. That is, even if Ameren for example were to opt to control its Coffeen plant (about 240 kilometers from Mingo Wilderness Area) more than its Joppa plant, the net effect on visibility would likely be similar.

EPA recognizes that CSAPR is under challenge and is currently stayed. However, Illinois is not relying on additional reductions from CSAPR to provide its appropriate contribution toward achieving reasonable progress in visibility protection. Therefore, the litigation status of CSAPR is not germane to the approvability of Illinois' regional haze plan.

III. What action is EPA taking?

EPA is approving Illinois' regional haze plan as satisfying the applicable requirements in 40 CFR 51.308. Most notably, EPA concludes that Illinois has satisfied the requirements for BART in 40 CFR 51.308(e) and has adopted a long-term strategy that reduces emissions in Illinois that, in combination with similar reductions elsewhere, EPA expects to suffice to achieve the reasonable progress goals at Class I areas affected by Illinois.

In this action, EPA is also approving a set of rules and two permits for incorporation into the state implementation plan. Specifically, EPA is approving the following rules: Title 35 of Illinois Administrative Code Rules 225.233 (paragraphs a, b, e, and g), 225.291, 225.292, 225.293, 225.295, 225.296 (except paragraph d), and 225 Appendix A. While the rules provide the SO_2 and NO_X limits as one of two options that the affected utilities may choose between, EPA is incorporating into the SIP Illinois' submittal of letters from the affected utilities choosing the option including the SO_2 and NO_X limits, which under the approved rules makes these limits permanently enforceable. Therefore, these SO_2 and NO_X limits are state enforceable and, with this SIP approval, now become federally enforceable as well. EPA also considers the limits of the state permits and the refinery consent decrees to be enforceable. While Illinois adopted the above rules as part of a state rulemaking which mostly addressed mercury emissions, the mercury provisions are not germane to this rulemaking, Illinois did not submit the mercury-related rules, and the limited set of rules that Illinois submitted suffice to mandate the SO_2 and NO_X emission controls that are pertinent to this action.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 4, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: May 29, 2012.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart O—Illinois

■ 2. Section 52.720 is amended by adding paragraph (c)(192) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(192) On June 24, 2011, Laurel Kroack, Illinois Environmental Protection Agency, submitted Illinois' regional haze plan to Cheryl Newton, Region 5, EPA. This plan includes a long-term strategy with emission limits for mandating emission reductions equivalent to the reductions from implementing best available retrofit technology and with emission reductions to provide Illinois' contribution toward achievement of reasonable progress goals at Class I areas affected by Illinois. The plan specifically includes regulations establishing Multi-Pollutant Standards and Combined Pollutant Standards, along with letters from the affected electric utilities establishing the applicability and enforceability of the option that includes sulfur dioxide and nitrogen oxide emission limits. The plan also includes permits establishing sulfur dioxide and nitrogen oxide emission limits for three additional electric generating plants and two consent decrees establishing sulfur dioxide and nitrogen oxide emission limits for two refineries.

(i) Incorporation by reference.

(A) The following sections of Illinois Administrative Code, Title 35: Environmental Protection, Subtitle B: Air Pollution, Chapter 1: Pollution Control Board, Subchapter c: Emission Standards and Limitations for Stationary Sources, Part 225, Control of Emissions from Large Combustion Sources, published at 33 IL Reg 10427, effective June 26, 2009, are incorporated by reference:

(*1*) Subpart B: Control Of Mercury Emissions From Coal-Fired Electric Generating Units, Section 225.233 Multi-Pollutant Standards (MPS), only subsections (a), (b), (e), and (g), Section 225.291 Combined Pollutant Standard: Purpose, Section 225.292 Applicability of the Combined Pollutant Standard, Section 225.293 Combined Pollutant Standard: Notice of Intent, Section 225.295 Combined Pollutant Standard: Emissions standards for NO_X and SO_2, and Section 225.296 Combined Pollutant Standard: Control Technology Requirements for NO_X, SO_2, and PM Emissions, except for 225.296(d).

(*2*) Section 225.Appendix A Specified EGUs for Purposes of the CPS (Midwest Generation's Coal-Fired Boilers as of July 1, 2006).

(B) Joint Construction and Operating Permit: Application Number 09090046, Issued on June 23, 2011, to City Water, Light & Power, City of Springfield.

(C) Joint Construction and Operating Permit: Application Number 09050022, Issued on June 24, 2011, to Kincaid Generation, LLC.

(ii) Additional material.

(A) Letter from Guy Gorney, Midwest Generation to Dave Bloomberg, Illinois EPA, dated December 27, 2007, choosing to be subject to provisions of the Multi-Pollutant Standards that include emission limits for sulfur dioxide and nitrogen oxides.

(B) Letter from R. Alan Kelley, Ameren, to Jim Ross, Illinois EPA, dated December 27, 2007, choosing to be subject to provisions of the Combined Pollutant Standards that include emission limits for sulfur dioxide and nitrogen oxides.

(C) Letter from Keith A. McFarland, Dynegy, to Raymond Pilapil, Illinois EPA, dated November 26, 2007, choosing to be subject to provisions of the Combined Pollutant Standards that include emission limits for sulfur dioxide and nitrogen oxides.

[FR Doc. 2012–16557 Filed 7–5–12; 8:45 am]

BILLING CODE 6560–50–P

Exhibit 14

696 F.3d 7

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

United States Court of Appeals,
District of Columbia Circuit.

EME HOMER CITY GENERATION, L.P., Petitioner
v.
ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents
San Miguel Electric Cooperative, et al., Intervenors.

Nos. 11–1302, 11–1315, 11–1323, 11–1329, 11–1338, 11–1340, 11–1350, 11–1357, 11–1358, 11–1359, 11–1360, 11–1361, 11–1362, 11–1363, 11–1364, 11–1365, 11–1366, 11–1367, 11–1368, 11–1369, 11–1371, 11–1372, 11–1373, 11–1374, 11–1375, 11–1376, 11–1377, 11–1378, 11–1379, 11–1380, 11–1381, 11–1382, 11–1383, 11–1384, 11–1385, 11–1386, 11–1387, 11–1388, 11–1389, 11–1390, 11–1391, 11–1392, 11–1393, 11–1394, 11–1395. | Argued April 13, 2012. | Decided Aug. 21, 2012. | Rehearing En Banc Denied Jan. 24, 2013.

Synopsis

Background: Various States, local governments, industry groups, and labor organizations petitioned for review of the Environmental Protection Agency's (EPA) Transport Rule.

Holdings: The Court of Appeals, Kavanaugh, Circuit Judge, held that:

[1] EPA exceeded its statutory authority under the "good neighbor" provision of the Clean Air Act in implementing the Transport Rule, and

[2] EPA could not issue Federal Implementation Plans (FIP) without giving States an initial opportunity to implement the required reductions through State Implementation Plans (SIP) or SIP revisions.

Vacated and remanded.

Rogers, Circuit Judge, filed dissenting opinion.

West Codenotes

Held Invalid

40 C.F.R. 51.121, 51.123, 51.124, 51.125, 52.35, 52.36, 52.38, 52.39, 52.54, 52.55, 52.184, 52.440, 52.441, 52.484, 52.485, 52.540, 52.584, 52.585, 52.732, 52.789, 52.790, 52.840, 52.841, 52.882, 52.883, 52.940, 52.941, 52.984, 52.1084, 52.1085, 52.1186, 52.1187, 52.1240, 52.1241, 52.1284, 52.1326, 52.1327, 52.1428, 52.1429, 52.1584, 52.1585, 52.1684, 52.1685, 52.1784, 52.1785, 52.1882, 52.1883, 52.2040, 52.2041, 52.2140, 52.2141, 52.2240, 52.2283, 52.2284, 52.2440, 52.2441, 52.2540, 52.2541, 52.2587, 52.2588.40 C.F.R. 72.1, 72.2, 72.3, 72.4, 72.5, 72.6, 72.7, 72.8, 72.9, 72.10, 72.11, 72.12, 72.13, 72.14, 72.20, 72.21, 72.22, 72.23, 72.24, 72.25, 72.26, 72.30, 72.31, 72.32, 72.33, 72.40, 72.41, 72.42, 72.43, 72.44, 72.50, 72.51, 72.60, 72.61, 72.62, 72.63, 72.64, 72.65, 72.66, 72.67, 72.68, 72.69, 72.70, 72.71, 72.72, 72.73, 72.74, 72.80, 72.81, 72.82, 72.83, 72.84, 72.85, 72.90, 72.91, 72.92, 72.93, 72.94, 72.95, 72.96.40 C.F.R. Pt. 72, App. A; 40 C.F.R. Pt. 72, App. B; 40 C.F.R. Pt. 72, App. C; 40 C.F.R. Pt. 72, App. D.40 C.F.R. 78.1, 78.2, 78.3, 78.4, 78.5, 78.12.40 C.F.R. 97.401, 97.402, 97.403, 97.404, 97.405, 97.406, 97.407, 97.408, 97.409, 97.410, 97.411, 97.412, 97.413, 97.414, 97.415, 97.416, 97.417,

97.418, 97.419, 97.420, 97.421, 97.422, 97.423, 97.424, 97.425, 97.426, 97.427, 97.428, 97.429, 97.430, 97.431, 97.432, 97.433, 97.434, 97.435, 97.501, 97.502, 97.503, 97.504, 97.505, 97.506, 97.507, 97.508, 97.509, 97.510, 97.511, 97.512, 97.513, 97.514, 97.515, 97.516, 97.517, 97.518, 97.519, 97.520, 97.521, 97.522, 97.523, 97.524, 97.525, 97.526, 97.527, 97.528, 97.529, 97.530, 97.531, 97.532, 97.533, 97.534, 97.535, 97.601, 97.602, 97.603, 97.604, 97.605, 97.606, 97.607, 97.608, 97.609, 97.610, 97.611, 97.612, 97.613, 97.614, 97.615, 97.616, 97.617, 97.618, 97.619, 97.620, 97.621, 97.622, 97.623, 97.624, 97.625, 97.626, 97.627, 97.628, 97.629, 97.630, 97.631, 97.632, 97.633, 97.634, 97.635, 97.701, 97.702, 97.703, 97.704, 97.705, 97.706, 97.707, 97.708, 97.709, 97.710, 97.711, 97.712, 97.713, 97.714, 97.715, 97.716, 97.717, 97.718, 97.719, 97.720, 97.721, 97.722, 97.723, 97.724, 97.725, 97.726, 97.727, 97.728, 97.729, 97.730, 97.731, 97.732, 97.733, 97.734, 97.735.

***9** On Petitions for Review of a Final Rule of the Environmental Protection Agency.

Attorneys and Law Firms

Bill Davis, Assistant Solicitor General, Office of the Attorney General for the State of Texas, argued the cause for Governmental Petitioners. With him on the briefs were Greg Abbott, Attorney General, Jonathan F. Mitchell, Solicitor General, Jon Niermann, Chief, Environmental Protection Division, Luther J. Strange, III, Attorney General, Office of the Attorney General for the State of Alabama, Leslie Sue Ritts, Pamela Jo Bondi, Attorney General, Office of the Attorney General for the State of Florida, Jonathan A. Glogau, Chief, Complex Litigation, Samuel S. Olens, Attorney General, Office of the Attorney General for the State of Georgia, John E. Hennelly and Diane L. DeShazo, Senior Assistant Attorneys General, Thomas M. Fisher, Solicitor General, Office of the Attorney General for the State of Indiana, Valerie Marie Tachtiris, Deputy Assistant Attorney General, Jeffrey A. Chanay, Deputy Attorney General, Office of the Attorney General for the State of Kansas, Henry V. Nickel, George P. Sibley, III, James D. "Buddy" Caldwell, Attorney General, Office of the Attorney General for the State of Louisiana, Megan K. Terrell, Chief, Environmental Section, Herman Robinson, Jackie Marie Scott Marve, Deidra L. Johnson, Kathy M. Wright, Donald James Trahan, David Richard Taggart, Jeffrey Winston Price, John Joseph Bursch, Solicitor General, Office of the Attorney General for the State of Michigan, Neil David Gordon, Assistant Attorney General, Sean Peter Manning, Chief, Environmental, Natural Resources, and Agriculture Division, Harold Edward Pizzetta, III, Special Attorney, Office of the Attorney General for the State of Mississippi, Jon Cumberland Bruning, Attorney General, Office of the Attorney General for the State of Nebraska, Katherine J. Spohn, Special Counsel, Dale T. Vitale, Gregg H. Bachmann, and Chris Kim, Assistant Attorneys General, Office of the Attorney General for the State of Ohio, Thomas Bates, Chief, Public Protection Unit, Office of the Attorney General for the State of Oklahoma, Patrick Wyrick, Solicitor General, P. Clayton Eubanks, Assistant Attorney General, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, James Emory Smith, Jr., Assistant Deputy Attorney General, Kenneth T. Cuccinelli, II, Attorney General, Office of the Attorney General for the Commonwealth of Virginia, E. Duncan Getchell, Jr., Solicitor General, and Thomas James Dawson, Assistant Attorney General, Wisconsin Department of Justice.

Peter D. Keisler argued the cause for Non–Governmental Petitioners. With him on the briefs were Roger R. Martella, Jr., C. Frederick Beckner III, Timothy K. Webster, F. William Brownell, Gregory G. Garre, Claudia M. O'Brien, Lori Alvino McGill, Jessica E. Phillips, Katherine I. Twomey, Stacey VanBelleghem, Janet J. Henry, Steven G. McKinney, Terese T. Wyly, William M. Bumpers, Joshua B. Frank, Megan H. Berge, P. Stephen Gidiere, III, Richard Alonso, Jeffrey R. Holmstead, Gary C. Rikard, Robert J. Alessi, Chuck D'Wayne Barlow, Peter P. Garam, Kyra Marie Fleming, Richard G. Stoll, Brian H. Potts, Julia L. German, Robert A. Manning, Joseph A. Brown, Mohammad O. Jazil, Eric J. Murdock, Andrea Bear Field, Norman W. Fichthorn, E. Carter Chandler Clements, James S. Alves, Gary V. Perko, William L. Wehrum, Jr., David M. Flannery, Gale Lea Rubrecht, Maureen N. Harbourt, ***10** Tokesha M. Collins, Bart E. Cassidy, Katherine L. Vaccaro, Diana A. Silva, William F. Lane, Jordan Hemaidan, Todd Palmer, Douglas E. Cloud, David Meezan, Christopher Max Zygmont, Matthew J. Splitek, Gary M. Broadbent, Michael O. McKown, Terry Russell Yellig, Dennis Lane, Karl R. Moor, Margaret Claiborne Campbell, Byron W. Kirkpatrick, Hahnah Williams, Peter S. Glaser, Tameka M. Collier, Grant F. Crandall, Arthur Traynor, III, Eugene M. Trisko, Jeffrey L. Landsman, Vincent M. Mele, Elizabeth P. Papez, John M. Holloway III, Elizabeth C. Williamson, and Ann M. Seha.

Michael J. Nasi, Shannon L. Goessling, and Douglas A. Henderson were on the brief for intervenor San Miguel Electric Cooperative and amici Industrial Energy Consumers of America, et al., in support of petitioners. Robert M. Cohan entered an appearance.

Norman L. Rave, Jr., David S. Gualtieri, and Jon M. Lipshultz, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the briefs were Jessica O'Donnell, Sonja Rodman, and Stephanie Hogan, Attorneys.

Simon Heller, Assistant Solicitor General, Office of the Attorney General for the State of New York, argued the cause for State/City Respondent–Intervenors. With him on the brief were Eric T. Schneiderman, Attorney General, Barbara D. Underwood, Solicitor General, Andrew G. Frank and Michael J. Myers, Assistant Attorneys General, Benna R. Solomon, James B. Dougherty, Joseph R. Biden, III, Attorney General, Office of the Attorney General for the State of Delaware, Valerie M. Satterfield, Deputy Attorney General, Douglas F. Gansler, Attorney General, Office of the Attorney General for the State of Maryland, Mary E. Raivel, Assistant Attorney General, Peter F. Kilmartin, Attorney General, Office of the Attorney General for the State of Rhode Island, Gregory S. Schultz, Special Assistant Attorney General, Martha Coakley, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, Frederick D. Augenstern, Assistant Attorney General, Scott J. Schwarz, William H. Sorrell, Attorney General, Office of the Attorney General for the State of Vermont, Thea J. Schwartz, Assistant Attorney General, Lisa Madigan, Attorney General, Office of the Attorney General for the State of Illinois, Gerald T. Karr, Assistant Attorney General, Irvin B. Nathan, Attorney General, Office of the Attorney General for the District of Columbia, Amy E. McDonnell, Deputy General Counsel, George Jepsen, Attorney General, Office of the Attorney General for the State of Connecticut, Kimberly P. Massicotte, Scott N. Koschwitz, and Matthew I. Levine, Assistant Attorneys General, William R. Phelan, Jr., Roy Cooper, Attorney General, Office of the Attorney General for the State of North Carolina, James C. Gulick, Senior Deputy Attorney General, Marc Bernstein and J. Allen Jernigan, Special Deputies Attorney General, and Christopher King. William J. Moore, III entered an appearance.

Brendan K. Collins argued the cause for Industry Respondent–Intervenors. With him on the brief were Robert B. McKinstry, Jr. and James W. Rubin.

Sean H. Donahue argued the cause for Public Health Respondent–Intervenors. With him on the brief were David T. Lifland, Vickie L. Patton, George Hays, Josh Stebbins, John Walke, and David Marshall. Ann Brewster Weeks entered an appearance.

Before: ROGERS, GRIFFITH, and KAVANAUGH, Circuit Judges.

Opinion

***11** Opinion for the Court filed by Circuit Judge KAVANAUGH, with whom Circuit Judge GRIFFITH joins.

Dissenting opinion filed by Circuit Judge ROGERS.

KAVANAUGH, Circuit Judge:

****387** Some emissions of air pollutants affect air quality in the States where the pollutants are emitted. Some emissions of air pollutants travel across State boundaries and affect air quality in downwind States. To deal with that complex regulatory challenge, Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable. Rather, Congress set up a federalism-based system of air pollution control. Under this cooperative federalism approach, both the Federal Government and the States play significant roles. The Federal Government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders.

In addition, and of primary relevance here, upwind States must prevent sources within their borders from emitting federally determined "amounts" of pollution that travel across State lines and "contribute significantly" to a downwind State's "nonattainment" of federal air quality standards. That requirement is sometimes called the "good neighbor" provision.

In August 2011, to implement the statutory good neighbor requirement, EPA promulgated the rule at issue in this case, the Transport Rule, also known as the Cross–State Air Pollution Rule. The Transport Rule defines emissions reduction responsibilities for 28 upwind States based on those States' contributions to downwind States' air quality problems. The Rule limits emissions from upwind States' coal- and natural gas-fired power plants, among other sources. Those power plants generate the majority of electricity used in the United States, but they also emit pollutants that affect air quality. The Transport Rule targets two of those pollutants, sulfur dioxide (SO_2) and nitrogen oxides (NO_x).

Various States, local governments, industry groups, and labor organizations have petitioned for review of the Transport Rule. Although the facts here are complicated, the legal principles that govern this case are straightforward: Absent a claim of constitutional authority (and there is none here), executive agencies may exercise only the authority conferred by statute, and agencies may not transgress statutory limits on that authority.

Here, EPA's Transport Rule exceeds the agency's statutory authority in two independent respects. *First,* the statutory text grants EPA authority to require upwind States to reduce only their own significant contributions to a downwind State's nonattainment. But under the Transport Rule, upwind States may be required to reduce emissions by more than their own significant contributions to a downwind State's nonattainment. EPA has used the good neighbor provision to impose massive emissions reduction requirements on upwind States without regard to the limits imposed by the statutory text. Whatever its merits as a policy matter, EPA's Transport Rule violates the statute. *Second,* the Clean Air Act affords States the initial opportunity to implement reductions required by EPA under the good neighbor provision. But here, when EPA quantified States' good neighbor obligations, it did not allow the States the initial opportunity to implement the required reductions with respect to sources within their borders. Instead, EPA quantified States' good neighbor obligations and *simultaneously* set forth EPA-designed ****388 *12** Federal Implementation Plans, or FIPs, to implement those obligations at the State level. By doing so, EPA departed from its consistent prior approach to implementing the good neighbor provision and violated the Act.

For each of those two independent reasons, EPA's Transport Rule violates federal law. Therefore, the Rule must be vacated.

In so ruling, we note that this Court has affirmed numerous EPA clean air decisions in recent years when those agency decisions met relevant statutory requirements and complied with statutory constraints. *See, e.g., National Environmental Development Association's Clean Air Project v. EPA,* 686 F.3d 803 (D.C.Cir.2012); *API v. EPA,* 684 F.3d 1342 (D.C.Cir.2012); *ATK Launch Systems, Inc. v. EPA,* 669 F.3d 330 (D.C.Cir.2012); *NRDC v. EPA,* 661 F.3d 662 (D.C.Cir.2011); *Medical Waste Institute & Energy Recovery Council v. EPA,* 645 F.3d 420 (D.C.Cir.2011); *American Trucking Ass'ns v. EPA,* 600 F.3d 624 (D.C.Cir.2010). In this case, however, we conclude that EPA has transgressed statutory boundaries. Congress could well decide to alter the statute to permit or require EPA's preferred approach to the good neighbor issue. Unless and until Congress does so, we must apply and enforce the statute as it's now written. Our decision today should not be interpreted as a comment on the wisdom or policy merits of EPA's Transport Rule. It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here. [1]

1 The dissent argues that petitioners' challenge to EPA's approach to the significant contribution issue is not properly before us because that issue was not sufficiently raised before the agency in the rulemaking proceeding. We fundamentally disagree with the dissent's reading of the record on that point.

The dissent also claims that petitioners' challenge to EPA's issuance of the FIPs is not properly before us because the affected States should have raised such a challenge earlier in the process. We again disagree. The dissent's analysis on the FIPs issue conflates (i) EPA's rejection of certain States' SIPs and (ii) EPA's decision in the Transport Rule to set States' "good neighbor" obligations and emissions budgets and simultaneously issue FIPs. The States here are challenging only the latter issue, and they have done so in a timely fashion. Indeed, they could not have done so until EPA, in the Transport Rule, simultaneously set the States' individual emissions budgets and issued FIPs.

We will explain both points more below. Suffice it here to say that, much as we might like to do so, we respectfully do not believe we can avoid the merits of this complex case, as the dissent urges.

I

A

[1] Under the Clean Air Act, the Federal Government sets air quality standards, but States retain the primary responsibility (if the States want it) for choosing how to attain those standards within their borders. *See Train v. NRDC,* 421 U.S. 60, 63–67, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Virginia v. EPA,* 108 F.3d 1397, 1406–10 (D.C.Cir.1997). The Act thus leaves it to the individual States to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders. (If a State refuses to participate, the Federal Government regulates the sources directly.)

To spell this out in more detail: The Clean Air Act charges EPA with setting National Ambient Air Quality Standards, or NAAQS, which prescribe the maximum permissible levels of common pollutants in the ambient air. *See* 42 U.S.C. § 7409(a) ****389 - *13** (b). EPA must choose levels which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

After a lengthy process, the details of which are not relevant here, EPA designates "nonattainment" areas—that is, areas within each State where the level of the pollutant exceeds the NAAQS. *See* 42 U.S.C. § 7407(d).

Once EPA sets a NAAQS and designates nonattainment areas within the States, the lead role shifts to the States. The States implement the NAAQS within their borders through State Implementation Plans, or SIPs. (As the experienced reader knows, there is no shortage of acronyms in EPA-land.) In their SIPs, States choose which individual sources within the State must reduce emissions, and by how much. For example, a State may decide to impose different emissions limits on individual coal-burning power plants, natural gas-burning power plants, and other sources of air pollution, such as factories, refineries, incinerators, and agricultural activities.

States must submit SIPs to EPA within three years of each new or revised NAAQS. *See* 42 U.S.C. § 7410(a)(1). Section 110(a)(2) of the Act lists the required elements of a SIP submission.

Section 110(a)(2)(D)(i)(I), the "good neighbor" provision at issue in this case, is one of the required elements of a SIP. The good neighbor provision requires that SIPs:

(D) contain adequate provisions—

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

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

42 U.S.C. § 7410(a)(2)(D).

[2] The good neighbor provision recognizes that emissions "from 'upwind' regions may pollute 'downwind' regions." *Appalachian Power Co. v. EPA,* 249 F.3d 1032, 1037 (D.C.Cir.2001). To put it colloquially, the good neighbor provision requires upwind States to bear responsibility for their fair share of the mess in downwind States. By placing the good neighbor requirement in Section 110(a)(2), Congress established the upwind State's SIP as the vehicle for implementing the upwind State's good neighbor obligation. Of course, an upwind State will not know what it needs to do to meet its good neighbor obligation until it learns the level of air pollution in downwind States, and further learns how much it is contributing to the problems in the downwind States. EPA plays the critical role in gathering information about air quality in the downwind States,

calculating each upwind State's good neighbor obligation, and transmitting that information to the upwind State. With that information, the upwind State can then determine how to meet its good neighbor obligation in a new SIP or SIP revision. *See* 42 U.S.C. § 7410(k)(5).

After EPA quantifies a State's good neighbor obligation, if a State does not timely submit an adequate SIP (or an adequate SIP revision) to take account of the good neighbor obligation as defined by EPA, responsibility shifts back to the Federal Government. Within two years of disapproving a State's SIP submission or SIP revision, or determining that a State has failed to submit a SIP, EPA must promulgate a Federal Implementation Plan to implement the NAAQS within that State. *See* 42 U.S.C. § 7410(c)(1).

****390 *14 B**

The good neighbor provision—and EPA's attempts to implement it—are familiar to this Court from past cases.

In *Michigan v. EPA,* 213 F.3d 663 (D.C.Cir.2000), we considered a challenge to EPA's 1998 NO_x Rule, commonly referred to as the NO_x SIP Call, which quantified the good neighbor obligations of 22 States with respect to the 1997 ozone NAAQS. *See* 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998).

The 1998 NO_x Rule did not define "amounts which will ... contribute significantly to nonattainment" solely on the basis of downwind air quality impact, as one might have expected given the statutory text. Rather, EPA also considered how much NO_x could be eliminated by sources in each State if those sources installed "highly cost-effective" emissions controls. *See Michigan,* 213 F.3d at 675. On review, some States argued that the statutory text required EPA to order reductions based on air quality impact alone, not cost of reduction. But the *Michigan* Court found no "clear congressional intent to preclude consideration of cost." *Id.* at 677 (citation omitted). The Court thus held that EPA may "consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.' " *Id.* at 677; *see also id.* at 677–79. In other words, EPA could use cost considerations to lower an upwind State's obligations under the good neighbor provision. [2]

2 Judge Sentelle dissented. In his view, the statutory text unambiguously "set forth one criterion: the emission of an amount of pollutant sufficient to contribute significantly to downwind nonattainment." *Id.* at 696 (Sentelle, J., dissenting); *cf. Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 467, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.").

In *North Carolina v. EPA,* 531 F.3d 896 (D.C.Cir.2008), we considered a challenge to EPA's 2005 Clean Air Interstate Rule, or CAIR. *See* 70 Fed. Reg. 25,162 (May 12, 2005). CAIR built on the 1998 NO_x Rule and defined 28 States' good neighbor obligations with respect to the 1997 ozone NAAQS and the 1997 NAAQS for annual levels of fine particulate matter, or annual $PM_{2.5}$. *See id.*

CAIR employed two different formulas—both of which incorporated cost considerations—to quantify each State's obligations for the pollutants covered by CAIR, SO_2 and NO_x. The *North Carolina* decision held that the formulas went beyond *Michigan*'s authorization to use cost and that the formulas therefore exceeded EPA's statutory authority. EPA may use cost to "require termination of only a subset of each state's contribution," the Court explained, but "EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." 531 F.3d at 918 (citation, emphasis, and some internal quotation marks omitted). The Court also held that "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." *Id.* at 921. The Court emphasized that EPA "may not require some states to exceed the mark." *Id.*

North Carolina thus articulated an important caveat to *Michigan*'s approval of cost considerations. The statute permits EPA to use cost to lower an upwind State's obligation under the good neighbor provision. *See Michigan,* 213 F.3d at 675, 677. But EPA may not use cost to increase ****391** ***15** an upwind State's obligation under the good neighbor provision—that is, to force an upwind State to "exceed the mark." *North Carolina,* 531 F.3d at 921. Put simply, the statute requires every upwind State to clean up at most *its own* share of the air pollution in a downwind State—not other States' shares.

C

The *North Carolina* Court remanded CAIR without vacatur, leaving CAIR in place "until it is replaced by a rule consistent with our opinion." *North Carolina v. EPA,* 550 F.3d 1176, 1178 (D.C.Cir.2008) (on rehearing).

The Transport Rule is EPA's attempt to develop a rule that is consistent with our opinion in *North Carolina.* EPA proposed the Transport Rule in August 2010 and finalized it in August 2011. *See* 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed); 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final). The Transport Rule addresses States' good neighbor obligations with respect to three NAAQS: the 1997 annual $PM_{2.5}$ NAAQS, the 1997 ozone NAAQS, and the 2006 24–hour $PM_{2.5}$ NAAQS. *See id.* at 48,209. [3]

3 The 2006 24–hour $PM_{2.5}$ NAAQS post-dated and therefore was not covered by CAIR.

The Transport Rule contains two basic components. First, the Rule defines each State's emissions reduction obligations under the good neighbor provision. Second, the Rule prescribes Federal Implementation Plans to implement those obligations at the State level. We describe each component here in some detail.

EPA began by quantifying the "amounts" of pollution that each State must prohibit under the good neighbor provision—that is, "amounts which will ... contribute significantly to nonattainment" or "interfere with maintenance" of the three NAAQS in other States. 42 U.S.C. § 7410(a)(2)(D)(i). [4]

4 EPA bases different aspects of the Transport Rule on distinct sources of statutory authority. EPA relied on its general rulemaking authority under Section 301(a)(1) of the Clean Air Act, 42 U.S.C. § 7601(a)(1), to construe Section 110(a)(2)(D)(i)(I) and to quantify the States' obligations to reduce emissions. *See* Transport Rule, 76 Fed. Reg. at 48,217; *see also Michigan,* 213 F.3d at 687. EPA relied on its authority under Section 110(c)(1), 42 U.S.C. § 7410(c)(1), to issue the Transport Rule FIPs. *See* Transport Rule, 76 Fed. Reg. at 48,217.

EPA used a two-stage approach to quantify each State's obligations under the good neighbor provision.

In the first stage, EPA determined whether a State emits "amounts which will ... contribute significantly" to a downwind State's nonattainment of any of the three NAAQS. EPA identified the significantly contributing upwind States based on "linkages" between each upwind State and specific downwind "nonattainment" or "maintenance" areas—that is, downwind areas that EPA modeling predicted would not attain, or absent regulation would not maintain, the NAAQS. Transport Rule, 76 Fed. Reg. at 48,236. An upwind State was linked to a downwind nonattainment or maintenance area for a given NAAQS if EPA modeling showed that the upwind State's contribution to that downwind area exceeded a numerical "air quality threshold"—that is, a specific amount of air pollution sent from the upwind State into the downwind State's air. *Id.* EPA set the air quality threshold for each pollutant at an amount equal to 1% of the relevant NAAQS. The resulting thresholds were (i) 0.8 ppb for ozone, (ii) 0.15 $\mu g/m^3$ for annual $PM_{2.5}$, and (iii) 0.35 $\mu g/m^3$ for 24–hour $PM_{2.5}$. *Id.* If modeling showed that an upwind State would send more than those ****392** ***16** amounts into a downwind State's air, as measured at a receptor site in a downwind State, the upwind State was deemed a "significant contributor" to the downwind State's air pollution problem.

Those numerical air quality thresholds determined which upwind States had to reduce their SO_2 and NO_x emissions and which upwind States did not—that is, the thresholds determined which upwind States' emissions "contribute significantly" to

downwind States' air pollution problems. Upwind States "whose contributions are below these thresholds," EPA found, "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS" in downwind States. *Id.* Because their emissions did not "contribute significantly," those States were not required to cut their emissions for purposes of the good neighbor provision.

As one would expect, this "significant contribution" threshold produced some close cases at the margins. For example, Maryland and Texas were covered for annual $PM_{2.5}$ based on downwind contributions of 0.15 and 0.18 $\mu g/m^3$, respectively—just barely meeting the 0.15 $\mu g/m^3$ threshold. *See id.* at 48,240. And Texas exceeded the annual $PM_{2.5}$ threshold at just a single downwind receptor, in Madison, Illinois. *See id.* at 48,241.[5] By contrast, Minnesota and Virginia, with maximum downwind contributions of 0.14 and 0.12 $\mu g/m^3$, respectively, just missed being covered for annual $PM_{2.5}$. *See id.* at 48,240.

5 Texas also narrowly exceeded the 0.35 $\mu g/m^3$ threshold for 24–hour $PM_{2.5}$; its maximum downwind contribution was 0.37 $\mu g/m^3$. *See* Transport Rule, 76 Fed. Reg. at 48,242.

For annual $PM_{2.5}$, a total of 18 States[6] exceeded the threshold and were therefore deemed "significant contributors." For 24–hour $PM_{2.5}$, a total of 22 States[7] exceeded the threshold. *See id.* at 48,241–42. Those States were thus included in the Rule's reduction programs for SO_2 and annual NO_x, pollutants that contribute to $PM_{2.5}$ formation. *See id.* at 48,210. For ozone, a total of 26 States[8] exceeded the threshold. *See id.* at 48,245. Those States were thus included in the Rule's reduction program for ozone-season NO_x which contributes to ozone formation. *See id.* at 48,210; *see also* 76 Fed. Reg. 80,760 (Dec. 27, 2011) (finalizing six States' inclusion in the Transport Rule for ozone-season NO_x).

6 Those States were: Alabama, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,240.

7 Those States were: Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,242.

8 Those States were: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,245.

At the second stage, however, EPA abandoned the air quality thresholds—that is, the stage one standard for whether an upwind State's emissions "contribute significantly" to a downwind State's nonattainment of air quality standards. Instead, at stage two, EPA used a cost-based standard: EPA determined how much pollution each upwind State's power plants could eliminate if the upwind State's plants applied all controls available at or below a ****393 *17** given cost per ton of pollution reduced. The cost-per-ton levels applied without regard to the size of each State's "significant contribution" at stage one. In other words, how much pollution each upwind State was required to eliminate was not tied to how much the upwind State contributed to downwind States' air pollution problems.

EPA predicted how far emissions would fall if power plants throughout the State were required to install controls available at or below various cost levels. The cost levels, or thresholds, were expressed in terms of cost per ton of pollutant reduced, with the idea being that plants would install all controls that cost less than the designated threshold.[9]

9 For example, a technology that cost $1,000 to install and eliminated 2 tons of NO_x from a power plant's emissions would cost $500/ton. In effect, EPA predicted how far emissions would fall if plants installed all of the controls from $1/ton to $500/ton.

EPA used a computer model to predict the reductions that would occur in each State at various cost thresholds. *See* EPA, Documentation for EPA Base Case v.4.10, at 2–1 (Aug. 2010), J.A. 2339. For example, for annual NO_x EPA modeled cost levels

of $500, $1,000, and $2,500/ton. *See* Transport Rule, 76 Fed. Reg. at 48,249–50. EPA went as high as $5,000/ton for ozone-season NO_x. *See id.* at 48,250. For SO_2, EPA modeled emissions at cost levels of $500, $1,600, $2,300, $2,800, $3,300, and $10,000 per ton. *See id.* at 48,251. At a later stage in the process, EPA used those predictions to decide how much each State would have to cut.

EPA then added up the emissions from all of the covered States to yield total regionwide emissions figures for each pollutant, at each cost threshold. *See* Transport Rule, 76 Fed. Reg. at 48,250–53. The higher the cost level selected, the greater the reduction of emissions, but also the greater the costs and burdens imposed on sources within the States.

Next, EPA used computer modeling to estimate the downwind air quality effects of imposing different cost-per-ton levels on the upwind States. *Id.* at 48,253. EPA modeled the air quality effects of applying a $500/ton cost level for NO_x and ascending cost-per-ton levels for SO_2. *See id.* at 48,255; EPA, Analysis to Quantify Significant Contribution Technical Support Document 15 & n.9 (July 2010), J.A. 2177.

Armed with those two sets of modeling data, EPA proceeded to choose which regionwide cost-per-ton threshold to apply for each of the three pollutants—SO_2, annual NO_x and ozone-season NO_x. EPA consulted both its cost-of-reduction modeling and its air quality modeling and identified what it termed "significant cost thresholds"—that is, cost-per-ton levels at which steep drops in upwind emissions or jumps in downwind air quality would occur. Transport Rule, 76 Fed. Reg. at 48,255; *see also id.* at 48,255–56. EPA then weighed both air quality and cost concerns in a "multi-factor assessment" to choose the final cost-per-ton levels. *Id.* at 48,256. The "multi-factor assessment" did not employ any hard formula to weigh those factors.

In the end, EPA settled on a single $500/ton threshold for ozone-season and annual NO_x. *See id.* at 48,256–57.

For SO_2, instead of using a single cost threshold for all of the SO_2 States, EPA divided the upwind States into two groups for the 2014 program year (that is, the emissions cuts required in 2014). EPA modeling showed that applying a $500/ton cost threshold resolved the attainment problems in the downwind areas to which seven upwind States were linked. *See id.* at 48,257. Those seven upwind States became the Group 2 States, which were subject to a $500/ton threshold for SO_2. *See id.* ****394 *18** But $500/ton did not resolve attainment problems in the downwind areas to which 16 other upwind States were linked. Those 16 upwind States became the Group 1 States, which were subject to a stricter $2,300/ton cost threshold for SO_2. *See id.* at 48,259.

EPA determined the amount of SO_2, annual NO_x or ozone-season NO_x that each covered State could eliminate if its power plants installed all cost-effective emissions controls—that is, those controls available at or below the applicable cost-per-ton thresholds. *See id.* at 48,260. EPA then used those figures to generate 2012, 2013, and 2014 emissions "budgets" for each upwind State, for each pollutant for which that State was covered. *See id.* at 48,259–63. The budget is the maximum amount of each pollutant that a State's power plants may collectively emit in a given year, beginning in 2012. [10]

10 States may augment their budgets somewhat by buying out-of-state allowances. *See* Transport Rule, 76 Fed. Reg. at 48,263–68.

EPA did not stop there and leave it to the States to implement the required reductions through new or revised State Implementation Plans, or SIPs. *Cf.* 42 U.S.C. § 7410(k)(5). Instead, EPA simultaneously promulgated Federal Implementation Plans, or FIPs.

The FIPs require power plants in covered upwind States to make the SO_2 and NO_x reductions needed to comply with each upwind State's emissions budget, as defined by EPA. The FIPs also create an interstate trading program to allow covered sources to comply as cost-effectively as possible. *See* Transport Rule, 76 Fed. Reg. at 48,271.

The FIPs convert each State's emissions budget into "allowances," which are allocated among power plants in the State. Under the FIPs, it is EPA, and not the States, that decides how to distribute the allowances among the power plants in each State. *See id.* at 48,284–88. [11]

11 Each power plant is "required to hold one SO_2 or one NO_x allowance, respectively, for every ton of SO_2 or NO_x emitted" during the relevant year. Transport Rule, 76 Fed. Reg. at 48,271; *see also id.* at 48,296–97 (describing penalties for noncompliance). Sources were required by the Rule to begin complying with the annual SO_2 and NO_x requirements by January 1, 2012 for the 2012–13 budgets and by January 1, 2014 for the post–2014 budgets. *See id.* at 48,277. (This Court stayed the Rule before it took effect.) The ozone-season NO_x requirements would kick in on May 1 of those years. *See id.* EPA chose those compliance deadlines in light of this Court's holding in *North Carolina* that the deadlines must be "consistent with the provisions in Title I mandating [NAAQS] compliance deadlines for downwind states." 531 F.3d at 912; *see also* Transport Rule, 76 Fed. Reg. at 48,277–78.

The FIPs use allowance trading to enable covered plants within the States to comply as cost-effectively as possible. The program creates four allowance trading markets: one for annual NO_x one for ozone-season NO_x one for the Group 1 SO_2 States, and one for the Group 2 SO_2 States. *See* Transport Rule, 76 Fed. Reg. at 48,271. Power plants in Group 1 SO_2 States may not purchase Group 2 SO_2 allowances, and vice versa. *See id.* at 48,271–72. Otherwise, interstate trading is generally permitted.

The Rule retains a limited, secondary role for SIPs. States have the option of submitting SIPs that modify some elements of the FIPs. *See id.* at 48,327–28. The first program year for which States can submit such SIPs is 2014. *See id.* States may also seek to replace the FIPs wholesale, as long as the SIP prohibits the amounts of NO_x and SO_2 emissions that EPA specified. *See id.* at 48,328. EPA says it would "review such a SIP on a case-by-case basis." *Id.* But, importantly, the States do not have a post-Rule opportunity to avoid FIPs by submitting a SIP ****395 *19** or SIP revision: The FIPs "remain fully in place in each covered state until a state's SIP is submitted and approved by EPA to revise or replace a FIP." *Id.*

Since it issued the final rule in August 2011, EPA has taken several subsequent regulatory actions related to the Transport Rule. *See* 76 Fed. Reg. 80,760 (Dec. 27, 2011) (finalizing six States' inclusion in the Rule for ozone-season NO_x); 77 Fed. Reg. 10,324 (Feb. 21, 2012) (making technical adjustments to modeling and delaying assurance penalty provisions until 2014); 77 Fed. Reg. 34,830 (June 12, 2012) (revising budgets for 13 States).

D

An array of power companies, coal companies, labor unions, trade associations, States, and local governments petitioned for review of EPA's Transport Rule.

On December 30, 2011, this Court stayed the Rule pending a decision on the merits. *See* Order, No. 11–1302, slip op. at 2 (D.C.Cir. Dec. 30, 2011). The Court's order instructed EPA to "continue administering the Clean Air Interstate Rule pending the court's resolution of these petitions for review." *Id.*

In Part II of this opinion, we address whether the Rule exceeds EPA's authority to order upwind States to reduce "amounts which will ... contribute significantly to nonattainment" in downwind States. In Part III, we address whether the statute permits EPA to issue FIPs without giving the States an initial opportunity to implement the required reductions through SIPs or SIP revisions. In Part IV, we consider the remedy.

II

In this Part, we analyze petitioners' argument that EPA exceeded its statutory authority under the "good neighbor" provision. Under the statute, EPA is limited to ordering upwind States to reduce "amounts which will ... contribute significantly to nonattainment" in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i).

A

The Transport Rule defines States' obligations under Section 110(a)(2)(D)(i)(I) of the Clean Air Act, a provision sometimes described as the "good neighbor" provision. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I); *Michigan v. EPA,* 213 F.3d 663, 671 (D.C.Cir.2000). The good neighbor provision requires that a State Implementation Plan, or SIP:

(D) contain adequate provisions—

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

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

42 U.S.C. § 7410(a)(2)(D). The good neighbor provision recognizes that not all air pollution is locally generated: Some ambient air pollution "is caused or augmented by emissions from other states. Emissions from 'upwind' regions may pollute 'downwind' regions." *Appalachian Power Co. v. EPA,* 249 F.3d 1032, 1037 (D.C.Cir.2001).

Although the statute grants EPA significant discretion to implement the good neighbor provision, the statute's text and this Court's decisions in *Michigan* and *North Carolina* establish several red lines that cabin EPA's authority. Those red lines are central to our resolution of this case.

***20** ****396** *First,* and most obviously, the text of Section 110(a)(2)(D)(i)(I) tells us that the "amounts which will ... contribute" to a downwind State's nonattainment are at most those amounts that travel beyond an upwind State's borders and end up in a downwind State's nonattainment area. [12] The statute is not a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State's actual contribution to downwind air quality.

12 At oral argument, EPA's counsel refused to concede this point.

[3] Moreover, the statutory text and this Court's decision in *North Carolina v. EPA* demonstrate that EPA may not force a State to eliminate more than its own "*significant* " contribution to a downwind State's nonattainment area—that is, to "exceed the mark," as we put it in *North Carolina.* 531 F.3d 896, 921 (D.C.Cir.2008). Thus, once EPA reasonably designates some level of contribution as "insignificant" under the statute, it may not force any upwind State to reduce more than its own contribution to that downwind State minus the insignificant amount. [13]

13 For example, suppose that EPA determined that any upwind State whose contribution to a downwind State was less than 3 units did not "contribute significantly to nonattainment." That would mean EPA had established 3 units as the significance floor. Other upwind contributors to that downwind State could not be required to reduce their downwind contributions below that floor. So an upwind State whose contribution to that downwind State is 30 units could be required to reduce its contribution by *at most* 27 units.

Of course, that is not the *only* constraint on EPA's authority to force the State to reduce its emissions. The other legal constraints described in this Part can further lower a State's maximum obligation.

[4] *Second,* under the terms of the statute and as we explained in *North Carolina,* the portion of an upwind State's contribution to a downwind State that "contribute[s] significantly" to that downwind State's "nonattainment" necessarily depends on the relative contributions of that upwind State, of other upwind State contributors, and of the downwind State itself. Each upwind State may be required to eliminate only its own "amounts which will ... contribute significantly" to a downwind State's "nonattainment." As explained in *North Carolina,* EPA may not require any upwind State to "share the burden of reducing other upwind states' emissions." *Id.* In other words, the statutory text—which refers to "amounts" which will "contribute significantly" to a downwind State's "nonattainment"—contains not just an absolute component (meaning that an upwind State's insignificant amounts are not covered) but also a relative component (meaning that each State's relative contribution to the downwind State's nonattainment must be considered).

Moreover, the end goal of the statute is attainment in the downwind State. EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment.

Therefore, if the downwind State would attain the NAAQS but for upwind States' contributions—that is, if the entire above-NAAQS amount is attributable to upwind States' emissions—then the upwind States' *combined* share is the entire amount by which the downwind State exceeded the NAAQS. And as we said in *North Carolina,* when EPA allocates that burden *among* the upwind States, EPA may not force any upwind State to "share the burden of reducing other upwind states' emissions." *Id.* Each upwind State must bear its own fair share. Therefore, the "significance" of each upwind State's contribution ****397 *21** cannot be measured in a vacuum, divorced from the impact of the other upwind States. Rather, the collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment. Otherwise, EPA would violate the statute and our decision in *North Carolina.* [14]

14 Before Congress adopted the current text in the Clean Air Act Amendments of 1990, the statutory text targeted amounts from an upwind State that would "*prevent* attainment" in a downwind State. 42 U.S.C. § 7410(a)(2)(E) (1988) (emphasis added); *cf.* Pub. L. No. 101–549, § 101(b), 104 Stat. 2399, 2404 (1990). Under the "prevent attainment" standard, none of the three upwind States in that hypothetical would by itself be a but-for cause of the downwind State's nonattainment. By moving from "prevent attainment" to "contribute significantly to nonattainment," the 1990 Amendments dropped the requirement that an individual upwind State's emissions *on their own* prevent downwind attainment or maintenance. *See* S. REP. NO. 101–228, at 21 (1989), 1990 U.S.C.C.A.N. 3385, 3407 ("Since it may be impossible to say that any single source or group of sources is the one which actually prevents attainment, the bill changes 'prevent attainment or maintenance' to 'contribute significantly to nonattainment or interfere with maintenance by,' thus clarifying when a violation occurs."). Instead, it now suffices if EPA identifies upwind emissions that, *together with emissions from other upwind contributors,* push a given downwind maintenance area above the NAAQS.

A specific example helps illustrate that point. Suppose the NAAQS is 100 units, but the downwind State's nonattainment area contains 150 units. Suppose further that the downwind State contributes 90 units, and three upwind States contribute 20 units each. Because the upwind States are responsible for the downwind State's exceeding the NAAQS by 50 units, the downwind State is entitled to at most 50 units of relief from the upwind States so that the downwind State can achieve attainment of the NAAQS. Distributing those obligations in a manner proportional to their contributions, each of the three upwind States' significant contribution would be, at most, 16 # units. Or suppose instead that the three upwind States contribute 10, 20, and 30 units respectively. Distributing those obligations in a manner proportional to their contributions, those three States' significant contributions would be at most 8 #, 16 #, and 25 units, respectively, leading to the combined reduction of 50 units needed for the downwind State to reach attainment. [15]

15 If the downwind State's contribution alone would push it above the NAAQS, then the entire above-NAAQS amount cannot be attributed only to upwind States. The downwind State is responsible for its own share of the above-NAAQS amount. In that scenario, upwind States that contribute to the downwind State are collectively on the hook for that share of the above-NAAQS amount that is attributable to upwind States' contributions. And, again, that collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State. Otherwise, one upwind State would be forced to "share the burden of reducing other upwind states' emissions," in violation of the statute. *North Carolina,* 531 F.3d at 921.

An example helps illustrate that point. Suppose the NAAQS is 100 units, and the downwind State's air contains 180 units. The downwind State contributes 120 units, and three upwind States contribute 20 units each. The downwind State is 80 units over the NAAQS—but 20 units of that is its own responsibility. The upwind States must therefore provide at most 60 units of relief. Distributing those obligations proportionally, each of the three upwind States' significant contribution would be, at most, 20 units.

In addition, our decisions in *Michigan* and *North Carolina* establish that EPA may consider cost, but only to further lower an individual State's obligations. See *Michigan,* 213 F.3d at 675; *North Carolina,* 531 F.3d at 918. Under *Michigan,* moreover, EPA may do so in a way ****398 *22** that benefits some upwind States more than others. *See* 213 F.3d at 679. In other words, in order to prevent exorbitant costs from being imposed on certain upwind States, EPA may lower the obligations imposed on those States.

Third, to conform to the text of the statute, EPA must also ensure that the combined obligations of the various upwind States, as aggregated, do not produce more than necessary "over-control" in the downwind States—that is, that the obligations do not go beyond what is necessary for the downwind States to achieve the NAAQS.

Even when EPA carefully conforms to the above limits on its authority, the possibility of over-control in downwind States still arises because multiple upwind States may affect a single downwind State and, conversely, a single upwind State may affect multiple downwind States. The requirement to prevent such over-control comes directly from the text of the statute: The good neighbor provision of the statute targets those emissions from upwind States that "contribute significantly *to nonattainment* " of the NAAQS. EPA may require only those reductions that are necessary for downwind States to attain the NAAQS. The good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS. Therefore, if modeling shows that a given slate of upwind reductions would yield more downwind air quality benefits than necessary for downwind areas to attain the NAAQS, EPA must attempt to ratchet back the upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States. [16]

16 For example, suppose that under the proportional approach explained above, State A would have to cut 5,000 tons of NO_x to achieve its largest downwind obligation, while State B would have to cut 2,000 tons to achieve its largest downwind obligation. If EPA modeling showed that all downwind nonattainment would be resolved if those two upwind States' combined reduction obligations were, say, 10% lower, EPA would have to ratchet back the upwind States' reduction obligations by a total of 10%. That would ensure that upwind States were only forced to prohibit those emissions that "contribute significantly to nonattainment."

To be sure, as even petitioners acknowledge, there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions enough to meet the NAAQS in other downwind States. *See* Industry & Labor Reply Br. 11 n.2. For those reasons, EPA must have some discretion about how to reasonably avoid such over-control. Moreover, because multiple upwind States may affect a single downwind State, and because a single upwind State may affect multiple downwind States, it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States. Our cases recognize as much. *See Michigan,* 213 F.3d at 679; *North Carolina,* 531 F.3d at 908. But the point remains: EPA must avoid using the good neighbor provision in a manner that would result in unnecessary over-control in the downwind States. Otherwise, EPA would be exceeding its statutory authority, which is expressly tied to achieving attainment in the downwind States.

B

[5] **[6]** We now apply those principles to the EPA Transport Rule. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ.* ****399 *23** *Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); *see also Michigan v. EPA,* 268 F.3d 1075, 1081 (D.C.Cir.2001) ("EPA is a federal agency—a creature of statute," and may exercise "only those authorities conferred upon it by Congress."). An agency may not exceed a statute's authorization or violate a statute's limits. If a statute is ambiguous, an agency that administers the statute may choose a reasonable interpretation of that ambiguity—but the agency's interpretation must still stay within the boundaries of the statutory text. *See Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). [17]

17 We set aside EPA's action here if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The standard we apply "is the same" under the judicial review provision of the Clean Air Act, 42 U.S.C. § 7607(d)(9), as under the Administrative Procedure Act, 5 U.S.C. § 706(2). *Motor Vehicle Manufacturers Ass'n v. EPA,* 768 F.2d 385, 389 n. 6 (D.C.Cir.1985).

In the Transport Rule, EPA used a two-stage approach to define "amounts which will ... contribute significantly" to downwind attainment problems. The first stage identified those upwind States that were "significant contributors" to downwind attainment problems. EPA determined that a State's contribution to a downwind nonattainment or maintenance area was significant if it

exceeded a numerical "air quality threshold" of 0.8 ppb for ozone, 0.15 $\mu g/m^3$ for annual $PM_{2.5}$, and 0.35 $\mu g/m^3$ for 24–hour $PM_{2.5}$. Transport Rule, 76 Fed. Reg. 48,208, 48,236 (Aug. 8, 2011). States "whose contributions are below these thresholds," EPA found, "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* Those upwind States were off the hook altogether.

But an upwind State that exceeded the significance threshold at even one downwind State's receptor was drawn wholesale into the Rule's second stage—cost-based emissions reductions. At that second stage, EPA abandoned the previous measure of significance—the numerical air quality thresholds, which were based on the quantity of pollution an upwind State sent to a downwind area. Instead, EPA switched over to relying on cost of reduction alone. EPA required each State's power plants to cut all of the emissions they could eliminate at a given cost per ton of pollution reduced—regardless of the "amounts" of the State's emissions EPA deemed to "contribute significantly" at stage one and regardless of the relative contributions of the other upwind States and the downwind State.

[7] We perceive at least three independent but intertwined legal flaws in EPA's approach to the good neighbor provision. Those flaws correspond to the three requirements we outlined above that come from the statutory text.

First, and most fundamentally, the Transport Rule is flawed because the requirement that EPA imposed on upwind States was not based on the "amounts" from upwind States that "contribute significantly to nonattainment" in downwind States, as required by the statute and our decision in *North Carolina.*

Petitioners claim that the initial stage of EPA's analysis—the numerical air quality thresholds, which used a bright-line test for whether a State's downwind emissions "contribute significantly"—created a " 'floor' below which any contribution is, by definition, viewed as insignificant." Industry & Labor Br. 20. Petitioners argue that EPA has no statutory authority to compel States to reduce amounts of pollution ****400** ***24** that are "insignificant." Therefore, petitioners contend that EPA could not ignore that floor at the later stage, when it calculated each State's "significant contribution" based on cost. [18]

18 The dissent contends that this point was not preserved for judicial review and that the agency was not aware of this issue during the agency proceedings. *See* 42 U.S.C. § 7607(d)(7)(B). For several reasons, we are convinced EPA had more than "adequate notification of the general substance" of petitioners' argument. *NRDC v. EPA,* 571 F.3d 1245, 1259 (D.C.Cir.2009) (quoting *South Coast Air Quality Mgmt. Dist. v. EPA,* 472 F.3d 882, 891 (D.C.Cir.2006)). Indeed, one of the central questions in the long history of EPA's efforts to implement the good neighbor provision has been whether EPA has complied with the basic statutory limits on its authority. So it is here.

First, the Transport Rule proceeding arose out of this Court's decision in *North Carolina,* on which petitioners' argument relies. *See* Transport Rule, 76 Fed. Reg. at 48,211 ("EPA is promulgating the Transport Rule in response to the remand of the Clean Air Interstate Rule (CAIR) by the U.S. Court of Appeals for the District of Columbia Circuit"). In *North Carolina v. EPA,* this Court explained the applicable statutory limitations and instructed EPA on remand to craft a new rule "consistent with our opinion." 550 F.3d 1176, 1177 (D.C.Cir.2008) (on rehearing). Instructing EPA to proceed in a manner "consistent with" *North Carolina* presupposes that EPA is *aware* of the Court's opinion. And the opinion made clear that once EPA defines each upwind State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at 921. In sum, EPA knew from the beginning that it was required to comply with *North Carolina,* including that part of the Court's holding on which petitioners rely here.

Second, EPA considered—and rejected—precisely the same argument in CAIR. EPA first acknowledged the comment: "Some commenters stated, more broadly, that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." CAIR, 70 Fed. Reg. 25,162, 25,176–77 (May 12, 2005). It then dismissed that argument: "Most important for present purposes, as long as the controls yield downwind benefits needed to reduce the extent of nonattainment, the controls should not be lessened simply because they may have the effect of reducing the upwind State's contribution to below the initial threshold." *Id.* at 25,177. EPA's rejection of the same argument in a prior rulemaking—indeed, in a prior rulemaking that is the direct progenitor of the current one—is highly relevant to whether the argument is preserved here. *See, e.g., American Petroleum Institute v. EPA,* 52 F.3d 1113, 1120 n. 1 (D.C.Cir.1995); *NRDC v. EPA,* 824 F.2d 1146, 1151 (D.C.Cir.1987) (en banc);

see also Appalachian Power Co. v. EPA, 135 F.3d 791, 818 (D.C.Cir.1998) ("The purpose of the exhaustion requirement is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule."). EPA's prior rejection of the same argument in CAIR, together with this Court's opinion in *North Carolina,* show that EPA "had notice of this issue and could, or should have, taken it into account." *NRDC,* 824 F.2d at 1151.

Third, EPA's statements at the proposal stage indicated EPA was not open to reconsidering CAIR's earlier rejection of petitioners' argument. *See* Proposed Transport Rule, 75 Fed. Reg. 45,210, 45,299 (Aug. 2, 2010) ("EPA evaluated a number of alternative approaches to defining significant contribution and interference with maintenance in addition to the approach proposed in this rule. Stakeholders suggested a variety of ideas. EPA considered all suggested approaches.... EPA is not proposing any of the alternative approaches listed here."). By that point, EPA had already dismissed the two air quality-only approaches it considered and had indicated its firm commitment to the cost-based approach. *See* EPA, Alternative Significant Contribution Approaches Evaluated Technical Support Document 7 (July 2010) (EPA, Significant Contribution TSD), J.A. 2312 (uniform cost-per-ton approach "has been successfully implemented before, with excellent environmental results"); *see also id.* at 3–7, J.A. 2308–12. In light of the indications that EPA was aware of their objection but had no intention to revisit its approach (and indeed had already rejected the objection), the specificity of commenters such as Wisconsin and Tennessee was "reasonable" under the circumstances. 42 U.S.C. § 7607(d)(7)(B); *see, e.g.,* Wisconsin Cmt., J.A. 1293 ("EPA needs to primarily depend on air quality results instead of control costs in defining" significant contributions); Tennessee Cmt., J.A. 556 ("A lower cost threshold should be considered for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values ($2,000/ton for SO_2 and $500/ton for NO_x), if applicable.... We would like to see a summary for each State and pollutant that indicates, independently of cost, the amounts necessary to eliminate the significant contribution and interference with maintenance from upwind States."); Delaware Cmt., J.A. 1756 (challenging EPA's decision to depart from the air quality thresholds used for inclusion and to quantify States' significant contributions based on cost considerations, not air quality); *see also Appalachian Power,* 135 F.3d at 817 ("the word 'reasonable' cannot be read out of the statute in favor of a hair-splitting approach"); *id.* at 818 (an objection need not be "phrased in exactly the same way in each forum"); *South Coast,* 472 F.3d at 891 (petitioners have "some leeway in developing their argument" on review).

In sum, we are confident here that EPA had more than "adequate notification of the general substance of the complaint." *South Coast,* 472 F.3d at 891. EPA was plainly on notice that its disregard of the significance floor was a potential legal infirmity in its approach.

***25** ****401** We agree with petitioners. The Transport Rule includes or excludes an upwind State based on the amount of that upwind State's significant contribution to a nonattainment area in a downwind State. That much is fine. But under the Rule, a State then may be required to reduce its emissions by an amount greater than the "significant contribution" that brought it into the program in the first place. That much is not fine.

Put more plainly, EPA determined that a State was subject to the good neighbor provision if it contributed at least a certain threshold amount to air pollution in a downwind State. But EPA then imposed restrictions based on region-wide air quality modeling projections; those restrictions could require upwind States to reduce emissions by more than the amount of that contribution.

EPA's approach poses a fundamental legal problem—one that derives from the text of the statute and from our precedents. Our decision in *Michigan* held that EPA may use cost considerations to require "termination of only a subset of each state's contribution." 213 F.3d at 675. And our decision in *North Carolina* made clear that EPA may not use cost to force an upwind State to "exceed the mark." 531 F.3d at 921. [19]

19 The Court in *North Carolina* reached these conclusions in its discussion of EPA's use of power plant fuel mix to distribute NO_x reduction obligations among the CAIR States. *See* 531 F.3d at 904, 918–21. EPA claims that the reasoning of that analysis is not relevant here because it did not relate to "general significant contribution issues," but rather to the manner of calculating each State's emissions budget. EPA Br. 23.

That is a distinction without a difference. The fuel mix analysis increased some States' obligations and reduced others'. EPA's argument overlooks that no step in its analysis—however the step is labeled—may impose burdens on States or private entities unless those burdens are anchored in statutory authority. Under the statute, States are required to prohibit only those "amounts

> which will ... contribute significantly to nonattainment" or "interfere with maintenance." 42 U.S.C. § 7410(a)(2)(D)(i); *see also North Carolina,* 531 F.3d at 919.

By using a numerical threshold at the initial stage—and thereby creating a floor below which "amounts" of downwind pollution were not significant—EPA defined the "mark," to use the term employed in *North Carolina.* EPA could not then ignore that mark and redefine each State's "significant contribution" in such a way that an upwind State's required reductions could be *more* than its own significant ****402 *26** contribution to a downwind State. [20]

20 This particular issue was not presented in *Michigan.* In the 1998 NO_x Rule, EPA balanced various air quality factors using a "weight-of-evidence approach." 63 Fed. Reg. 57,356, 57,381 (Oct. 27, 1998). Unlike the Transport Rule, the 1998 NO_x Rule did not employ a numerical threshold, nor any other "bright line criterion," to screen out States at the first stage. *Id.* at 57,383.

EPA now claims that the Rule's air quality thresholds were established for a "limited analytical purpose" and "otherwise say nothing about what part of each State's contribution should be considered 'significant.' " EPA Br. 33. That claim rings hollow. EPA itself said in the final rule that "states whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." Transport Rule, 76 Fed. Reg. at 48,236. EPA therefore acknowledged that amounts below the threshold are not "amounts which will ... contribute significantly" to downwind attainment problems. [21]

21 EPA cannot avoid *North Carolina* by declining to quantify the "amount" of each State's downwind contribution, "beginning its analysis with cost," 531 F.3d at 918, and simply designating the output of that cost-based analysis each State's "significant contribution." The statutory term "amounts which will ... contribute significantly" is not so elastic. *See id.* at 920 ("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."). As explained above, "amounts which will ... contribute" logically cannot exceed the amount of a pollutant that leaves a State's borders and reaches a nonattainment area. And insignificant amounts must be excluded. Moreover, the "significance" of an upwind State's emissions for a downwind area's attainment problem cannot be divorced from the relative impact of other States' contributions to that problem.

In short, EPA used the air quality thresholds to establish a floor below which "amounts" of air pollution do not "contribute significantly." [22] The statute requires a State to prohibit at most those "amounts" which will "contribute significantly"—and no more. If amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more. The Transport Rule does not adhere to that basic requirement of the statutory text and our precedents. [23]

22 EPA protests that it used the numerical thresholds only to determine "which upwind State contributions to downwind problems are so small as to warrant exclusion." EPA Br. 31. But that must mean those "amounts" that are "so small as to warrant exclusion" are not "significant." (It would be illogical to carve out a de minimis exception for emissions that are statutorily "significant.")

23 EPA seems reluctant to acknowledge any textual limits on its authority under the good neighbor provision. At oral argument, EPA suggested that "reasonableness" is the only limit on its authority to use cost-effectiveness to force down States' emissions. Tr. of Oral Arg. at 44–45. EPA would not rule out the possibility that under the good neighbor provision, it could require a State to reduce *more than the State's total emissions that go out of State. See id.* at 43–45. But such a claim of authority does not square with the statutory text—"amounts" of pollution obviously cannot "contribute" to a downwind State's pollution problem if they don't even reach the downwind State.

Second, EPA's Transport Rule also runs afoul of the statute's proportionality requirement as described in our decision in *North Carolina:* EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions." 531 F.3d at 921; *see* Industry & Labor Br. 33 (in imposing SO_2 budgets, EPA "did not even consider the *relative* contributions of the various States"). EPA's "redistributional instinct may be ****403 *27** laudatory," *North Carolina,* 531 F.3d at 921, but it cannot trump the terms of the statute. Under the statute, each upwind State that contributes to a downwind nonattainment area is responsible for no more than its own "amounts which will ... contribute significantly" to the downwind State's pollution problem. To be sure, under *Michigan,* EPA may rely on cost-effectiveness factors in order to allow some upwind States to do

less than their full fair share. *See* 213 F.3d at 675; *cf.* Petitioning States' Br. 17, *Michigan,* 213 F.3d 663 (No. 98–1497). But when EPA asks one upwind State to eliminate *more* than its statutory fair share, that State is necessarily being forced to clean up another upwind State's share of the mess in the downwind State. Under the statute and *North Carolina,* that is impermissible.

Here, EPA's Transport Rule violated the statute because it made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems.

In the same vein, EPA's Transport Rule failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS. *See* Industry & Labor Br. 24–25. How "significantly" an upwind State contributes to a downwind State's nonattainment also depends in part on how much of the above-NAAQS amount comes from the downwind State itself. As we explained above, EPA therefore must factor in the downwind State's own contribution, alongside those of the various upwind States. But EPA did not do that here.

Third, and relatedly, EPA also failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States. EPA's statutory authority, once again, is limited to attaining the NAAQS in the downwind States. EPA may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS. Here, EPA did not try to take steps to avoid such over-control. [24]

24 At the proposal stage in the proceeding that culminated in the Transport Rule, EPA considered a proportional approach that reflected many of the essential principles described above. *See* EPA, Significant Contribution TSD at 6–7, J.A. 2311–12. Under that approach, the upwind contributors to a given downwind area would collectively have to provide a "defined air quality improvement" to the downwind State, in the amount by which the downwind State exceeded the NAAQS. *Id.* at 6, J.A. 2311. And the upwind States' individual shares of that collective duty would be defined "in direct proportion to their original contribution[s]" to the downwind State. *Id.* EPA ultimately chose not to adopt that approach, however.

In sum, EPA's authority derives from the statute and is limited by the statutory text. [25] EPA's reading of Section 110(a)(2)(D)(i)(I)—a narrow and limited ****404 *28** provision—reaches far beyond what the text will bear.

25 The statute also requires upwind States to prohibit emissions that will "interfere with maintenance" of the NAAQS in a downwind State. "Amounts" of air pollution cannot be said to "interfere with maintenance" unless they leave the upwind State and reach a downwind State's maintenance area. To require a State to reduce "amounts" of emissions pursuant to the "interfere with maintenance" prong, EPA must show some basis in evidence for believing that those "amounts" from an upwind State, together with amounts from other upwind contributors, will reach a specific maintenance area in a downwind State and push that maintenance area back over the NAAQS in the near future. Put simply, the "interfere with maintenance" prong of the statute is not an open-ended invitation for EPA to impose reductions on upwind States. Rather, it is a carefully calibrated and commonsense supplement to the "contribute significantly" requirement.

Although the statutory text alone prohibits EPA's Rule, the statutory context provides additional support for our conclusion. The Supreme Court, in analyzing Section 109 of the Clean Air Act, rejected the premise that Congress would "alter the fundamental details of a regulatory scheme" in "ancillary provisions"—in other words, that Congress would "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). The good neighbor provision is one of more than 20 SIP requirements in Section 110(a)(2). It seems inconceivable that Congress buried in Section 110(a)(2)(D)(i)(I)—the good neighbor provision—an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems "cost-effective." Such a reading would transform the narrow good neighbor provision into a "broad and unusual authority" that would overtake other core provisions of the Act. *Gonzales v. Oregon,* 546 U.S. 243, 267, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). We "are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

* * *

States are obligated to prohibit only those "amounts" of pollution "which will ... contribute significantly" to downwind attainment problems—and no more. Because the Transport Rule exceeds those limits, and indeed does not really try to meet those requirements, it cannot stand.

III

There is a second, entirely independent problem with the Transport Rule. EPA did not stop at simply quantifying each upwind State's good neighbor obligations. Instead, in an unprecedented application of the good neighbor provision, EPA also simultaneously issued Federal Implementation Plans, or FIPs, to implement those obligations on sources in the States. EPA did so without giving the States an initial opportunity to implement the obligations themselves through their State Implementation Plans, or SIPs.

The Clean Air Act ordinarily gives States the initial opportunity to implement a new air quality standard on sources within their borders; States do so by submitting SIPs. *See* 42 U.S.C. §§ 7407(a), 7410(a)(1). Here, by preemptively issuing FIPs, EPA denied the States that first opportunity to implement the reductions required under their good neighbor obligations. EPA justifies its "FIP-first" approach by pointing to its earlier findings that the States had failed to meet their good neighbor obligations. But those findings came *before* the Transport Rule quantified the States' good neighbor obligations. EPA's approach punishes the States for failing to meet a standard that EPA had not yet announced and the States did not yet know.

Under the Act, EPA has authority to set standards, but the statute reserves the first-implementer role for the States. That division of labor applies not just to the NAAQS but also to the good neighbor provision, Section 110(a)(2)(D)(i)(I), as EPA itself has recognized several times in the past. When EPA defines States' good neighbor obligations, it must give the States the first opportunity to implement the new requirements.

****405 *29 A**

[8] "Under the Clean Air Act, both the Federal Government and the States exercise responsibility for maintaining and improving air quality." *American Trucking Ass'ns v. EPA,* 600 F.3d 624, 625 (D.C.Cir.2010). The Act sets forth a basic division of labor: The Federal Government establishes air quality standards, but States have primary responsibility for attaining those standards within their borders. *See Train v. NRDC,* 421 U.S. 60, 63–67, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *American Trucking,* 600 F.3d at 625–26; *Virginia v. EPA,* 108 F.3d 1397, 1406–10 (D.C.Cir.1997); *see also* 42 U.S.C. § 7401(a) ("The Congress finds ... that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments...."); 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State...."). [26]

26 The 1970 Amendments, which "sharply increased federal authority" in *setting* air quality standards, at the same time "explicitly preserved the principle" of State primacy in *implementing* pollution controls. *Train,* 421 U.S. at 64, 95 S.Ct. 1470. The 1990 Amendments, which enacted the current text of Section 110(a)(2)(D)(i)(I), "did not alter the division of responsibilities between EPA and the states in the section 110 process." *Virginia,* 108 F.3d at 1410.

[9] That statutory division of authority is strict. This Court has described the *Train–Virginia* line of cases as erecting a statutory "federalism bar" under Section 110 of the Act. *See Appalachian Power Co. v. EPA,* 249 F.3d 1032, 1046 (D.C.Cir.2001) (citing *Train,* 421 U.S. 60, 95 S.Ct. 1470; *Virginia,* 108 F.3d 1397); *Michigan v. EPA,* 213 F.3d 663, 687 (D.C.Cir.2000). That statutory federalism bar prohibits EPA from using the SIP process to force States to adopt specific control measures. *See Michigan,* 213 F.3d at 687; *Virginia,* 108 F.3d at 1410.

In *Train,* the Supreme Court invoked that statutory division of labor in holding that the Clean Air Act gives EPA "no authority to question the wisdom of a State's choices of emission limitations," so long as the State's SIP submission would result in "compliance with the national standards for ambient air." 421 U.S. at 79, 95 S.Ct. 1470. The Court stated:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, *it is relegated by the Act to a secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.

Id. (emphasis added); *see also Union Electric Co. v. EPA,* 427 U.S. 246, 256, 269, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976) (EPA may not reject a SIP on grounds of technical or economic infeasibility; that "would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

Similarly, in *Virginia,* this Court held that EPA had no authority under Section 110 to condition its approval of northeastern States' SIPs on the States' adoption of California's vehicle emission control measures. *See* 108 F.3d at 1401–10. The ****406 *30** Court relied on the basic principle that the States, not EPA, are the primary implementers under Section 110. *See id.* at 1410 ("section 110 does not enable EPA to force particular control measures on the states").

In sum, Title I of the Act establishes a "partnership between EPA and the states." *NRDC v. Browner,* 57 F.3d 1122, 1123 (D.C.Cir.1995). The terms of that partnership are clear: EPA sets the standards, but the States "bear primary responsibility for attaining, maintaining, and enforcing these standards." *American Lung Ass'n v. EPA,* 134 F.3d 388, 389 (D.C.Cir.1998).

B

With that basic structure in mind, we consider the question presented here: whether EPA may use its rulemaking authority to quantify States' obligations under Section 110(a)(2)(D)(i)(I) and *simultaneously* issue Federal Implementation Plans, without giving the States a first opportunity to comply.

We begin by briefly describing the set of statutory provisions on which EPA relies here.

EPA is the first mover in regulating ambient air pollution in Title I of the Clean Air Act. Section 109 requires EPA to promulgate NAAQS for common air pollutants. *See Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 462, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (citing 42 U.S.C. § 7409(a)). But once EPA sets a NAAQS, "responsibility under the Act shifts from the federal government to the states." *Lead Industries Ass'n v. EPA,* 647 F.2d 1130, 1137 (D.C.Cir.1980).

Section 110 governs State Implementation Plans. Section 110(a)(1) requires States to submit SIPs to implement each new or revised NAAQS. *See* 42 U.S.C. § 7410(a)(1). Section 110(a)(2) lists many elements that a SIP must contain in order to ensure that the Plan will be comprehensive enough to enable the State to attain the NAAQS. *See* 42 U.S.C. § 7410(a)(2).[27] The good neighbor provision, Section 110(a)(2)(D)(i)(I), is one of those required elements.

27 *See, e.g.,* 42 U.S.C. § 7410(a)(2)(A) (SIP shall "include enforceable emission limitations and other control measures," "as well as schedules and timetables for compliance"), 7410(a)(2)(B) (SIP shall provide for means to "monitor, compile, and analyze data on ambient air quality" and provide the data to EPA upon request), 7410(a)(2)(C) (SIP shall "include a program to provide for the enforcement of" the control measures required by subparagraph (A)), 7410(a)(2)(E) (SIP shall provide assurances that State and local authorities "will have adequate personnel, funding, and authority" under State and local law "to carry out such implementation plan"),

7410(a)(2)(F) (SIP shall require "the installation, maintenance, and replacement of equipment" by "stationary sources to monitor emissions from such sources").

[10] Section 110(c)(1) creates a federal backstop if the States fail to submit adequate SIPs. When EPA finds that a State "has failed to make a required submission" or "disapproves a State implementation plan submission in whole or in part" because of a SIP "deficiency," EPA must "promulgate a Federal implementation plan" within two years, "unless the State corrects the deficiency" in the meantime in a manner approved by EPA. 42 U.S.C. § 7410(c)(1). In essence, the issue here is whether a State's implementation of its good neighbor obligation can be considered part of the State's "required submission" in its SIP (or whether the SIP can be deficient for failing to implement the good neighbor obligation) even before EPA quantifies the State's good neighbor obligation. We think not. EPA's quantifying ****407 *31** of A state's good neighbor obligation and setting of A state's emissions budget is what "require[s]" the State to make a "submission" implementing that obligation on sources within the State. After EPA has set the relevant emissions budgets for each State, EPA may require States to submit new SIPs under Section 110(a)(1) or to revise their SIPs under Section 110(k)(5). That is the approach EPA has used in the past. In short, once EPA defines or quantifies a State's good neighbor obligation, the State must have a reasonable time to implement that requirement with respect to sources within the State. [28]

28 Section 110(k)(5), the SIP call provision, authorizes EPA to "establish reasonable deadlines" not to exceed 18 months for SIP revisions, once notice is given. 42 U.S.C. § 7410(k)(5); *cf.* 1998 NO_x Rule, 63 Fed. Reg. at 57,451 (12–month deadline).

In short, the triggers for a FIP are EPA's finding that the SIP fails to contain a "required submission" or EPA's disapproving a SIP because of a "deficiency." But logically, a SIP cannot be deemed to lack a required submission or be deemed deficient for failing to implement the good neighbor obligation until after EPA has defined the State's good neighbor obligation. Once it defines the obligation, then States may be forced to revise SIPs under Section 110(k)(5) or to submit new SIPs under Section 110(a)(1). Only if that revised or new SIP is properly deemed to lack a required submission or is properly deemed deficient may EPA resort to a FIP for the State's good neighbor obligation.

C

1

In light of Section 110(c)(1), EPA here made "a finding of failure to submit and/or disapproved a SIP submission" for each State with respect to each NAAQS for which that State would be covered. EPA Br. 44 (citing 42 U.S.C. § 7410(c)(1)); *see also* EPA, Status of CAA 110(a)(2)(D)(i)(I) SIPs Final Rule Technical Support Document (July 2011) (EPA, SIPs TSD), J.A. 3167. [29] On the basis of those findings, EPA asserted authority to issue the Transport Rule FIPs.

29 EPA was cognizant of another potential obstacle: its own past approval of CAIR SIPs. CAIR covered the 1997 ozone and annual $PM_{2.5}$ NAAQS, two of the three NAAQS at issue here. *See* 70 Fed. Reg. 25,162, 25,165 (May 12, 2005). Many covered States had submitted and received EPA approval of CAIR SIPs. *See* EPA, SIPs TSD, J.A. 3167. EPA apparently was concerned that those approved CAIR SIPs might deprive EPA of authority under Section 110(c)(1) to issue Transport Rule FIPs for those two NAAQS.

EPA tried to address this in the final rule. It claimed that because *North Carolina* invalidated CAIR, approved CAIR SIPs no longer fulfilled States' Section 110(a)(2)(D)(i)(I) obligations. *See* Transport Rule, 76 Fed. Reg. 48,208, 48,219 (Aug. 8, 2011). It bears noting, however, that EPA continued to approve CAIR SIPs after *North Carolina. See, e.g.,* 74 Fed. Reg. 65,446 (Dec. 10, 2009). But to try to make sure, in the final Transport Rule EPA retrospectively "corrected" its past approvals of CAIR SIPs, to clarify its view that an approved CAIR SIP did not shield a State from the Transport Rule FIPs. *See* 76 Fed. Reg. at 48,219; *see also* 42 U.S.C. § 7410(k)(6) (EPA may "revise" any approval the Administrator determines "was in error"). EPA made those "corrections" without using notice and comment rulemaking, despite the statutory requirement that EPA make any corrections "in the same manner as the approval." 42 U.S.C. § 7410(k)(6).

Because the Transport Rule must be vacated in any event, we need not address here whether EPA's "corrections" of CAIR SIP approvals exceeded its authority under Section 110(k)(6).

But EPA's many SIP disapprovals and findings of failure to submit share one problematic feature: EPA made all of **408 *32 those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision. *See* EPA, SIPs TSD, J.A. 3167.

EPA sees no problem with that. In EPA's view, there is no difference between a State's obligation to comply with the NAAQS and a State's good neighbor obligation: States must submit SIPs addressing both within three years of a NAAQS, or face FIPs.

But there is a difference—a glaring one—between the two obligations. A NAAQS is a clear numerical target. For example, the NAAQS for annual $PM_{2.5}$ is 15 $\mu g/m^3$. Every State knows precisely what numerical goal its SIP must achieve. If a State misses that clear numerical target, it has only itself to blame.

By contrast, the good neighbor obligation is not a clear numerical target—far from it—until EPA defines the target. Even after EPA sets a NAAQS, an upwind State's good neighbor obligation for that pollutant is nebulous and unknown. The statutory standard is "amounts" of pollution which will "contribute significantly to nonattainment" or "interfere with maintenance" of the new NAAQS in a downwind State. There is no way for an upwind State to know its obligation without knowing levels of air pollution in downwind States and then apportioning its responsibility for each downwind State's nonattainment. Therefore, the upwind State's obligation remains impossible for the upwind State to determine *until EPA defines it.*[30] Without further definition by EPA, a prohibition on "amounts which will ... contribute significantly" is like a road sign that tells drivers to drive "carefully." The regulated entities—here, the upwind States—need more precise guidance to know how to conform their conduct to the law. A SIP logically cannot be deemed to lack a "required submission" or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.

30 As EPA itself has recognized in the past: "The precise nature and contents of such a submission is [sic] not stipulated in the statute. EPA believes that the contents of the SIP submission required by section 110(a)(2)(D)(i) may vary depending upon the facts and circumstances related to the specific NAAQS." EPA, Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards 3 (Aug. 15, 2006) (EPA, 2006 Guidance).

EPA faults the States for not hitting that impossible-to-know target with their SIP submissions. In effect, EPA's view is that the only chance States have to hit the target is *before* EPA defines the target. By the time EPA makes the target clear, it's already too late for the States to comply.

Interestingly, outside of this litigation, EPA has itself recently and repeatedly recognized that it makes no sense for States to act until EPA defines the target. Just a few weeks ago, for example, in a separate proceeding EPA said that while some elements of a SIP submission are "relatively straightforward," "others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." 77 Fed. Reg. 46,361, 46,363 (Aug. 3, 2012). "For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant **409 *33 contribution." *Id.* at n.7. Thus, EPA has said that the good neighbor provision "clearly require[s] interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." *Id.; see also, e.g.,* 77 Fed. Reg. 45,320, 45,323 & n.7 (July 31, 2012) (same); 77 Fed. Reg. 43,196, 43,199 & n.7 (July 24, 2012) (same); 77 Fed. Reg. 22,533, 22,536 & n.7 (Apr. 16, 2012) (same); 76 Fed. Reg. 40,248, 40,250 & n.5 (July 8, 2011) (same).

In this litigation, however, EPA insists that the text of Section 110(c)(1) compels its FIP-first approach. But EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines the target *after* the States' chance to comply with the target has already passed. *Cf. FCC v. Fox Television Stations, Inc.*, —— U.S. ——, 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *id.* ("regulated parties should know what is required of them so they may act

accordingly"); *Christopher v. SmithKline Beecham Corp.*, —— U.S. ——, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance....").

[11] We take a different view. Statutory text "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea–Land Services, Inc.*, ——U.S. ——, 132 S.Ct. 1350, 1357, 182 L.Ed.2d 341 (2012) (quoting *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

Title I's core two-step process is that the Federal Government sets end goals and the States choose the means to attain those goals. *See Michigan,* 213 F.3d at 687; *see also Virginia,* 108 F.3d at 1410. EPA's theory—that EPA can define the end goals for the good neighbor provision and *simultaneously* issue federal plans to implement them—upends that process and places the Federal Government firmly in the driver's seat at both steps. The FIP-first approach is incompatible with the basic text and structure of the Clean Air Act.

In our view, determining the level of reductions required under Section 110(a)(2)(D)(i)(I) is analogous to setting a NAAQS. And determining the level of reductions under the good neighbor provision triggers a period during which States may submit appropriate SIPs under Section 110(a)(1) or SIP revisions under Section 110(k)(5).

That approach fits comfortably within the statutory text and structure. In both situations—setting a NAAQS and defining States' good neighbor obligations—EPA sets the numerical end goal. And in both cases, once the standards are set, "determining the particular mix of controls among individual sources to attain those standards" remains "a State responsibility." 1998 NO_x Rule, 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998).

2

Other contextual and structural factors also support our conclusion that Section 110(a)(2)(D)(i)(I) preserves the basic principle that States, not the Federal Government, are the primary implementers after EPA has set the upwind States' good neighbor obligations.

***34 **410** Section 110's particular function in the statutory scheme is to give the States the first opportunity to implement the national standards EPA sets under Title I. *See* 42 U.S.C. § 7410(a)-(c); *see also Train,* 421 U.S. at 79, 95 S.Ct. 1470; *Virginia,* 108 F.3d at 1410; *Michigan,* 213 F.3d at 686–87. The good neighbor requirement's placement in Section 110(a)—a provision calling for State-level regulation—strongly suggests that Congress intended *States* to implement the obligations set forth in Section 110(a)(2)(D)(i)(I). By contrast, if EPA's FIP-first interpretation were to prevail, Section 110(a)(2)(D)(i)(I) would not fit well in Section 110(a).

Moreover, Title I contains a separate provision, Section 126, that explicitly contemplates direct EPA regulation of specific sources that generate interstate pollution. *See* 42 U.S.C. § 7426(b)-(c); *see also Appalachian Power,* 249 F.3d at 1046. Section 126(b) permits a State to petition EPA for a finding that a source in a neighboring State emits pollution in violation of Section 110(a)(2)(D)(i).[31] *See* 42 U.S.C. § 7426(b). Section 126(c) gives EPA discretion to impose severe sanctions, including "emission limitations and compliance schedules," on a source for which a finding has been made. 42 U.S.C. § 7426(c); *see also* 42 U.S.C. § 7509. The fact that Congress explicitly authorized EPA to use direct federal regulation to address interstate pollution suggests it did not contemplate direct Federal regulation in Section 110(a)(2)(D)(i)(I). *Cf. Whitman,* 531 U.S. at 467–68, 121 S.Ct. 903; *General Motors Corp. v. United States,* 496 U.S. 530, 541, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990). And as this Court has previously held, that Section 126 imposes "extrinsic legal constraints" on State autonomy "*does not affect a state's discretion under § 110.*" *Appalachian Power,* 249 F.3d at 1047 (emphasis added).

31 Section 126(b)'s text refers to "section 7410(a)(2)(D)(ii)." 42 U.S.C. § 7426(b). This Court has identified the cross-reference to paragraph (ii), instead of paragraph (i), as scrivener's error. *See Appalachian Power,* 249 F.3d at 1040–44.

In sum, the text and context of the statute, and the precedents of the Supreme Court and this Court, establish the States' first-implementer role under Section 110. We decline to adopt a reading of Section 110(a)(2)(D)(i)(I) that would blow a hole in that basic structural principle. [32]

32 We conclude that EPA's interpretation on the FIPs issue is contrary to the text and context of the statute (a *Chevron* step 1 violation), in the alternative is absurd (a *Chevron* step 1 violation), and again in the alternative is unreasonable (thus failing *Chevron* step 2 if we get to step 2).

3

The novelty of EPA's approach underscores its flaws. In the past, EPA has applied the good neighbor provision in the States-first way we have outlined here.

The 1998 NO_x Rule (which we addressed in *Michigan*) quantified each State's good neighbor obligation but then gave the States 12 months to submit SIPs to implement the required reductions. *See* 63 Fed. Reg. at 57,358, 57,450–51; 42 U.S.C. § 7410(k)(5). Indeed, EPA explicitly assured States that the Rule did not intrude on their authority to choose the means to achieve the EPA-defined end goal. *See* 1998 NO_x Rule, 63 Fed. Reg. at 57,369. EPA then explained, persuasively, why it made sense not to deviate from Title I's standard division of labor in the good neighbor context:

> The task of determining the reductions necessary to meet section 1 10(a)(2)(D) involves allocating the use of the downwind States' air basin. This area is a commons in the sense that the ****411 *35** contributing State or States have a greater interest in protecting their local interests than in protecting an area in a downwind State over which they do not have jurisdiction and for which they are not politically accountable. Thus, in general, it is reasonable to assume that *EPA may be in a better position to determine the appropriate goal,* or budget, for the contributing States, *while leaving [it] to the contributing States' discretion to determine the mix of controls* to make the necessary reductions.

Id. at 57,370 (emphases added).

In *Michigan,* this Court held that the 1998 Rule did not transgress the *Train–Virginia* federalism bar. But the terms of the *Michigan* Court's approval highlight how flagrantly the new Transport Rule crosses that line. We said: "EPA does not tell the states how to achieve SIP compliance. Rather, EPA looks to section 110(a)(2)(D) and *merely provides the levels to be achieved by state-determined compliance mechanisms.*" 213 F.3d at 687 (emphasis added). We emphasized that States had a "real choice" how to implement the required reductions. *Id.* at 688.

Like the 1998 NO_x Rule, the 2005 Clean Air Interstate Rule gave States the first crack at implementing the reductions required by EPA. *See* 70 Fed. Reg. 25,162, 25,263 (May 12, 2005) (requiring SIPs within 18 months). When EPA issued CAIR FIPs in April 2006, about a year after it promulgated CAIR, it clarified that it intended the FIPs to serve as a "Federal backstop" to the ongoing SIP process, and did not intend to "take any other steps to implement FIP requirements that could impact a State's ability to regulate their sources in a different manner" until "a year after the CAIR SIP submission deadline." *See* CAIR FIPs, 71 Fed. Reg. 25,328, 25,330 (Apr. 28, 2006). That timetable, EPA assured the States, would allow EPA "to approve timely SIPs *before* implementation of FIP requirements occurs." *Id.* at 25,331 (emphasis added).

In both the 1998 NO_x Rule and the 2005 CAIR, EPA was therefore careful not to infringe the States' first-implementer role. EPA's own past practice and statements illustrate the anomaly of its new FIP-first approach.

D

On a separate tack, EPA does not concede that it denied the States their rightful chance to implement their good neighbor obligations. It contends States *did* have an opportunity to submit SIPs. In EPA's view, once it issued the 2006 24–hour $PM_{2.5}$ NAAQS, States had three years under Section 110(a)(1) to seek and obtain EPA approval of SIPs addressing their good neighbor obligations.

But to reiterate, the problem is that the three-year period expired *before* EPA issued the Transport Rule and defined the good neighbor obligations of upwind States. EPA has an answer for that—one we find extraordinarily unpersuasive. In its view, each State should have come up with (i) its own definition of "amounts which will ... contribute significantly" and (ii) its own modeling and methodology for applying that definition. *See* EPA Br. 48 ("EPA has never stated that its methodology is the only way") (emphasis omitted).

In effect, EPA claims the statute requires each State to take its own stab in the dark at defining "amounts which will ... contribute significantly" to a downwind State's nonattainment. The State would then have to apply that homemade definition using its own homemade methodology. [33]

33 EPA points to guidance documents it issued in 2006 and 2009. Those documents further undermine EPA's contention that the stab in the dark was a realistic opportunity for States to avoid being pulled into the Transport Rule FIPs.

The 2006 document, published after CAIR but before *North Carolina,* did not apply to CAIR States. *See* EPA, 2006 Guidance at 4. It told non-CAIR States that "EPA anticipates, based upon existing information developed in connection with the CAIR, that emissions from sources in States not covered by the CAIR do not contribute significantly to nonattainment or interfere with maintenance of the 8–hour ozone or $PM_{2.5}$ NAAQS in any other State." *Id.* at 5.

The 2009 guidance document concerned the 2006 24–hour $PM_{2.5}$ NAAQS, which was not covered by CAIR. The seven-page document included three paragraphs of vague guidance on "significant contribution" under Section 110(a)(2)(D). *See* EPA, Guidance on SIP Elements Required Under Sections 110(a)(*1*) and (2) for the 2006 24–Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) 3 (Sept. 25, 2009) (EPA, 2009 Guidance) ("The state's conclusion must be supported by an adequate technical analysis. Information to support the state's determination with respect to significant contribution to nonattainment might include, but is not limited to, information concerning emissions in the state, meteorological conditions ..., monitored ambient concentrations ..., the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling."); *cf.* 1998 NO_x Rule, 63 Fed. Reg. at 57,370 (if EPA does not identify the "acceptable level of NO_x reductions, the upwind State would not have guidance as to what is an acceptable submission").

The 2009 document ordered the States, equipped with that vague guidance, to submit SIPs to address Section 110(a)(2)(D)(i)(I) for 24–hour $PM_{2.5}$. But in the same breath, it warned them that EPA itself intended to "complete a rule to address interstate pollution transport in the eastern half of the continental United States." EPA, 2009 Guidance at 3. EPA did not say what would happen if a State's approach did not coincide with the approach EPA was developing for its own rule, but experience tells the tale.

***36** ***412** Of course, once a State takes its stab, EPA could disapprove it—especially if the State defined its own obligation to be less than what EPA deemed it to be. Experience appears to bear that out: Petitioners point out that every Transport Rule State that submitted a good neighbor SIP for the 2006 24–hour $PM_{2.5}$ NAAQS was disapproved. *See* State & Local Br. 29–31; State & Local Reply Br. 5–7.

That should not come as a surprise. In the 1998 NO_x Rule, EPA acknowledged that pre-Rule stabs in the dark were bound to fail. "Without determining an acceptable level of NO_x reductions," EPA warned, "the upwind State would not have guidance as to what is an acceptable submission." 63 Fed. Reg. at 57,370. And States would incur significant costs developing those SIP submissions.

As EPA repeatedly reminds this Court, interstate pollution is a collective problem that requires a comprehensive solution. *See* EPA Br. 5 ("Absent effective federal control, individual States often have little economic or political incentive to self-impose

regulatory controls (and attendant costs) within their States solely to address air quality problems in other States."). And EPA itself has recognized that having each State independently guess at its own good neighbor obligations is not a plausible solution to interstate pollution: "It is most efficient—*indeed necessary*—for the Federal government to establish the overall emissions levels for the various States." 1998 NO_x Rule, 63 Fed. Reg. at 57,370 (emphasis added).

Yet EPA now encourages us to suspend disbelief and conclude that under the statute, a State's only chance to avoid FIPs is to make a successful stab in the dark—a feat that not one Transport Rule State managed to accomplish. EPA clearly does not believe the stab-in-the-dark approach would really permit States to avoid FIPs—its own past statements show that. But EPA's authority to issue these FIPs rests on our accepting its rickety statutory logic.

***37** ****413** We decline the invitation. Our duty is to "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citations and internal quotation marks omitted). EPA's FIP-first approach fails that test.

When EPA quantifies States' good neighbor obligations, it must give the States a reasonable first opportunity to implement those obligations. That approach reads Section 110(a)(2)(D)(i)(I) in harmony with the rest of Section 110. It preserves Title I's Federal–State division of labor—a division repeatedly reinforced by the Supreme Court and this Court. And it accords with the commonsense notion that Congress did not design the good neighbor provision to set the States up to fail. [34]

34 The dissent contends that the States' challenge on this issue comes too late. We disagree. The dissent conflates (i) EPA's prior disapproval of certain States' SIPs and (ii) EPA's decision to quantify the good neighbor obligation and to simultaneously issue FIPs rather than to issue a SIP call for SIP revisions (or to allow new SIPs). Petitioners are challenging only the latter point. And EPA announced its final decision to proceed that way in the Transport Rule itself. Put another way, the statute says that EPA must issue a FIP within two years after a State fails to make a "required submission" or submits a deficient SIP. But a State cannot be "required" to implement its good neighbor obligation in a SIP "submission"—nor be deemed to have submitted a deficient SIP for failure to implement the good neighbor obligation—until it knows the target set by EPA. In this case, EPA set the relevant target in the Transport Rule. Petitioners' challenge to the Transport Rule's FIPs is entirely timely.

IV

[12] The decision whether to vacate a flawed rule "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 that may itself be changed." *Allied–Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C.Cir.1993) (internal quotation marks omitted); *see also Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C.Cir.1997).

[13] Here, we have no doubt that the agency chose incorrectly. The Transport Rule stands on an unsound foundation—including EPA's flawed construction of the statutory term "amounts which will ... contribute significantly to nonattainment." 42 U.S.C. § 7410(a)(2)(D)(i). That deficiency is too fundamental to permit us to "pick and choose portions" of the rule to preserve. *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C.Cir.2008). And as with the Clean Air Interstate Rule, the Transport Rule's "fundamental flaws foreclose EPA from promulgating the same standards on remand." *Id.* (internal quotation marks omitted). EPA's chosen manner of implementing the Rule—issuing FIPs without giving the States a post-Rule opportunity to submit SIPs—also rests on a misreading of the statute.

We therefore vacate the Transport Rule rulemaking action and FIPs, and remand to EPA.

The remaining question is the status of CAIR. In *North Carolina*, this Court initially held that CAIR's "fundamental flaws" required vacatur. 531 F.3d at 929. On rehearing, the Court reconsidered its initial decision and modified its order to remand CAIR without vacatur. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C.Cir.2008). The Court noted that under our precedents, it is appropriate to remand without vacatur "where vacatur would at least temporarily defeat the enhanced ****414** ***38** protection

of the environmental values covered by the EPA rule at issue." *Id.* (internal quotation marks, brackets, and ellipsis omitted). The Court was "convinced that, notwithstanding the relative flaws of CAIR, allowing CAIR to remain in effect until it is replaced by a rule consistent with our opinion would at least temporarily preserve the environmental values covered by CAIR." *Id.*

In accordance with our Order granting the motions to stay the Transport Rule, EPA has continued to administer CAIR. *See* Order, No. 11–1302, at 2 (D.C.Cir. Dec. 30, 2011); *see also* http://www.epa.gov/cair. Vacating CAIR now would have the same consequences that moved the *North Carolina* Court to stay its hand—and indeed might be more severe now, in light of the reliance interests accumulated over the intervening four years. We therefore conclude, as did the Court in *North Carolina,* that the appropriate course is for EPA to continue to administer CAIR pending its development of a valid replacement. [35]

35 The *North Carolina* Court did "not intend to grant an indefinite stay of the effectiveness" of its decision. 550 F.3d at 1178. We likewise expect that EPA will proceed expeditiously on remand.

* * *

We vacate the Transport Rule and the Transport Rule FIPs and remand this proceeding to EPA. EPA must continue administering CAIR pending the promulgation of a valid replacement.

So ordered.

ROGERS, Circuit Judge, dissenting:

To vacate the Transport Rule, the court disregards limits Congress placed on its jurisdiction, the plain text of the Clean Air Act ("CAA"), and this court's settled precedent interpreting the same statutory provisions at issue today. Any one of these obstacles should have given the court pause; none did. The result is an unsettling of the consistent precedent of this court strictly enforcing jurisdictional limits, a redesign of Congress's vision of cooperative federalism between the States and the federal government in implementing the CAA based on the court's own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court's precedent on which the Environmental Protection Agency ("EPA") was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court.

Congress has limited the availability of judicial review of challenges to final rules promulgated by the EPA in two ways that are relevant here. Under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), petitions for judicial review must be filed within sixty days of promulgation of a final rule, and under CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment ... may be raised during judicial review." The court has, until today, strictly enforced these requirements, which exist for two important reasons: to enforce repose so that the rulemaking process is not crippled by surprise challenges to matters that were rightfully presumed settled, and to guarantee an agency's expert consideration and possible correction of any flaws in its rules *before* the matter reaches a court. Instead the court casts aside both jurisdictional provisions, upending these two fundamental principles. In so doing, the court thus fails to "maintain uniformity of the court's decisions" on these "question[s] of exceptional ****415 *39** importance." FED. R.APP. P. 35(a)(1) & (2).

As one basis underlying its vacatur of the Transport Rule, the court permits a collateral attack on prior final rules in which EPA disapproved state implementation plan ("SIP") submissions with respect to the "good neighbor provision," CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), or found States failed to submit such a SIP at all. In those Final SIP Rules, EPA unambiguously stated its interpretation that States had an independent obligation under section 110(a) to submit "good neighbor" SIPs regardless of whether EPA first quantified each State's emission reduction obligations. Under section 307(b)(1), States had sixty days to seek judicial review of those Final SIP Rules to challenge EPA's interpretation of section 110(a). EPA's authority to promulgate the federal implementation plans ("FIPs"), pursuant to section 110(c), in the Transport Rule was *triggered* by EPA having published those Final SIP Rules, and under section 307(b)(1) States may not collaterally attack the propriety of those Final SIP Rules now. This is not a mere technicality—EPA developed and promulgated the Transport Rule with the knowledge that all but three States did not seek judicial review of its interpretation of section 110(a) and in light of this court's

opinion in *North Carolina v. EPA,* 531 F.3d 896 (D.C.Cir.2008). The court therefore lacks jurisdiction under section 307(b)(1) to consider States' belated challenge to EPA's interpretation of section 110(a) as part of its review of the Transport Rule; the petitions challenging the Final SIP Rules filed by three States are not consolidated with the petitions challenging the Transport Rule, as they involve separate provisions of the CAA and different final rules. The court glosses over the plain text and structure of section 110 to avoid that reality, and in the process rewrites sections 110(a) and 110(c), altering the triggering mechanism for States' obligations to submit "good neighbor" SIPs and EPA's obligation to promulgate FIPs, based on its own speculative conclusion that the process Congress adopted is "impossible" for States to follow. To reach its conclusion, the court today holds that the CAA *requires* what it previously held the CAA ambiguously *permits* EPA to do.

As another ground to vacate the Transport Rule, the court concludes that, under EPA's two-step approach to defining "significant contribution" under the "good neighbor" requirement in section 110(a)(2)(D)(i)(I), a State "may be required to reduce its emissions by an amount greater than the 'significant contribution' that brought it into the program in the first place." Op. at 25. No objection was made during the Transport Rule administrative proceedings to EPA's approach, let alone its *statutory authority,* to use different, unrelated measures of significance for inclusion and budget-setting. Acknowledging this, the court reaches beyond the Transport Rule administrative record, despite section 307(d)(7)(B)'s clear command, to find jurisdiction. But the three reasons it offers do not add up. By suggesting that EPA acted inconsistently with *North Carolina* in adopting a two-step approach, with different, unrelated measures of "significant contribution" for inclusion and budget-setting, the court ignores that in *North Carolina* this court expressly declined to disturb that same approach. 531 F.3d at 916–17. In relying on a comment expressing a policy preference made during the administrative proceedings of the predecessor of the Transport Rule (to which petitioners failed to alert the court until *rebuttal* oral argument), the court ignores that the comment does not challenge EPA's statutory authority to pursue ****416 *40** its two-step approach, and the fact that no one petitioned the court in *North Carolina* for judicial review based on that comment, which is why the court in *North Carolina* left that approach undisturbed, *see id.* The court also ignores that the prior rulemaking docket was not incorporated into the Transport Rule administrative proceedings. Together, these "ignored" facts demonstrate that EPA had no reason to suspect any party before it in the Transport Rule administrative proceedings subscribed to the objection stated in the old comment, nor even to locate and consider that comment. Finally, EPA's rejection on technical grounds of alternative approaches for measuring "significant contribution" based solely on air quality, not cost and air quality, during the Transport Rule administrative proceedings says nothing about whether EPA would have refused to entertain petitioners' new objection in this court that EPA was statutorily required to modify its two-step approach by making the inclusion threshold of step-one a floor for reductions under the cost approach of step-two. The alternative approaches EPA considered and rejected are not even the approaches petitioners now endorse, and, in any event, cannot excuse a failure to state their objection with "reasonable specificity" during the Transport Rule administrative proceedings.

The court's remaining reasons for vacatur lack merit. First, the court concludes EPA violated the "good neighbor" provision's "proportionality" requirement, but petitioners presented no such statutory authority argument in their briefs, instead challenging EPA's grouping of States for purposes of SO_2 reduction as arbitrary and capricious. Even if they had, the court lacks jurisdiction because the argument is premised on speculation that EPA's two-step approach to measuring "significant contribution" might require States to reduce emissions by *more* than the amount that triggered their inclusion in the Transport Rule in the first place —the same argument over which the court lacks jurisdiction due to petitioners' failure to challenge EPA's statutory authority for its approach during the Transport Rule administrative proceedings. On the merits, the court's "proportionality" conclusion contradicts the court's opposite conclusion in *North Carolina* that EPA's measurement of a State's "significant contribution" did not have to correlate directly with its air quality impact "relative to other upwind states." 531 F.3d at 908 (citing *Michigan v. EPA,* 213 F.3d 663, 679 (D.C.Cir.2000)). Similarly, the court's holding that EPA failed to consider the effect of in-state emissions is likewise premised on the sub-threshold argument. Further, the court's "in-State emissions" and its "over-control" conclusions are contradicted by the Transport Rule administrative record.

I.

Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), requires a petition for judicial review of EPA final actions to be filed within sixty days of publication in the Federal Register. "The filing period in the Clean Air Act 'is jurisdictional in nature'; if the petitioners have failed to comply with it, we are powerless to address their claim." *Med. Waste Inst. & Energy Recovery Council v. EPA,* 645 F.3d 420, 427 (D.C.Cir.2011) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 460 (D.C.Cir.1998)).

> The Supreme Court has explained that "judicial review provisions are jurisdictional in nature and must be construed with strict fidelity to their terms. This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often ****417 *41** stated, mandatory and jurisdictional, and are not subject to equitable tolling."

Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 682 (D.C.Cir.2001) (quoting *Stone v. Immigration & Naturalization Serv.,* 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (internal quotation marks, alterations, and citation omitted)). Accordingly, in Medical Waste this court dismissed a challenge to a final rule for lack of jurisdiction where petitioners failed to seek judicial review when EPA "*first use[d]* " its statutory approach, 645 F.3d at 427 (emphasis added). "An objection is considered a collateral attack only if 'a reasonable [petitioner] ... would have perceived a very substantial risk that the [rule] meant what the [agency] now says it meant.' " *S. Co. Servs., Inc. v. FERC,* 416 F.3d 39, 45 (D.C.Cir.2005) (internal quotations marks, citation, and alterations omitted).

The Transport Rule, responding to States' failures to submit adequate "good neighbor" SIPs, is a FIP that addresses the interstate transport of emissions in twenty-seven States in the eastern United States for three national ambient air quality standards ("NAAQS"): the 1997 8–hour ozone NAAQS, the 1997 annual $PM_{2.5}$ NAAQS, and the 2006 24–hour $PM_{2.5}$ NAAQS. [1] *See* Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011). In the Transport Rule, EPA determined that the same level of emission reduction obligations would apply for each of these three NAAQS. *See id.* at 48,264. Over a year prior to promulgating the Transport Rule, EPA promulgated Final SIP Rules publishing findings that twenty-nine States and territories had failed to submit SIPs with the required "good neighbor" provisions for the 2006 24–hour $PM_{2.5}$ NAAQS. [2] *See* Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. 32,673 (June 9, 2010); Tennessee Failure to Submit Good Neighbor SIP Finding, 76 Fed. Reg. 43,180 (July 20, 2011). In these Final SIP Rules, EPA stated:

1 Section 110(a)(1) of the CAA provides that States must submit SIPs within three years (or less, if set by EPA) of promulgation of a NAAQS. Section 110(a)(2)(D), in turn, requires States to submit SIPs with "adequate provisions"

> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I).

2 The States and territories were: Alaska, Colorado, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. *See* Failure to Submit Good Neighbor SIP Findings, 75 Fed. Reg. at 32,674. (On July 20, 2011, EPA published an additional finding that Tennessee had failed to submit a "good neighbor" SIP for the 2006 24–hour $PM_{2.5}$ NAAQS. *See* Tennessee Failure to Submit Good Neighbor SIP Fin ding, 76 Fed. Reg. 43,180 (July 20, 2011). Tennessee is not a petitioner here.

> This finding establishes a 2–year deadline for promulgation by EPA of a FIP, in accordance with section 110(c)(1), for any state that either does not submit or EPA can not approve a SIP as meeting the attainment and maintenance requirements of [the "good neighbor" provision] for the 2006 24–hour $PM_{2.5}$ NAAQS.... This action ... does not pertain to ... a SIP Call pursuant to section 110(k)(5).
>
> *Id.* at 32,674; *see also* 76 Fed. Reg. at 43,180–81 (Tennessee). The Final SIP ****418 *42** Rules further state that the findings of failure to submit were of nationwide scope and effect, and therefore pursuant to section 307(b)(1), 42 U.S.C. § 7607(b)(1), a petition for judicial review had to be filed with the D.C. Circuit within sixty days of the publication of the findings in

the Federal Register. *See* Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,675–76; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,182–83. No State filed a petition for judicial review.

Other States submitted 2006 24–hour $PM_{2.5}$ SIPs with "good neighbor" provisions, but EPA disapproved that portion of the SIP submissions of ten States covered by the Transport Rule: Alabama, Georgia, Indiana, Kansas, Kentucky, Missouri, New Jersey, New York, North Carolina, and Ohio. [3] In the Final SIP Rules, EPA rejected objections that States had no obligation to submit SIPs until EPA had quantified the States' amount of "significant contribution" and that EPA was required to permit States to revise their SIPs prior to imposing a FIP pursuant to 42 U.S.C. § 7410(c)(1). [4] The Final SIP Rules disapproving the "good neighbor" SIP submissions alerted the affected States that "petitions for judicial review must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011," *see, e.g.,* 76 Fed. Reg. at 43,136 (Alabama), the sixty day deadline prescribed by CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Only Georgia, Kansas, and Ohio filed petitions for judicial review of EPA's disapproval action and their petitions are not consolidated with the petitions now under review, as they challenge different final rules. [5]

3 *See* Approval and Promulgation of Air Quality Implementation Plan; Alabama; Disapproval of Interstate Transport Submission for the 2006 24–Hour $PM_{2.5}$ Standards, 76 Fed. Reg. 43,128 (July 20, 2011); 76 Fed. Reg. 43,159 (Georgia); 76 Fed. Reg. 43,175 (Indiana & Ohio); 76 Fed. Reg. 43,143 (Kansas); 76 Fed. Reg. 43,136 (Kentucky); 76 Fed. Reg. 43,156 (Missouri); 76 Fed. Reg. 43,153 (New Jersey & New York); 76 Fed. Reg. 43,167 (North Carolina).

4 *See* 76 Fed. Reg. at 43,131–33 (Alabama); 76 Fed. Reg. at 43,162–64 (Georgia); 76 Fed. Reg. at 43,176–79 (Indiana & Ohio); 76 Fed. Reg. at 43,145–47 (Kansas); 76 Fed. Reg. at 46,139–41 (Kentucky); 76 Fed. Reg. at 43,170–72 (North Carolina). No comments were submitted to the proposed disapproval of Missouri's "good neighbor" SIP submission, *see* 76 Fed. Reg. at 43,156, and only one unrelated comment was submitted to New York and New Jersey's proposed disapproval, *see* 76 Fed. Reg. at 43,154. None of these three States is a petitioner here.

5 *See Ohio v. EPA,* No. 11–3988 (6th Cir.); *Westar Energy, Inc. v. EPA,* No. 11–1333 (D.C. Cir.); *Kansas v. EPA,* No. 12–1019 (D.C. Cir.); *Georgia v. EPA,* No. 11–1427 (D.C. Cir.). The court consolidated the two Kansas cases (Nos. 11–1333 and 12–1019) on January 10, 2012. *See* Order Case No. 12–1019 (Jan. 10, 2012). The court also severed from Kansas's Transport Rule petition, Case No. 11–1329, its challenge to EPA's disapproval of its "good neighbor" SIP submission. *See id.* On January 10, 2012, the Sixth Circuit granted the parties' joint motion to hold the case in abeyance pending the outcome of the instant case. On January 18, 2012, the D.C. Circuit issued orders holding the Kansas and Georgia cases in abeyance pending the outcome of the appeal in the present case.

A.

Now that EPA has, as it warned, promulgated FIPs for States covered by the Transport Rule, State petitioners contend that EPA lacked authority to do so for the 2006 24–hour $PM_{2.5}$ NAAQS because "a FIP can cure a deficiency only in a *required* submission, and States were not required to include SIP provisions to eliminate 'significant contributions' not yet defined by EPA legislative rule." State Petrs' Br. at 31. If a State wished to ****419 *43** object that under section 110(a) it had no obligation to include "good neighbor" provisions in its SIP until EPA quantified its "significant contribution" in emission reduction budgets, then the CAA required it do so at the time EPA found it had not met its SIP "good neighbor" obligation. State petitioners offer no response in their reply brief to EPA's position that this argument is a collateral attack barred by section 307(b)(1). *See* Resp.'s Br. at 46–47.

Ignoring the plain terms of section 307(b)(1) as well as this court's long-settled precedent, the court reaches the merits of this issue despite its lack of jurisdiction. In the Final SIP Rules finding States had failed to submit "good neighbor" SIPs, EPA put covered States on unambiguously "sufficient notice" that it interpreted the CAA as placing an independent obligation on each State to include adequate "good neighbor" provisions in its SIP regardless of whether EPA had prospectively quantified its amount of "significant contribution." *S. Co. Servs.,* 416 F.3d at 44. By the very nature of the Final SIP Rules, EPA was informing States that they had not met their obligation to submit "good neighbor" SIPs, an obligation States now contend they never had. Furthermore, EPA warned that its findings of failure to submit triggered the two-year FIP clock of section 110(c)(1),

and not the SIP Call provision of section 110(k)(5). *See* Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,673–74; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,180–81. In alerting States to the judicial review deadline, EPA reiterated that States had sixty days to file "*any* petitions for review ... related to [ ] findings of failure to submit SIPs *related to the requirements of* [the 'good neighbor' provision]." Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,676; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,183 (emphases added). Not having sought judicial review of the Final SIP Rules determining that they failed to submit *required* "good neighbor" SIPs, States may not now object that they were *not required* to submit "good neighbor" SIPs until EPA first quantified their reduction obligations. "The sixty day window provided by statute has long since closed, and we may not reopen it and entertain a belated challenge ... now." *Med. Waste,* 645 F.3d at 427. Therefore, the court lacks jurisdiction over the collateral attacks by petitioners Louisiana, Michigan, Nebraska, Oklahoma, Virginia, and Wisconsin, as part of the Transport Rule petitions, on EPA's interpretation of section 110(a) stated in the Final SIP Rules finding they failed to submit required "good neighbor" SIPs.

Similarly on notice, neither Alabama nor Indiana petitioned for judicial review of EPA's disapproval of their SIP submissions. In the Final SIP Rule disapproving Alabama's SIP submission, EPA quotes one commenter as stating:

> EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements.... [T]he finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.

76 Fed. Reg. at 43,131. EPA responded that "the state obligation stems from the CAA itself.... *States had an opportunity to conduct their own analyses regarding interstate transport.*" *Id.* (emphasis added). EPA also warned that it was obligated to promulgate a FIP within two years of disapproving Alabama's SIP, *see id.* at 43,132, and rejected comments that the ****420 *44** SIP Call revision process of section 110(k)(5) should apply, because, in its view, that provision applies only where there is an existing, approved SIP, *see id.* at 43,133. In its summary of Indiana's comments on the proposed disapproval of its SIP submission, EPA noted that Indiana took the position that EPA "should provide [the State] the opportunity to revise its [ ] SIP once the Transport Rule is completed" and that a "FIP is [ ] contrary to the spirit of the CAA by unnecessarily limiting [S]tate authority." 76 Fed. Reg. at 43,177. EPA responded, relying on the CAA's plain text, that Indiana was required by section 110(a) to submit SIPs with adequate "good neighbor" provisions, and that upon disapproving its submission, EPA had a legal obligation under the CAA to promulgate a FIP. *See id.* Alabama and Indiana's comments, along with EPA's responses, demonstrate that the two States were on clear notice of EPA's interpretation of the CAA as imposing an independent obligation on the States to submit "good neighbor" SIPs, even in the absence of EPA-quantified amounts of "significant contribution." Yet neither Alabama nor Indiana sought judicial review of EPA's Final SIP Rules disapproving their SIP submissions, and their attempt now to collaterally attack those Final SIP Rules is barred. *See Med. Waste,* 645 F.3d at 427.

Given EPA's clear statements in its Final SIP Rules disapproving States' SIP submissions and finding they failed to submit required "good neighbor" SIPs, there is no basis to conclude that State petitioners might *not* have perceived a substantial risk that EPA *meant* what it *said. See S. Co. Servs.,* 416 F.3d at 45. The instant case, involving consolidated petitions challenging the Transport Rule, is therefore not the appropriate forum to decide whether, under section 110(a), States have an independent obligation to submit "good neighbor" SIPs when EPA has not first quantified amounts of "significant contribution." EPA promulgated Final SIP Rules in which it made its interpretation clear; judicial challenge to those rules is the proper forum to decide the question. [6]

6 The same is true for Ohio, Georgia, and Kansas, which petitioned for judicial review of EPA's disapproval of their "good neighbor" SIP submissions. The court's "review in th[e] [instant] case is limited to" the Transport Rule, and the court thus "lack[s] jurisdiction over" challenges to those States' SIP disapprovals premised on whether they have an independent obligation to submit "good neighbor" SIPs. *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 149 (D.C.Cir.2012). The petitions filed by those States challenging their SIP disapprovals are not consolidated with the petitions before the court today, *see supra* n.5, and Ohio's petition is pending in the Sixth Circuit. The court must therefore "decline [State] [p]etitioners' invitation to rule on the merits of cases which are properly before different panels." *Id.* This is all the more important here, where EPA has not yet been afforded the opportunity to assert an

improper venue defense in the two cases pending before the D.C. Circuit. *See Tex. Mun. Power Agency v. EPA,* 89 F.3d 858, 867 (D.C.Cir.1996); 42 U.S.C. § 7607(b)(1) (petitions for review of SIP disapprovals may be brought only in the court of appeals "for the *appropriate* circuit") (emphasis added). If Georgia, Kansas, and Ohio wish to avoid enforcement of the Transport Rule FIPs because they contend EPA's SIP disapprovals were in error, the proper course is to seek a stay of EPA's disapprovals in their pending cases; if granted, a stay would eliminate the basis upon which EPA may impose FIPs on those States. *See* 42 U.S.C. § 7410(c)(1)(B).

Indeed, the court itself forecasts this conclusion: "EPA's many SIP disapprovals and findings of failure to submit share one problematic feature: EPA made all of those findings *before* it told the States what emission reductions their SIPs were supposed to achieve under the "good neighbor" provision." Op. at 31–32 (emphasis in original). However "problematic ****421 *45** the court views this "feature" of those Final SIP Rules, this is a "problem" this three-judge panel is powerless to resolve because it lacks jurisdiction under CAA section 307(b)(1) to entertain State petitioners' "back-door challenge" to EPA's interpretation of section 110(a) stated in those Final SIP Rules. *Natural Res. Def. Council v. EPA,* 824 F.2d 1146, 1150 (D.C.Cir.1987) (internal quotation marks omitted).

The court responds that the dissent "conflates" State petitioners' collateral attack on the Final SIP Rules announcing their Section 110(a) SIP obligations with State petitioners' supposedly distinct argument that EPA cannot promulgate a FIP simultaneously with its quantification of a State's emission reduction obligations. *See* Op. at 12 n.1, 37 n.34. This response misleadingly quotes the statute, and in the process, proves the dissent's point. The court states "the statute says that EPA must issue a FIP within two years after a State fails to make a 'required submission' or submits a deficient SIP. But a State cannot be 'required' to implement its "good neighbor" obligation in a SIP 'submission' ... until it knows the target set by EPA." *Id.* at 37 n.34. [7] That is *not* what the statute says. Section 110(c) provides that:

7 Notice the circularity in the court's statement. The court says State petitioners' "simultaneity" argument can be "[p]ut another way," Op. at 37 n.34, as an argument that States had no section 110(a) SIP requirements until EPA quantified their emission reduction budgets. Under section 307(b)(1), that is exactly the argument that States were required to make in petitions for judicial review of the Final SIP Rules setting forth EPA's section 110(a) interpretation.

> (1) The Administrator *shall* promulgate a Federal implementation plan *at any time* within 2 years after *the Administrator*—
>
> (A) *finds* that a State has failed to make a required submission ... or
>
> (B) *disapproves* a State implementation plan submission in whole or in part;
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, *before* the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphases added). EPA's FIP obligation is therefore not triggered, without more, by a State's mere failure to submit a SIP required by section 110(a), but instead by an *explicit* EPA Final Rule *finding* that the State either failed to submit a required SIP or an adequate SIP. A challenge to EPA's interpretation of section 110(a) must therefore be brought as a petition for judicial review of those Final SIP Rules announcing that States failed to meet their section 110(a) "good neighbor" SIP obligations. *See Med. Waste,* 645 F.3d at 427. Under the plain terms of the CAA, EPA's obligation (and authority) to promulgate a FIP is *triggered* by those Final SIP Rules, and the process by which EPA must promulgate a FIP is governed by section 110(c), not, as the court posits, by section 110(a). The court therefore, and not the dissent, does the conflating by turning what should be a challenge to EPA's FIP authority under section 110(c) into a collateral attack on EPA's interpretation of section 110(a) set forth in the prior Final SIP Rules.

The plain text of section 110(c)(1) obligates EPA to promulgate a FIP "at any time" within two years of disapproving a SIP submission or finding a State failed to submit a SIP. 42 U.S.C. § 7410(c)(1). Moreover, nothing in section 110(c) requires EPA to reveal to States the *content* (*i.e.,* the emission reduction budgets) it intends to include in its FIP *prior* to *proposing* ****422 *46** a FIP. Although the CAA allows States to submit SIPs to "correct[ ] the deficiency," they must do so "before" EPA's promulgation of a FIP, which may occur "at any time" within two years. *Id.*

The court thus rewrites section 110(c)(1)'s unambiguous grant of authority to EPA (and ultimate obligation of EPA) to promulgate a FIP *at any time* within the two year window to read: "~~unless~~ *but not until* the State corrects the deficiency and the Administrator approves the [SIP] or [SIP] revision, before *may* the Administrator promulgates such [FIP]." "[A]s the Supreme Court has emphasized time and again, courts have no authority to rewrite the plain text of a statute." *Kay v. FCC,* 525 F.3d 1277, 1279 (D.C.Cir.2008). Because the CAA "means what it says," EPA was required, after publishing disapprovals and findings of failure to submit SIPs, to promulgate FIPs within two years, and it was not required to wait for States first to submit SIPs. *Landstar Express Am. v. Fed. Maritime Comm'n,* 569 F.3d 493, 498 (D.C.Cir.2009). The court's attempt to ferret out an argument about "simultaneity" as a distinct challenge properly brought against the Transport Rule based on EPA's interpretation of section 110(a) is thus a straw man for its endorsement of State petitioner's collateral attack on EPA's interpretation of section 110(a) in the Final SIP Rules. Its rewriting of section 110(c) is made all the more remarkable by its recognition that "we must apply and enforce the statute as it's now written." Op. at 12.

B.

Even if the court had jurisdiction over State petitioners' challenge to their independent obligation to submit "good neighbor" SIPs under CAA section 110(a), its statutory analysis proceeds with no regard for the plain text and structure of the CAA or for the deference owed to permissible agency interpretations of statutes they administer where Congress has left a gap for the agency to fill or the statute is ambiguous.

"As in all statutory construction cases," the court must "begin with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 461–62, 122 S.Ct. 941 (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (internal quotation marks and citation omitted)). Thus, under *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the first step in statutory interpretation requires a determination of "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *id.* If, after applying traditional tools of statutory construction, the court determines "the statute is silent or ambiguous with respect to the specific issue," then, under step two, the court will defer to an agency's statutory interpretation if it "is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

The questions regarding States' obligations to submit "good neighbor" SIPs are straightforward: (1) Do States have an independent obligation to submit SIPs with adequate "good neighbor" provisions; (2) if so, what triggers that obligation; (3) if there is an obligation, what is the deadline for the SIP submission; and (4) must ****423** ***47** EPA prospectively quantify each States' amount of "significant contribution" to downwind nonattainment? The plain text of the statute provides equally straightforward answers: (1) Yes; (2) promulgation of a NAAQS; (3) within three years of promulgation of a NAAQS (unless the EPA Administrator prescribes a shorter deadline); and (4) no, but EPA *may* do so if it chooses.

Section 109 of the CAA requires EPA to promulgate NAAQS, a national health-based standard. *See* 42 U.S.C. § 7409. Section 110, in turn, provides that

> (a)(1) Each State *shall* ... adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) *after the promulgation of a national primary air quality standard* (or any revision thereof) ... a plan which provides for implementation, maintenance, and enforcement of such [ ] standard ... within such State.
>
> (2) Each implementation plan submitted by a State under this chapter ... *shall*
>
> ...

(D) contain adequate provisions—

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

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such [NAAQS].

Id. §§ 7410(a)(1) & (a)(2)(D)(i)(I) (emphases added). The plain text requires that within three years of EPA's promulgation of a NAAQS, States *shall* submit SIPs, and those SIPs *shall* include *adequate* "good neighbor" provisions. This is the unambiguous obligation and chronology established by Congress. EPA has the first duty to set the NAAQS, and then States have series of follow-up duties, listed in section 110(a), to ensure attainment of the NAAQS. Among the duties clearly assigned to States is the inclusion in SIPs of adequate "good neighbor" provisions.

The court views this "interpretation"—that is, *reading the actual text of the statute*—as a scene from *Alice in Wonderland. See* Op. at 33. It concludes that "[i]n our view, determining the level of reductions required under Section 110(a)(2)(D)(i)(I) is analogous to setting a NAAQS. And determining the level of reductions under the "good neighbor" provision triggers a period during which States may submit SIPs." *Id.* at 33. Even if the court's analogy were sound, [8] the premise of its analogy does not support its conclusion that EPA's determination of emission reduction obligations triggers States' obligations to submit "good neighbor" SIPs. Rather, the court rewrites a decades-old statute whose plain text and structure establish a clear chronology of federal and State responsibilities. Nowhere does the CAA place a requirement on EPA to quantify each State's amount of "significant contribution" to be eliminated pursuant to the "good neighbor" provision, let alone include any provision relieving States of their "good neighbor" SIP obligations in the event EPA does not first quantify emission reduction obligations. [9]
****424** ***48** The court's "view" that EPA " determining the level of reductions under the "good neighbor" provision triggers the period during which States may submit SIPs" is irrelevant in view of the unambiguously plain text of section 110(a)(1) and (a)(2)(D)(i)(I), and, if the statute were ambiguous, the court would be required to defer to EPA's interpretation that States have an independent obligation to submit "good neighbor" SIPs within three years of promulgation of the NAAQS because that interpretation is permissible under the statute, *see Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. The court's "role is 'not to 'correct' the text so that it better serves the statute's purposes'; nor under *Chevron* may [the court] 'avoid the Congressional intent clearly expressed in the text simply by asserting that [the court's] preferred approach would be better policy. The Congress has spoken plainly...." *Virginia Dep't of Med. Assistance Servs. v. Dep't of Health & Human Servs.,* 678 F.3d 918, 926 (D.C.Cir.2012) (quoting *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1089 (D.C.Cir.1996)).

8 The NAAQS are determined based on what is "requisite to protect the public health" and "public welfare," 42 U.S.C. § 7409(b)(1) & (2), and are a uniform national standard. The "good neighbor" provision, on the other hand, is not a separate national standard, but instead is simply one of the CAA's State-specific mechanisms to ensure attainment of the NAAQS. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

9 The court's comparison of section 110 to section 126, *see* Op. at 34, conflates direct federal regulation of *sources* with EPA's statutory authority to enforce requirements that *States* comply with their "good neighbor" SIP obligations. Given that Congress included a *specific* provision obligating EPA to promulgate FIPs if States fail to submit adequate SIPs within three years of promulgation of a NAAQS, *see* CAA § 110(c)(1); 42 U.S.C. § 7410(c)(1), and EPA relies on it in the Transport Rule, section 126's federal authorization to regulate specific *sources* of emissions has no bearing on the statutory analysis here.

Furthermore, the court's holding is entirely at odds with the holding in *Michigan v. EPA,* 213 F.3d 663 (D.C.Cir.2000), *see LaShawn A. v. Barry,* 87 F.3d 1389, 1395 (D.C.Cir.1996) (en banc). In *Michigan,* State petitioners contended that EPA violated the CAA by prospectively informing States what their nitrogen oxides (NO_x) emission reduction budgets needed to be to adequately eliminate their amounts of "significant contribution" under the "good neighbor" provision, thus acknowledging their independent obligation to submit adequate "good neighbor" SIPs, *see* 213 F.3d at 686–87. State petitioners in *Michigan* argued that EPA had *no authority* to do what the State petitioners now before the court contend EPA has *no authority* ***not to***

do. In *Michigan* the court deferred, pursuant to *Chevron* step two, to EPA's interpretation it could set State emissions budgets prospectively, given section 110's "silence" on the question, as a permissible exercise of EPA's general rulemaking authority under CAA section 301(a)(1), 42 U.S.C. § 7601(a)(1). [10] Inverting *Michigan*'s analysis of section 110, the court holds that under *Chevron* step one, *see* Op. at 34 n.32, section 110 itself *unambiguously requires* EPA to prospectively inform States of their "good neighbor" emission reduction requirements. *See id.* at 31–35. Nothing in section 110, section 301, or any other section of the CAA requires EPA to do this. Instead the court today turns "may" into "must," and holds that if EPA does not exercise its general rulemaking authority in the manner of the court's design, then section 110(a)(1)'s and 110(a)(2)(D)(i)(I)'s mandatory, unambiguous requirements that States submit adequate "good neighbor" SIPs within three years of the promulgation of a NAAQS are *erased from the statute* by judicial fiat—relieving States of the duty Congress imposed. [11] The court offers no explanation ****425 *49** for how its holding can be squared with *Michigan* in this regard.

10 Section 301(a)(1) of the CAA provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a)(1).

11 Suffice it to say, it is extraordinarily unusual for a court to conclude, at *Chevron* step one, that it must delete mandatory obligations from a statute in order to accord with Congress's plain intent. *See* Op. at 34 n.32. It is all the more unusual to suggest that an agency's interpretation is "impermissible" at *Chevron* step two when the interpretation parrots the text of the statute.

The court's rationale for rewriting the CAA's plain text is its *own* conclusion that "the upwind State's obligation remains *impossible* for the upwind State to determine *until EPA defines it.*" *Id.* at 32 (first emphasis added). In its words, the statute "requires each State to take its own stab in the dark ... [and] apply [a] homemade definition using its own homemade methodology." *Id.* at 35. The court concludes EPA's interpretation (that is, following the statute's plain text) produces absurd results, *see id.* at 34 n.32. Pretermitting whether there is a shred of record evidence to show such an impossibility, a statutory outcome is absurd [only] if it *defies rationality* [;] ... an outcome *so contrary to perceived social values* that Congress could not have intended it." *Landstar Express,* 569 F.3d at 498–99 (internal quotation marks and citations omitted) (emphases added). To the extent the court's rationale hinges on its speculation that States lack technical capability and information, this blinks at reality. As counsel for EPA emphasized at oral argument, *see* Tr. Oral Arg. at 59, 61, without contradiction by any petitioners' counsel during rebuttal oral argument, States are fully capable of measuring interstate transport of emissions by conducting modeling, and they have done so before and continue to do so: "The states can make that effort, and they can submit SIPs to EPA. Again, that is how the process works in the states that aren't included in these transport regions." *Id.* at 61. Indeed, as this court has recognized, States are charged with operating air quality monitors; "[e]xhaustive technical specifications regulate the States' operation of a network of air monitors that collect air quality data for any given area." *Catawba Cnty., N.C. v. EPA,* 571 F.3d 20, 30 (D.C.Cir.2009); *cf. ATK Launch Sys. v. EPA,* 669 F.3d 330, 334 (D.C.Cir.2012). The air quality monitoring data collected by the States is publically available in the National Emissions Inventory. [12] That is, State air quality divisions are no strangers to complex air quality and meteorological modeling of interstate transport of emissions. [13]

12 *See* U.S. EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, *available at* http://www.epa.gov/ttnchie1/eiinformation.html (last visited July 23, 2012); *see also* U.S. EPA, Technology Transfer Network Clearinghouse for Regulatory Atmospheric Modeling, *available at* http://www.epa.gov/ttn/scram/aqmindex.htm (last visited July 23, 2012) (providing modeling tools).

13 To cite one example: the State of Texas. The Texas Council on Environmental Quality ("TCEQ") has published an extensive description of its air quality modeling activities and capabilities on its website. "The TCEQ uses state of the art computer models to simulate the meteorological conditions and chemical reactions that contribute to the formation of air pollutants." TCEQ, Introduction to Air Quality Modeling, *available at* http://m.tceq.texas.gov/airquality/airmod/overview/am_intro.html (last visited July 23, 2012). Furthermore, "TCEQ uses state-of-the-science, four-dimensional computer models that incorporate atmospheric physical laws and measured observations to predict weather conditions over space and time." TCEQ, Introduction to Air Quality Modeling: Meteorological Modeling, http://m.tceq.texas.gov/airquality/airmod/overview/am_met.html (last visited July 23, 2012). Indeed, TCEQ uses the same model EPA used to model emission contributions—CAMx. EPA notes in its brief that Texas provided

some of the technical data that led to its inclusion in the final Transport Rule. *See* EPA Br. at 109. These are far from "homemade" methodologies. *See* Op. at 35.

***50** ****426** No petitioner suggests that States lack the capability to measure their interstate emissions of pollutants or to access that information from other States to independently determine emission reduction budgets, much less that they have not had time to do so; rather their reason for not doing so appears to stem from insistence (supported by industry sources) that their reduction of emissions not be one iota greater than is necessary for downwind States to attain and maintain NAAQS and that it is easier (and presumably less costly, *see* Oral Arg. Tr. 58) for EPA to figure this out than it is for the individual States to do so, working cooperatively and using any EPA guidance. This may be so but it does not demonstrate that Congress's scheme, protecting States' choices about how to meet NAAQS requirements, in part by independently determining ways to meet their "good neighbor" obligation as the States argued in *Michigan,* is absurd.

It is true, as the court notes, *see* Op. at 34–35, that in two previous "good neighbor" rulemakings EPA afforded States the opportunity to submit SIPs after announcing emission reduction budgets. But an agency is not forever restricted to its previous policy choices or statutory interpretations; instead, it may change course provided it acknowledges it is doing so, presents "good reasons" for doing so, and its approach is "permissible under the statute." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). Agencies "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* The discretion agencies enjoy in modifying their policy approaches is particularly expansive where the agency declines to exercise its *discretionary* rulemaking authority, as EPA did here. "It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC,* 656 F.2d 807, 818 (D.C.Cir.1981).

Here, EPA acknowledged its previous approach, *see* Transport Rule, 76 Fed. Reg. at 48,217; NPRM, 75 Fed. Reg. at 45,222–223, and explained its decision in response to comments requesting States be given time to submit SIPs before EPA imposed the Transport Rule FIPs. EPA stated, first, that it had no authority to alter the statutory deadlines for SIP submissions and that the CAA did not require it to issue a rule quantifying States' "good neighbor" obligations, *see* Transport Rule, 76 Fed. Reg. at 48,220; second, that the court in *North Carolina,* in remanding rather than vacating CAIR, "emphasized EPA's obligation to remedy [CAIR's] flaws expeditiously" and thus "EPA d[id] not believe it would be appropriate to establish a lengthy transition period to the rule which is to replace CAIR," Transport Rule, 76 Fed. Reg. at 48,220; and third, that in *North Carolina* this court also required EPA to align upwind States' emission reduction deadlines with the NAAQS attainment dates of "2015 or earlier," *see North Carolina,* 531 F.3d at 930. [14] EPA's ****427** ***51** decision to adhere to the plain text of the statute, and not to exercise its discretionary general rulemaking authority, *see Michigan,* 213 F.3d at 686–87, was thus well-explained by the time pressures imposed *by this court. See Fox Television,* 556 U.S. at 515, 129 S.Ct. 1800. Inasmuch as those time pressures were animated as well by concern for the public health and welfare—Congress required that attainment with the NAAQS occur "as expeditiously as practicable." 42 U.S.C. §§ 7502(a)(2)(A) & 7511; *see North Carolina,* 531 F.3d at 930—the instant case is particularly ill-suited for overturning EPA's exercise of its discretion in not adding an additional rulemaking step to the process. Given that the court "will overturn an agency's decision not to initiate a rulemaking only for compelling cause," and one of those few compelling reasons is when the decision *declining* to promulgate a rule exacerbates "grave health and safety problems for the intended beneficiaries of the statutory scheme," *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC,* 388 F.3d 903, 911 (D.C.Cir.2004) (internal quotation marks and citation omitted), it hardly makes sense for the court to *require* EPA to promulgate a rule when the effect will be to *delay* health benefits. Indeed, the court is *most* reluctant to require agencies to promulgate rules "when the interests at stake are primarily economic," *id.,* and the court's view that it is "impossible" for States to comply with their independent "good neighbor" obligation under section 110(a) is animated by the burdens that obligation imposes on States and industry sources, *see* Oral Arg. Tr. 58.

14 That EPA may, under different circumstances, view it as preferable to prospectively quantify States' emission reduction obligations, *see* Op. at 32, is irrelevant to whether EPA's stated reasons for departing, in the Transport Rule from its previous approach are adequate, given the court's instruction in *North Carolina* to expeditiously replace the flawed CAIR and align NAAQS attainment dates. The context of the federal register citations is, EPA's points out, EPA's review of a submitted SIP; the preamble does not state EPA must engaged in detailed interstate transport analysis before States must meet their statutory SIP obligations. Furthermore,

consistent with the federal register citations noted by the court, EPA has traditionally issued guidance to States on calculating their "good neighbor" emission reduction obligations and it did so here, *see, e.g.,* EPA Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24–hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) (Sept. 25, 2009).

In sum, the court's conclusion that it would have been a "homemade" "stab in the dark" for the States to submit adequate "good neighbor" SIPs prior to promulgation of the Transport Rule lacks a basis in fact, and the court's speculation that EPA would have inevitably disapproved such submissions, *see* Op. at 36, is just that—speculation. And if that happened, States could judicially challenge the disapprovals, seeking a stay to avoid application of the Transport Rule FIPs. Absent record evidence to suggest that the plain text of the CAA's "good neighbor" SIP obligation on States leads to "an outcome *so contrary to perceived social values* that Congress could not have intended it," *Landstar Express,* 569 F.3d at 498–99 (internal quotation marks and citations omitted) (emphasis added), the court is bound, in view of the host of responsibilities placed on States in the CAA, to enforce the statute as Congress wrote it in plain terms, to give deference to EPA's permissible interpretations where the CAA is silent or ambiguous, and to adhere to the court's interpretation of EPA's authority in *Michigan,* as well as acknowledge, as the expert agency has advised without contradiction, that States have demonstrated competence to satisfy their plain statutory "good neighbor" obligations.

II.

The court also is without jurisdiction to hold that EPA lacked statutory authority to use a different measure of "significant contribution" for setting emission reduction budgets, unrelated to its measure of "significance" for purposes of threshold inclusion of individual States in the Transport ****428 *52** Rule. Op. at 25–27. Petitioners contended that there was a hypothetical possibility that "application of cost-effective controls [ ] could drive a State's emissions below the point that, under phase one, would have excluded the State from any regulation whatsoever." State Petrs' Br. at 35; Industry & Labor Petrs' Br. at 22–24. [15] BECAUSE NO OBJECTIOn was made during the transport rule administrative proceedings to EPA's statutory authority to adopt its two-step approach, the court thus lacks jurisdiction to decide this issue. *See* CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The jurisdictional question is not *close;* the court's effort to avoid this court's well-settled precedent fails clearly.

15 As EPA responded, nothing in the record suggests this hypothetical possibility actually would occur as a result of the Transport Rule, *see* Resp.'s Br. at 33–34 & n.20; *id.* at 32 n.18, and the point of choosing a "cost" that is "effective" for each State assumes only a reasonable subset of emissions will be reduced. *See* Oral Arg. Tr. at 44–46. Furthermore, contrary to the court's suggestion, *see* Op. 26 n.23, EPA explained that selecting a cost below $500/ton of emissions would permit States to stop operating existing controls, thus increasing, rather than decreasing, pollution. *See* Transport Rule, 76 Fed. Reg. at 48,256–57.

A.

Section 307(d)(7)(B) of the CAA provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity *during the period for public comment* ... may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B) (emphasis added). The court has " 'strictly' enforce[d] this requirement," *Mossville Envtl. Action Now v. EPA,* 370 F.3d 1232, 1238 (D.C.Cir.2004) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 462 (D.C.Cir.1998)); *see also Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1259 (D.C.Cir.2009). The court also has made clear that "[r]easonable specificity requires something more than a general challenge to EPA's approach." *Mossville,* 370 F.3d at 1238 (internal quotation marks and alteration omitted). The court's enforcement of this requirement has been most strict in the context of statutory authority objections:

> While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for agencies' proper role in the *Chevron* framework

> requires that the court be *particularly careful* to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum.

Cement Kiln Recycling v. EPA, 255 F.3d 855, 860 (D.C.Cir.2001) (quoting *Natural Res. Def. Council, Inc. v. EPA,* 25 F.3d 1063, 1074 (D.C.Cir.1994)) (emphasis added). Consistently, until now, the court has held that failure to object specifically to EPA's lack of *statutory authority* is grounds for dismissal of such objections in this court. *See, e.g., Natural Res. Def. Council v. EPA,* 559 F.3d 561, 563–64 (D.C.Cir.2009); *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1097 (D.C.Cir.1996); *Ohio v. EPA,* 997 F.2d 1520, 1528 (D.C.Cir.1993); *Linemaster Switch Corp. v. EPA,* 938 F.2d 1299, 1308 (D.C.Cir.1991); *Natural Res. Def. Council v. Thomas,* 805 F.2d 410, 427 (D.C.Cir.1986).

Notably on point, in *Cement Kiln* the court held that comments stating a policy preference to EPA were insufficient to preserve for judicial review objections that the preferred approach was statutorily required, 255 F.3d at 860–61. "[T]hese comments merely argued that EPA could permissibly *consider* [the approach], not (as petitioners now argue) that [the CAA] *requires* ****429 *53** [the approach]." *Id.* at 860 (internal quotation marks and citation omitted) (emphases in original). And " the parties were not saved by the fact that they had made other technical, policy, or legal arguments before the agency. Indeed, if such were the rule, a party could never waive a legal claim as long as the party in fact appeared and argued *something* before the agency." *Nat. Res. Def. Council,* 25 F.3d at 1074 (internal quotation marks omitted) (emphasis added).

Petitioners rely on two comments in an attempt to show a challenge to EPA's statutory authority to the approach it adopted was presented during the Transport Rule administrative proceedings. *See* Industry & Labor Petrs.' Reply Br. at 6, n.1. Neither is sufficient. Tennessee commented that "[a] lower cost threshold should be considered for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values ($2,000/ton for SO2 and $500/ton for NO_X), if applicable." Tennessee Comments on 2010 Proposed Transport Rule, Attachment 1, at 1 (Aug. 27, 2010). But this comment does not suggest that EPA is statutorily barred from following its approach. *See Cement Kiln,* 255 F.3d at 860–61; *Natural Res. Def. Council,* 25 F.3d at 1073–74. Furthermore, Tennessee's comment does not even suggest a policy preference that the one percent of NAAQS threshold level be a floor. Rather, Tennessee's comment specifically mentions States reducing contributions *below* the threshold without suggesting that result would violate the CAA. Thus, the only thing Tennessee commented on with "reasonable specificity" was that EPA consider not using a uniform cost threshold for all States.

Wisconsin's comment also does not demonstrate the statutory authority challenge now advanced by petitioners in this court was preserved. First, Wisconsin stated that it "support[ed] the 1% contribution threshold ... for identifying states that are significant contributors to downwind state's air quality nonattainment and maintenance problems." Wisconsin Comments, at 1 (Oct. 1, 2010). Wisconsin further stated:

> State final emission budgets (2014) need to be set with a stronger linkage to residual air quality impact from the [electricity generating unit ("EGU")] on downwind sites compared to the current proposed linkage of limiting emission reductions by an *arbitrarily low cost threshold.* EPA has set which states have contribution reduction responsibility based on air quality impact, but appears to default to a modeling of the most efficient regional EGU control program based exclusively on cost-effectiveness.
>
> In defining significant contribution, EPA *should* place a *greater emphasis* on air quality impact (contribution) remedy than the assessed state-by-state marginal control cost-effectiveness of proposed remedy in the setting of the 2014 state budgets for EGU reductions. Issues are both legal and a concern for some level of EGU system control installation equity between nearby states and between facilities with differing coal types which are dispatched within the same electricity markets.

Id. at 7 (emphases added). Wisconsin nowhere suggested that EPA is statutorily required to use the one percent inclusion threshold as a floor for emission reductions; it simply urged that EPA "should" put a "greater emphasis" on air quality impacts at the *individual EGU* level. Indeed, Wisconsin commented that the cost threshold was *too low,* the exact opposite of what petitioners now claim. *See* Industry & Labor Petrs.' Br. at 31–34. The ****430 *54** closest Wisconsin comes to raising a statutory authority argument is its statement that the "issues are [ ] legal;" but that vague comment is in a sentence indicating the

State's preference that EPA regulate at the EGU, rather than the State level, in order to achieve "EGU system control installation equity." Wisconsin Comments, at 7.

Consequently, neither Tennessee's nor Wisconsin's comments argued "with reasonable specificity" that EPA was statutorily required to treat the threshold inclusion level in its two-step approach to defining "significant contribution" as a floor in calculating emission reduction requirements. [16] Nor do they even present a policy preference for such an approach and, indeed, can be interpreted as *supporting* sub-threshold reductions. Even if the comments *implied* a challenge, which they do not, an implied challenge is insufficient because

16 The court adds a cite, *see* Op. at 25 n.18, to a comment from Delaware: "It is Delaware's opinion that an upwind state's emissions contribution is significant ... based on the emissions and their effect on air quality, and is independent of cost considerations." This is not a statutory authority objection to the two-step approach, and in any event EPA's rejection of Delaware's "opinion" was sustained in *Michigan,* 213 F.3d at 679.

> that is not the way the regulatory system is structured. Such a standard would require agencies to review perpetually all of the 'implied' challenges in any challenge they receive. We will not impose such a burden on the agency. All that [petitioner] had to do was draft one sentence that specifically challenged EPA's decision. It did not, and that specific challenge is thus not preserved.
>
> ...
>
> [T]he only way [the comments] could be read as placing the EPA on notice is to place the burden on EPA to cull through all the letters it receives and answer all of the possible implied arguments. Such a rule would defeat the statutory requirement for "reasonable specificity."

Mossville, 370 F.3d at 1239–40. None of the comments during the Transport Rule administrative proceedings approaches the level of "reasonable specificity" required for this court to have jurisdiction over petitioners' new statutory authority argument.

B.

Acknowledging this, the court nonetheless concludes that it has jurisdiction to address this new issue because "EPA was on notice that its disregard of the significance floor was a potential legal infirmity in its approach." Op. at 25 n.18. None of the three reasons the court offers for its conclusion that there need not be objections raised "with reasonable specificity during the period for public comment," 42 U.S.C. § 7607(d)(7)(B), is convincing.

First, the court states that EPA was required "to craft a new rule consistent with [*North Carolina*]," Op. at 24 n.18 (internal quotation marks and citation omitted), and thus should have been alerted to petitioners' new objection, raised for the first time now in this court. But in *North Carolina* the court specifically permitted the exact same approach in CAIR. Discussing this approach, the court explained:

> [S]tate SO_2 budgets are *unrelated* to the criterion (the "air quality factor") by which 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 ****431 *55** this threshold, EPA claims to have used [as its] measure ... 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 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.*

North Carolina, 531 F.3d at 916–17 (emphases added). There is no basis to conclude that EPA acted inconsistently with *North Carolina* by replicating the approach the court left undisturbed. It is true that in *North Carolina* the court rejected EPA's use of fuel factors in allocating allowances for the CAIR trading program because doing so redistributed reduction responsibilities to the benefit of States with more coal-fired electricity generation, *see id.* at 920–21. The court stated that EPA

> 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.*

Id. at 921 (emphases added). But a holding that EPA had acted arbitrarily in designing its trading program cannot fairly be deemed to alert EPA that it might exceed its *statutory authority* in using an approach to measuring "significant contribution" that the court *specifically* declined to disturb. *Cf. Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1259 (D.C.Cir.2009) ("EPA cannot be expected to take [an] argument, raised in support of one specific objection, and apply it sua sponte to another provision."). EPA was entitled, in the absence of objection in the Transport Rule administrative proceedings, to rely in promulgating the Transport Rule upon the court's decision not to disturb its approach. And the fact that after *North Carolina* no comment in the Transport Rule administrative proceedings objected that EPA was exceeding its statutory authority in adopting its approach underscores the fact that EPA was not acting inconsistently with *North Carolina* in light of a few sentences about fuel factors plucked out of context.

Second, reaching farther afield, the court points to a comment submitted during the CAIR rulemaking that it deems sufficient, when combined with the holding in North Carolina, to "show that EPA 'had notice of this issue and could, or should have, taken it into account.' " Op. at 24 n.18 (quoting *Natural Res. Def. Council v. EPA,* 824 F.2d at 1146, 1151 (D.C.Cir.1987)). [17] The CAIR comment stated "that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." CAIR, 70 Fed. Reg. 25,162, 25,176–77 (May 12, 2005). This comment, which was not cited in any petitioners' brief to this court but first mentioned by industry petitioners during rebuttal oral argument, cannot carry the weight the court assigns to it, particularly in light of the holding in *North Carolina.* The court generally does not entertain arguments raised for the ****432** ***56** first time in a reply brief, *see Altman v. SEC,* 666 F.3d 1322, 1329 (D.C.Cir.2011); *North Carolina,* 531 F.3d at 924 n. 6, let alone for the first time at oral argument, *see Roth v. U.S. Dep't of Justice,* 642 F.3d 1161, 1181 (D.C.Cir.2011); *Ark Las Vegas Rest. Corp. v. NLRB,* 334 F.3d 99, 108 n. 4 (D.C.Cir.2003), much less during *rebuttal* oral argument, *see Coalition of Battery Recyclers Ass'n,* 604 F.3d at 623; *Old Dominion Dairy Products, Inc. v. Sec. of Defense,* 631 F.2d 953, 961 n. 17 (D.C.Cir.1980). The reason is simple: "in order to prevent 'sandbagging of appellees and respondents,' we do not consider arguments that were raised neither in the opening brief nor by respondents." *S. Coast Air Quality Mgmt. Dist. v. EPA,* 554 F.3d 1076, 1081 n. * (D.C.Cir.2009) (quoting *Sitka Sound Seafoods, Inc. v. NLRB,* 206 F.3d 1175, 1181 (D.C.Cir.2000)). Here that reason has particular resonance because EPA was relying on the court's decision in *North Carolina,* 531 F.3d at 916–17, to "not disturb" its two-step approach to defining "significant contribution," and no one referenced the CAIR comment during the Transport Rule administrative proceedings.

17 Remarkably, the court quotes a case in which the common law exhaustion doctrine, rather than CAA section 307(d)(7)(B), applied: the rule at issue was promulgated prior to enactment of section 307(d)(7)(B). *See Natural Res. Def. Council,* 824 F.2d at 1150–51.

Even setting aside the starkly novel forfeiture standard the court has chosen to apply to industry petitioners, the cited CAIR comment is insufficient to establish that the issue of EPA's statutory authority was properly preserved for the court to have jurisdiction to address it. The court relies on a footnote in *American Petroleum Institute v. EPA,* 52 F.3d 1113, 1120 n. 1 (D.C.Cir.1995), for the proposition that it is "highly relevant" if an agency previously "reject[ed] [ ] the same argument in a prior rulemaking," Op. at 24 n.18. Although the CAIR comment communicates a policy preference, this court has distinguished between comments presenting policy preferences and those presenting statutory authority objections, *see, e.g., Cement Kiln,* 255 F.3d at 860–61, and technical and policy arguments are insufficient to preserve objections to EPA's statutory authority. *See Nat. Res. Def. Council,* 25 F.3d at 1074. The CAIR comment that EPA rejected in the other rulemaking is therefore not "the same

argument" that petitioners belatedly attempt to raise now. Furthermore, in American Petroleum, the court concluded that the jurisdictional question was "close" inasmuch as EPA had *explicitly* incorporated the docket from the previous rulemaking in the second rulemaking, and the previous rulemaking had been aborted, such that there was no intervening opportunity for judicial review. *See Am. Petroleum,* 52 F.3d at 1120 n. 1. Neither of those factors that made American Petroleum a close case is present here. The Transport Rule was promulgated to replace CAIR, but the CAIR docket was never incorporated into the Transport Rule docket—perhaps because of the court's instruction in *North Carolina* that EPA "redo its analysis from the ground up." 531 F.3d at 929. EPA would have had no reason to reexamine the voluminous CAIR docket in search for objections that were not raised before the court in *North Carolina.* Also, unlike the aborted rule whose docket EPA incorporated in American Petroleum, in CAIR there was an intervening opportunity for judicial review. Yet no one sought judicial review of CAIR on the basis of the CAIR comment now relied on by the court. This precise circumstance was relied upon by the court in *North Carolina* in declining to disturb EPA's approach. *See id.* at 917; *see Med. Waste,* 645 F.3d at 427. [18] Once the court ****433 *57** in *North Carolina* declined to disturb EPA's approach, because no objection to EPA's authority to adopt its approach had been raised to the court, petitioners were required to inform EPA during the Transport Rule administrative proceedings that they objected to EPA's statutory authority to pursue that approach. *See* 42 U.S.C. § 7607(d)(7)(B). If *American Petroleum* presented a "close" jurisdictional question, then the jurisdictional question here is easily decided.

18 The fact that Kansas, Nebraska, and Oklahoma were *not* regulated under CAIR, and thus would have a newly ripened claim, *see Coalition for Responsible Regulation,* 684 F.3d at 129–32, does not mean that those States are relieved from *making* that claim during the Transport Rule administrative proceedings, as CAA section 307(d)(7)(B) requires. This is all the more true here because the petitioners who *were* subject to CAIR *abandoned* the CAIR comment now relied on by the court when they sought judicial review. To suggest that EPA should have foreseen that Kansas, Nebraska, and Oklahoma, despite *not making* an objection to the proposed Transport Rule on this ground, secretly *did* object on the basis of a comment made during a rulemaking to which they were not parties, and was abandoned on judicial review by those who made it, distorts the ripeness and CAA exhaustion doctrines beyond recognition and "give[s] parties to Clean Air Act proceedings a powerful weapon for delaying and sandbagging Agency action." *Lead Indus. Ass'n Inc. v. EPA,* 647 F.2d 1130, 1173 (D.C.Cir.1980).

Third, the court concludes that "EPA's statements at the proposal stage indicated EPA was not open to reconsidering CAIR's earlier rejection of petitioners' argument," and that because EPA had dismissed "the two air quality-only approaches it considered," the comments of Tennessee, Wisconsin, and Delaware were " 'reasonable' under the circumstances," Op. at 24, n.18. But there was no such "earlier rejection of petitioners' argument" in CAIR because the CAIR comment did not suggest that EPA exceeded its statutory authority by following its two-step approach to defining "significant contribution." See *Cement Kiln,* 255 F.3d at 860–61. Furthermore, industry petitioners acknowledge in their Reply Brief that they "are not advocating an 'air quality-only' approach," but instead a cost-based approach with a floor for emission reduction obligations. Industry & Labor Petrs' Reply Br. at 10. So, EPA's rejection of two alternative air quality-only approaches has no bearing on whether EPA would have been willing to entertain an objection during the Transport Rule administrative proceedings that the "good neighbor" provision required it to use the threshold level for a State's inclusion in the Transport Rule as a floor for emission reduction obligations.

Nothing in this court's precedent on CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), supports the court's tortured efforts to avoid the jurisdictional limits in the CAA and seize jurisdiction where petitioners clearly fall far short of preserving their claim by objecting to EPA's statutory authority during the Transport Rule administrative proceedings with "reasonable specificity." The court does not acknowledge this court's precedent setting a strict standard for preservation of statutory authority objections, which demonstrates the inconsistency of the court's exercise of jurisdiction today. *See, e.g., Natural Res. Def. Council,* 559 F.3d at 563–64; *Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512, 538 (D.C.Cir.2009); *Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1259 (D.C.Cir.2009); *Mossville,* 370 F.3d at 1238; *Cement Kiln,* 255 F.3d at 860–61; *George E. Warren Corp. v. EPA,* 159 F.3d 616, 629 (D.C.Cir.1998); *Motor & Equip. Mfrs. Ass'n,* 142 F.3d at 462; *Natural Res. Def. Council,* 25 F.3d at 1074; *Ohio v. EPA,* 997 F.2d at 1528–29; *Natural Res. Def. Council v. EPA,* 937 F.2d 641, 647–48 (D.C.Cir.1991); *Linemaster Switch Corp.,* 938 F.2d at 1308; *Thomas* ****434 *58** 805 F.2d at 425–27; *Lead Indus. Ass'n,* 647 F.2d at 1173.

Rather than confront the force of this precedent, the court relies on phrases from a few opinions suggesting a more flexible standard, *see* Op. at 24–25 n.18, but tellingly omits any discussion of the analyses or outcomes in those cases. This is because even where the court has mentioned flexibility, the comments at issue were either significantly more specific than the comments of Tennessee and Wisconsin, and were thus sufficient, or were more specific but nonetheless deemed wanting. For example, in *Natural Resources Defense Council v. EPA,* 571 F.3d 1245, 1259 (D.C.Cir.2009), the court suggested there is "leeway" but concluded, in words that resonate here, that "EPA cannot be expected to take [an] argument, raised in support of one specific objection, and apply it sua sponte to another provision." *Id.* at 1259–60. The irony in the court's reliance on this case is that it expects EPA to read *North Carolina* in precisely the opposite manner—it concludes EPA should have taken a holding about "exceeding the mark" in the CAIR trading allowance program and *sua sponte* applied it to the methodology for calculating "significant contribution," even though the court explicitly declined to disturb that methodology. *See supra* Pt. II.B. In *Appalachian Power,* 135 F.3d 791, 817 (D.C.Cir.1998), the court concluded the "argument ... during the comment period [was]—in substance, if not in form, the same objection" raised before the court, whereas here the comments of Tennessee and Wisconsin did not raise the statutory authority objection now urged upon the court in either form *or* substance. The court also relies on *Natural Resources Defense Council v. EPA,* 824 F.2d 1146, 1150–51 (D.C.Cir.1987) (en banc), which involved common law exhaustion, not CAA section 307(d)(7)(B), and in that case the issue was "explicitly raised ... in comments" before the EPA, *id.* at 1151. And although observing in *South Coast Air Quality Management District v. EPA,* 472 F.3d 882, 891–92 (D.C.Cir.2009), that petitioners have "some leeway," the court concluded that leeway did not permit the petitioner to rely upon a general procedural preference stated in a cover letter to its comments to alert EPA to the details of the objections to a final rule.

None of the court's proffered reasons for ignoring section 307(d)(7)(B)'s jurisdictional limitations has merit on its own, nor in combination. "[Z]ero plus zero [plus zero] equals zero." *U.S. v. Clipper,* 313 F.3d 605, 609 (D.C.Cir.2002).

III.

The court's remaining reasons for vacating the Transport Rule are also either beyond its jurisdiction or unpersuasive.

First, the court concludes that EPA violated the CAA by not calculating the required emission reductions "on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." Op. at 27. This is so, the court says, because in *Michigan* the court only permitted cost to be considered as a way "to allow some upwind States to do *less* than their full fair share," not more. *Id.* Petitioners have not argued that EPA violated the CAA by not calculating emission reductions on a proportional basis, as the court suggests. *See Anna Jaques Hosp. v. Sebelius,* 583 F.3d 1, 7 (D.C.Cir.2009). The statement in industry petitioners' brief that the court quotes, *see* Op. at 26, instead maintains that EPA was *arbitrary and capricious* in the way it grouped States for 2014 sulfur dioxide (SO_2) budgets because, they claimed, EPA did so without "consider [ing] *relative* contributions ****435 *59** of the various States," Industry & Labor Petrs' Br. at 33. This challenge is limited to the asserted *arbitrariness* of how certain States were categorized for one pollutant's budget for one year. The court lacks jurisdiction to consider *sua sponte* an objection to EPA's statutory authority not raised by petitioners within the sixty day period required under CAA section 307(b)(1), 42 U.S.C. § 7607(b) (1); *see Med. Waste,* 645 F.3d at 427. As this court has previously said, "[t]o rely on relief plaintiffs never requested on a claim they never made would be to conclude that zero plus zero equals more than zero." *NAACP, Jefferson Cnty. Branch v. U.S. Sugar Corp.,* 84 F.3d 1432, 1438 (D.C.Cir.1996).

Second, even if petitioners *had* raised a "proportionality" statutory authority objection, this objection and the court's conclusion are premised on the speculative possibility that the Transport Rule might require States to reduce emissions to a level below the one percent of NAAQS inclusion threshold of EPA's two-step approach to defining "signification contribution," and thus *more* than their statutory fair share—an argument over which the court also lacks jurisdiction. *See supra* Part II. Further, the court's conclusion is at odds with *North Carolina* where the court concluded that EPA's measure of significant contribution need not "directly correlate with each State's individualized air quality impact on downwind nonattainment *relative to other upwind states.*" 531 F.3d at 908 (emphasis added); *see LaShawn A.,* 87 F.3d at 1395. It also ignores that in *Michigan* the court expressly permitted the use of uniform cost thresholds to measure "significance," and likewise permitted the "ineluctabl[e]" result of small

and large contributors being required to make the same amount of reductions. 213 F.3d at 679. Without jurisdiction to reach an argument on whether the Transport Rule requires States to reduce *more* than their statutory fair share, *Michigan* requires the conclusion that EPA's choice of cost thresholds in the Transport Rule was permissible.

Next, the court concludes that EPA failed to consider the effect of in-State emissions of downwind States on their own nonattainment and interference with maintenance problems, *see* Op. at 57. Petitioners conceded at oral argument that this "in-State contribution" contention was "not actually an independent statutory authority argument," Oral Arg. Tr. at 32, but merely a repackaged version of the objection to the possibility of reductions below the one percent of NAAQS inclusion threshold, an argument over which the court lacks jurisdiction, *see supra* Part II. Even if the court had jurisdiction to address it, the court's conclusion is unsupported by the record. EPA examined the various cost threshold for each State, and in so doing considered

> how much air quality improvement in downwind states result[ed] from upwind state emission reductions at different levels; whether, considering upwind emission reductions and *assumed local (in-state) reductions,* the downwind air quality problems would be resolved; and the components of the remaining downwind air quality problem (e.g., whether it is *a predominantly local or in-state problem,* or whether it still contains a large upwind component).

Transport Rule, 76 Fed. Reg. at 48,256 (emphases added); *see id.* at 48,259 (concluding remaining nonattainment problem in Liberty–Clairton was the result of local emissions). EPA thus in fact examined the contribution of downwind States to their own nonattainment problems.

Finally, the court concludes that EPA "did not try to take steps to avoid" collective ****436 *60** over-control, Op. at 27. This conclusion too is unsupported by the record. The Transport Rule was not projected to achieve attainment of all downwind nonattainment and maintenance problems attributed to upwind States. *See id.* at 48,210, 48,232, 48,247–48; Resp.'s Br. at 38 n.24. Because EPA's analysis demonstrated instances of "remaining downwind air quality problems," Transport Rule, 76 Fed. Reg. at 48,256, there is no support for the court's conclusion that the Transport Rule resulted in collective over-control.

IV.

The Transport Rule, as EPA observes, represents "the culmination of decades of Congressional, administrative, and judicial efforts to fashion a workable, comprehensive regulatory approach to interstate air pollution issues that have huge public health implications." Resp.'s Br. at 12. The legislative history to amendments of the CAA documents Congress's frustration with the upwind States' historic failure to take effective action on their own to curtail their contributions to problems of pollution in downwind States, leading to amendments to strengthen EPA's hand. The court ignores Congress's limitations on the court's jurisdiction and decades of precedent strictly enforcing those limitations and proceeds to do violence to the plain text of the CAA and EPA's permissible interpretations of the CAA, all while claiming to be "apply[ing] and enforc[ing] the statute as it's now written." Op. at 12. The result is the endorsement of a "maximum delay" strategy for regulated entities, rewarding States and industry for cloaking their objections throughout years of administrative rulemaking procedures and blindsiding the agency with both a collateral attack on its interpretation of section 110(a) and an objection raised for the first time in this court, despite the court's previous decisions declining to disturb the approach EPA adopted in the Transport Rule.

To reach the result—vacating the Transport Rule—the court does several remarkable things. It seizes jurisdiction over the issue of States' independent "good neighbor" obligation by allowing States to pursue a collateral attack on Final SIP Rules from which they either failed timely to file petitions for review or their petitions challenging those rules have not been consolidated with the petitions challenging the Transport Rule that are before this three-judge panel. It asserts jurisdiction over industry's challenge to EPA's two-step approach to defining "significant contribution" by excusing industry from its failure to preserve the issue by first presenting it to EPA and then resting jurisdiction on a comment in another rulemaking that was first cited by industry in *rebuttal* oral argument and cannot bear the weight the court assigns to it because it did not challenge EPA's statutory authority to adopt its two-step approach. All this is contrary to Congress's limitations on the court's jurisdiction and

this court's precedent enforcing those limitations. The rest of the court's analysis recalibrates Congress's statutory scheme and vision of cooperative federalism in the CAA. Along the way, the court abandons any consideration that an agency is entitled to repose, absent objection during its administrative proceedings, when a court, here on *two* occasion, expressly leaves undisturbed its two-step approach to enforcing a statute it administers and no objection is raised during the Transport Rule administrative proceedings. Then, in dictum, the court offers suggestions as to how EPA might fix the problems the court has created upon rewriting the CAA and trampling on this court's precedent in *North Carolina* and *Michigan.*

***61 **437** None of this is to suggest that EPA should be excused from the statutory limits on its authority or any material procedural missteps under the CAA or the APA. But neither can the court ignore jurisdictional limits or substantive provisions that Congress wrote in clear terms and EPA's permissible interpretations of the CAA in addressing statutory silence or ambiguity. Rather it underscores why, as a programmatic and public health matter, Congress concluded there are important reasons for jurisdictional limits and administrative exhaustion that this court heretofore has steadfastly acknowledged in recognizing both the limits of its jurisdiction and of its role in enforcing the CAA as Congress wrote it.

Accordingly, I respectfully dissent.

Parallel Citations

75 ERC 1776, 402 U.S.App.D.C. 383

End of Document

Exhibit 15

(b) The Secretary must provide each agency by January 15 of each year with the format and guidelines for electronically submitting the agency's occupational injury and illness recordkeeping information.

(c) Each agency must submit to the Secretary by May 1, 2014, a list of all establishments. The list must include information about the department/agency affiliation, NAICS code, a street address, city, state and zip code. Federal agencies are also responsible for updating their list of establishments by May 1 of each year when they submit the annual report to the Secretary required by § 1960.71(a)(1).

* * * * *

■ 8. Add new § 1960.73 to read as follows:

§ 1960.73 Federal agency injury and illness recordkeeping forms.

(a) When filling out the OSHA Form 300 or equivalent, each agency must enter the employee's OPM job series number and job title in Column (c).

(b) When recording the injuries and illnesses of uncompensated volunteers, each agency must enter a "V" before the OPM job series number in Column (c) of the OSH Form 300 log or equivalent.

(c) Each agency must calculate the total number of hours worked by uncompensated volunteers.

[FR Doc. 2013–18457 Filed 8–2–13; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0687]

Drawbridge Operation Regulation; Albemarle Sound to Sunset Beach, Atlantic Intracoastal Waterway (AICW), Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the S.R. 74 Bridge, at mile 283.1, over the AICW, at Wrightsville Beach, NC. The deviation is necessary to facilitate electrical system and equipment upgrades to the bridge. This temporary deviation allows the drawbridge to remain in the closed to navigation position.

DATES: This deviation is effective from 7 p.m. on August 19, 2013 to 7 p.m. August 27, 2013.

ADDRESSES: The docket for this deviation, [USCG–2013–0687] is available at *http://www.regulations.gov.* Type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this deviation. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Jim Rousseau, Bridge Administration Branch Fifth District, Coast Guard; telephone (757) 398–6557, email *James.L.Rousseau2@uscg.mil.* If you have questions on reviewing the docket, call Barbara Hairston, Program Manager, Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION: The North Carolina Department of Transportation, who owns and operates this bascule bridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.821 (a)(4), to facilitate electrical system and mechanical equipment upgrades to the bridge.

Under the regular operating schedule, the draw for the S.R. 74 Bridge, at mile 283.1 over the AICW, at Wrightsville Beach, NC shall open on signal for commercial vessels at all times and on signal for pleasure vessels except between 7 a.m. and 7 p.m., need only open on the hour; and except for annual triathlon events that occur from September through November. The S.R. 74 Bridge has a temporary vertical clearance in the closed position of 18 feet above mean high water due to additional ongoing maintenance.

Under this temporary deviation, the drawbridge will be maintained in the closed to navigation position, beginning at 7 p.m., on Monday, August 19, 2013 until 7 p.m., on Tuesday August 20, 2013. In the event of inclement weather, the alternate dates and times will begin at 7 p.m., on Monday August 26, 2013 ending at 7 p.m., on Tuesday August 27, 2013. The bridge will operate under its normal operating schedule at all other times. The Coast Guard has carefully coordinated the restrictions with commercial and recreational waterway users.

Vessels able to pass under the bridge in the closed position may do so at anytime and are advised to proceed with caution. The bridge will be able to open for emergencies but at a slower rate. There is no immediate alternate route for vessels transiting this section of the AICW but vessels may pass before and after the closure each day. The Coast Guard will also inform additional waterway users through our Local and Broadcast Notices to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impacts caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 25, 2013.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2013–18740 Filed 8–2–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2012–0233; FRL 9841–4]

RIN 2060–AR18

Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes air quality designations for certain areas in the United States for the 2010 primary Sulfur Dioxide (SO_2) National Ambient Air Quality Standard (NAAQS). The EPA is issuing this rule to identify areas that, based on recorded air quality monitoring data showing violations of the NAAQS, do not meet the 2010 SO_2 NAAQS and areas that contribute to SO_2 air pollution in a nearby area that does not meet the SO_2 NAAQS. At this time, the EPA is designating as nonattainment most areas in locations where existing monitoring data from 2009–2011 indicate violations of the 1-hour SO_2 standard. The EPA intends to address in separate future actions the designations for all other areas for which the agency is not yet prepared to issue designations and that are consequently not addressed in this final rule. The Clean Air Act (CAA) directs areas designated nonattainment by this rule to undertake certain planning and pollution control

activities to attain the NAAQS as expeditiously as practicable.

DATES: *Effective Date:* The effective date of this rule is October 4, 2013.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2012–0233. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air Docket is (202) 566–1742.

In addition, the EPA has established a Web site for this rulemaking at: *http://www.epa.gov/so2designations.* The Web site includes the EPA's final SO_2 designations, as well as state and tribal initial recommendation letters, the EPA's modification letters, technical support documents, responses to comments and other related technical information.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, please contact Rhonda Wright, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Planning Division, C539–04, Research Triangle Park, NC 27711, telephone (919) 541–1087, email at *wright.rhonda@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regional Office Contacts:

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Region II—Kenneth Fradkin (212) 637–3702,

Region III—Ruth Knapp (215) 814–2191,

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Region V—John Summerhays (312) 886–6067,

Region VI—Dayana Medina (214) 665–7241,

Region VII—Larry Gonzalez (913) 551–7041,

Region VIII—Crystal Ostigaard (303) 312–6602,

Region IX—John Kelly (415) 947–4151, and

Region X—Steve Body (206) 553–0782.

The public may inspect the rule and state-specific technical support information at the following locations:

Regional offices	States
Dave Conroy, Chief, Air Programs Branch, EPA New England, 1 Congress Street, Suite 1100, Boston, MA 02114–2023, (617) 918–1661.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.
Richard Ruvo, Chief, Air Planning Section, EPA Region II, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–4014.	New Jersey, New York, Puerto Rico and Virgin Islands.
Cristina Fernandez, Associate Director, Office of Air Program Planning, EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2187, (215) 814–2178.	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia.
R. Scott Davis, Chief, Air Planning Branch, EPA Region IV, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, 12th Floor, Atlanta, GA 30303, (404) 562–9127.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.
John Mooney, Chief, Air Programs Branch, EPA Region V, 77 West Jackson Street, Chicago, IL 60604, (312) 886–6043.	Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.
Guy Donaldson, Chief, Air Planning Section, EPA Region VI, 1445 Ross Avenue, Dallas, TX 75202, (214) 665–7242.	Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
Joshua A. Tapp, Chief, Air Programs Branch, EPA Region VII, 11201 Renner Blvd., Lenexa, KS 66129, (918) 551–7606.	Iowa, Kansas, Missouri and Nebraska.
Gail Fallon, Acting Unit Chief, Air Quality Planning Unit, EPA Region VIII, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6281.	Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming.
Doris Lo, Air Planning Office, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3959.	American Samoa, Arizona, California, Guam, Hawaii, Nevada and Northern Mariana Islands.
Debra Suzuki, Manager, State and Tribal Air Programs, EPA Region X, Office of Air, Waste, and Toxics, Mail Code OAQ–107, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553–0985.	Alaska, Idaho, Oregon and Washington.

Table of Contents

The following is an outline of the Preamble.

I. Preamble Glossary of Terms and Acronyms

The following are abbreviations of terms used in the preamble.

APA Administrative Procedure Act
CAA Clean Air Act
CFR Code of Federal Regulations
DC District of Columbia
EO Executive Order
EPA Environmental Protection Agency
FR Federal Register
NAAQS National Ambient Air Quality Standards
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
SO_2 Sulfur Dioxide
SO_X Sulfur Oxides
RFA Regulatory Flexibility Act
SIP State Implementation Plan
UMRA Unfunded Mandate Reform Act of 1995
TAR Tribal Authority Rule
TSD Technical Support Document
U.S. United States
VCS Voluntary Consensus Standards

II. What is the purpose of this document?

The purpose of this action is to announce and promulgate designations and boundaries for certain areas of the country not meeting the 2010 SO_2 NAAQS based on available information, in accordance with the requirements of the CAA. The initial list of areas being designated nonattainment in each state and the boundaries of each area appear in the tables within the regulatory text.

This notice identifies the 29 initial areas being designated as nonattainment areas for the 2010 SO_2 NAAQS. The basis for designating each area as "nonattainment" is monitored air quality data from calendar years 2009–2011 indicating a violation of the NAAQS in the area. For these areas being designated nonattainment, the CAA directs states to develop State Implementation Plans (SIPs) that meet the requirements of sections 172(c) and 191–192 of the CAA and provide for attainment of the NAAQS as expeditiously as practicable, but no later than October 4, 2018. The CAA directs states to submit these SIPs to the EPA within 18 months of the effective date of these designations, i.e., by April 6, 2015.

III. What is sulfur dioxide?

SO_2 is one of a group of highly reactive gasses known as "oxides of sulfur" (SO_X). The largest sources of SO_2 emissions are from fossil fuel combustion at power plants (73 percent) and other industrial facilities (20 percent). Smaller sources of SO_2 emissions include industrial processes, such as extracting metal from ore, and the burning of high sulfur containing fuels by locomotives, large ships and non-road equipment. SO_2 is linked with a number of adverse effects on the respiratory system.

IV. What is the 2010 SO_2 NAAQS and what are the health concerns that it addresses?

The Administrator signed a final rule revising the primary SO_2 NAAQS on June 2, 2010. The rule was published in the **Federal Register** on June 22, 2010 (75 FR 35520), and became effective on August 23, 2010. Based on the Administrator's review of the air quality criteria for oxides of sulfur and the primary NAAQS for oxides of sulfur as measured by SO_2, the EPA revised the primary SO_2 NAAQS to provide requisite protection of public health with an adequate margin of safety. Specifically, the EPA established a new 1-hour SO_2 standard at a level of 75 parts per billion (ppb), which is met at an ambient air quality monitoring site when the 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations is less than or equal to 75 ppb, as determined in accordance with Appendix T of 40 CFR part 50. 40 CFR 50.17(a)–(b). The EPA also established provisions to revoke both the existing 24-hour and annual primary SO_2 standards, subject to certain conditions. 40 CFR 50.4(e).

Current scientific evidence links short-term exposures to SO_2, ranging from 5 minutes to 24 hours, with an array of adverse respiratory effects including bronchoconstriction and increased asthma symptoms. These effects are particularly important for asthmatics at elevated ventilation rates (e.g., while exercising or playing). Studies also show a connection between short-term exposure and increased visits to emergency departments and hospital admissions for respiratory illnesses, particularly in at-risk populations including children, the elderly and asthmatics.

The EPA's NAAQS for SO_2 is designed to protect against exposure to the entire group of SO_X. SO_2 is the component of greatest concern and is used as the indicator for the larger group of gaseous SO_X. Other gaseous SO_X (e.g., SO_3) are found in the atmosphere at concentrations much lower than SO_2.

Emissions that lead to high concentrations of SO_2 generally also lead to the formation of other SO_X. Control measures that reduce SO_2 can generally be expected to reduce people's exposures to all gaseous SO_X. This may also have the important co-benefit of reducing the formation of fine sulfate particles, which pose significant public health threats. SO_X can react with other compounds in the atmosphere to form small particles. These particles penetrate deeply into sensitive parts of the lungs and can cause or worsen respiratory disease, such as emphysema and bronchitis, and can aggravate existing heart disease, leading to increased hospital admissions and premature death.[1] The EPA's NAAQS for particulate matter are designed to provide protection against these health effects.

V. What are the CAA requirements for air quality designations and what action has the EPA taken to meet these requirements?

After the promulgation of a new or revised NAAQS, the EPA is required to designate areas as "nonattainment," "attainment," or "unclassifiable," pursuant to section 107(d)(1) of the CAA.

The process for designating areas following promulgation of a new or revised NAAQS is contained in section 107(d) of the CAA. The CAA requires the EPA to complete the initial designations process within 2 years of promulgating a new or revised standard. If the Administrator has insufficient information to make these designations by that deadline, the EPA has the authority to extend the deadline for completing designations by up to 1 year. On July 27, 2012, the EPA announced that it had insufficient information to complete the designations for the 1-hour SO_2 standard within 2 years and extended the designations deadline to June 3, 2013.

At this time, the EPA is initially designating as nonattainment most areas in locations where existing monitoring data from 2009–2011 indicate violations of the 1-hour SO_2 standard. In some cases, we have had to use data from a different three-year period or are still evaluating whether data from 2009–2011 are influenced by exceptional events. In separate future actions, the EPA intends to address the designations for all other areas for which the agency is not yet prepared to issue designations and that are consequently not addressed in this final rule. With input from a diverse group of stakeholders, the EPA has developed a comprehensive implementation strategy for the future SO_2 designations actions that focuses resources on identifying and addressing unhealthy levels of SO_2 in areas where people are most likely to be exposed to violations of the standard. For

[1] *See* Fact Sheet Revisions to the Primary National Ambient Air Quality Standard, Monitoring Network, and Data Reporting Requirements for Sulfur Dioxide at *http://www.epa.gov/airquality/sulfurdioxide/pdfs/20100602fs.pdf.*

informational purposes, the strategy is available at: *http://www.epa.gov/airquality/sulfurdioxide/implement.html.* The EPA plans to continue to work closely with state, tribal and local air quality management agencies to ensure health-protective, commonsense implementation of the 1-hour SO_2 NAAQS.

By not later than 1 year after the promulgation of a new or revised NAAQS, CAA section 107(d)(1)(A) provides that each state governor is required to recommend air quality designations, including the appropriate boundaries for areas, to the EPA. The EPA reviews those state recommendations and is authorized to make any modifications the Administrator deems necessary. The statute does not define the term "necessary," but the EPA interprets this to authorize the Administrator to modify designations that did not meet the statutory requirements or were otherwise inconsistent with the facts or analysis deemed appropriate by the EPA. If the EPA is considering modifications to a state's initial recommendation, the EPA is required to notify the state of any such intended modifications to its recommendation not less than 120 days prior to the EPA's promulgation of the final designation. During this period of no less than 120 days, if the state does not agree with the EPA's modification, it has an opportunity to respond to the EPA and to demonstrate why it believes the modification proposed by the EPA is inappropriate, as contemplated by section 107(d)(1)(B)(ii). Even if a state fails to provide any recommendation for an area, in whole or in part, the EPA still must promulgate a designation that the Administrator deems appropriate, pursuant to section 107(d)(1)(B)(ii).

Section 107(d)(1)(A)(i) of the CAA defines a nonattainment area as any area that does not meet an ambient air quality standard or that is contributing to ambient air quality in a nearby area that does not meet the standard. If an area meets either prong of this definition, then the EPA is obligated to designate the area as "nonattainment."

The EPA believes that section 107(d) provides the agency with discretion to determine how best to interpret the terms in the definition of a nonattainment area (e.g., "contributes to" and "nearby") for a new or revised NAAQS, given considerations such as the nature of a specific pollutant, the types of sources that may contribute to violations, the form of the standards for the pollutant, and other relevant information. In particular, the EPA believes that the statute does not require the agency to establish bright line tests or thresholds for what constitutes "contribution" or "nearby" for purposes of designations.[2]

Similarly, the EPA believes that the statute permits the EPA to evaluate the appropriate application of the term "area" to include geographic areas based upon full or partial county boundaries, and contiguous or non-contiguous areas, as may be appropriate for a particular NAAQS. For example, section 107(d)(1)(B)(ii) explicitly provides that the EPA can make modifications to designation recommendations for an area "or portions thereof," and under section 107(d)(1)(B)(iv) a designation remains in effect for an area "or portion thereof" until the EPA redesignates it.

Designation activities for federally-recognized tribal governments are covered under the authority of section 301(d) of the CAA. This provision of the CAA authorizes the EPA to treat eligible tribes in a similar manner as states. Pursuant to section 301(d)(2), the EPA promulgated regulations, known as the Tribal Authority Rule (TAR), on February 12, 1999. 63 FR 7254, codified at 40 CFR part 49. That rule specifies those provisions of the CAA for which it is appropriate to treat tribes in a similar manner as states. Under the TAR, tribes may choose to develop and implement their own CAA programs, but are not required to do so. The TAR also establishes procedures and criteria by which tribes may request from the EPA a determination of eligibility for such treatment. The designations process contained in section 107(d) of the CAA is included among those provisions determined to be appropriate by the EPA for treatment of tribes in the same manner as states. Under the TAR, tribes generally are not subject to the same submission schedules imposed by the CAA on states. As authorized by the TAR, tribes may seek eligibility to submit designation recommendations to the EPA. In addition, CAA section 301(d)(4) gives the EPA discretionary authority, in cases where it determines that treatment of tribes as identical to states is "inappropriate or administratively infeasible," to provide for direct administration by regulation to achieve the appropriate purpose.

To date, six tribes have applied under the TAR for eligibility to submit its own recommendations under section 107(d). Nonetheless, the EPA invited all tribes to submit recommendations concerning designations for the 2010 SO_2 NAAQS. The EPA worked with the tribes that requested an opportunity to submit designation recommendations. Tribes were provided an opportunity to submit their own recommendations and supporting documentation and could also comment on state recommendations and the EPA modifications.

Designation recommendations and supporting documentation were submitted by most states and several tribes to the EPA by June 3, 2011. After receiving these recommendations, and after reviewing and evaluating each recommendation, the EPA provided a response to the states and tribes on February 7, 2013.[3] In these letter responses, we indicated whether the EPA intended to make modifications to the initial state or tribal recommendations and explained the EPA's reasons for making any such modifications. For the majority of the areas, the EPA agreed with the state's recommended boundary. The EPA requested that states and tribes respond to any proposed EPA modifications by April 8, 2013. The EPA received comments from some states suggesting changes to the EPA's proposed modifications and providing additional information. The EPA evaluated these comments, and all of the timely supporting technical information provided. As a result, and based on that input and analysis, some of the final designations reflect further modifications to the initial state recommendations. The state and tribal letters, including the initial recommendations, the EPA's February 2013 responses to those letters, any modifications, and the subsequent state comment letters, are in the docket for this action.

Although not required by section 107(d) of the CAA, the EPA also provided an opportunity for members of the public to comment on the EPA's February 2013 response letters. In order to gather additional information for the EPA to consider before making final designations, the EPA published a notice on February 15, 2013 (78 FR 1124) which invited the public to comment on the EPA's intended designations. In the notice, the EPA stated that public comments must be received on or before March 18, 2013. The EPA received several requests from stakeholders for additional time to prepare their comments. Some of the requesters noted that the original 30-day comment period was insufficient time to

[2] This view was confirmed in *Catawba County* v. *EPA*, 571 F.3d 20 (DC Cir. 2009).

[3] As indicated in the February 2013 letters, the EPA is not yet prepared to designate any areas in Indian country. The EPA intends to address the designations for these areas in separate future actions.

review the EPA's responses to states' and tribes' recommended designations and to compile meaningful responses due to the complexity of the issues impacting certain areas. Taking that into consideration, the EPA extended the public comment period to April 8, 2013. State and tribal initial recommendations and the EPA's responses, including modifications, were posted on a publically accessible Web site (*http://www.epa.gov/so2designations*). Timely comments from the public and the EPA's responses to significant comments are in the docket for this action.

VI. What guidance did the EPA issue and how did the EPA apply the statutory requirements and applicable guidance to determine area designations and boundaries?

In the notice of proposed rulemaking for the revised SO_2 NAAQS (74 FR 64810; December 8, 2009), the EPA issued proposed guidance on its approach to implementing the standard, including its approach to initial area designations. The EPA solicited comment on that guidance and, in the notice of final rulemaking (75 FR 35520; June 22, 2010), provided further guidance concerning implementation of the standard and how to identify nonattainment areas and boundaries for the SO_2 NAAQS. Subsequently, on March 24, 2011, the EPA provided additional designations guidance to assist states with making their recommendations for area designations and boundaries.[4] In that guidance, the EPA recommended that monitoring data from the most recent three consecutive years be used to identify a violation of the SO_2 NAAQS. This is appropriate because the form of the SO_2 NAAQS is calculated as a 3-year average of the 99th percentile of the yearly distribution of 1-hour daily maximum SO_2 concentrations (specifically the most recent 3 consecutive years).[5] The EPA is basing these initial final designations on monitored SO_2 concentrations from Federal Reference Method and Federal Equivalent Method monitors that are sited and operated in accordance with 40 CFR Parts 50 and 58. The EPA notes that data from 2008–2010 were the most recent data available to states and tribes when they made their recommendations to the EPA in June 2011. Accordingly, although the determination of whether an area violates the standard was based on 2009–2011 data, the EPA considered state recommendations and data from 2008–2010, as appropriate, in determining boundaries for nonattainment areas.

In the guidance, the EPA stated that the perimeter of a county containing a violating monitor would be the initial presumptive boundary for nonattainment areas, but also stated that the state, tribe and/or the EPA could conduct additional area-specific analyses that could justify establishing either a larger or smaller area. The EPA indicated that the following factors should be considered in an analysis of whether to exclude portions of a county and whether to include additional nearby areas outside the county as part of the designated nonattainment area: (1) Air quality data; (2) emissions-related data; (3) meteorology; (4) geography/topography; and (5) jurisdictional boundaries, as well as other available data. States and tribes may identify and evaluate other relevant factors or circumstances specific to a particular area.

Most states and several tribes submitted their designations recommendations in June 2011. In each case, the EPA reviewed the state recommendations and, where appropriate, the EPA accepted the state's recommendations. However, where the EPA determined that changes were necessary to a state's initial recommendation, we conveyed those preliminary determinations to the state in February 2013, and have worked with states to further review appropriate boundaries.

VII. What air quality data has the EPA used?

The final SO_2 designations contained in this action are based upon violations of the NAAQS determined by air quality monitoring data from calendar years 2009–2011, except where it was necessary or appropriate to use a different three-year period. The form of the standard requires a calculation of monitoring values from 3 consecutive years. The 1-hour primary standard is violated at an ambient air quality monitoring site when the 3-year average of the annual 99th percentile of the daily maximum 1-hour average concentrations exceeds 75 ppb, as determined in accordance with appendix T of 40 CFR part 50. For comparison to the level of the standard, ambient air quality shall be measured by a reference method based on appendix A or A–1, or by a Federal Equivalent Method designated in accordance with 40 CFR part 53.

VIII. How do designations affect Indian Country?

All counties, partial counties or Air Quality Control Regions listed in the tables within the regulatory text are designated as indicated. For the first round of SO_2 designations, the EPA is only designating certain nonattainment areas shown to be violating the NAAQS based on monitored data. There are no areas in Indian Country being designated nonattainment at this time. All remaining areas, including areas of Indian Country, for which the EPA is not yet prepared to issue final designations will be addressed in a subsequent round of designations.

IX. Where can I find information forming the basis for this rule and exchanges between the EPA, States and tribes related to this rule?

Information providing the basis for this action are provided in several technical support documents (TSDs), a response to comments document (RTC) and other information in the docket. The TSDs, RTC, applicable EPA's guidance memoranda, copies of correspondence regarding this process between the EPA and the states, tribes and other parties, are available for review at the EPA Docket Center listed above in the **ADDRESSES** section of this document and on the agency's SO_2 Designations Web site at *http://www.epa.gov/so2designations*. Area-specific questions can be addressed to the EPA Regional Offices.

X. Statutory and Executive Order Reviews

Upon promulgation of a new or revised NAAQS, the CAA requires the EPA to designate areas as attaining or not attaining the NAAQS. The CAA then specifies requirements for areas based on whether such areas are attaining or not attaining the NAAQS. In this final rule, the EPA assigns designations to selected areas as required.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action responds to the CAA requirement to promulgate air quality designations after promulgation of a new or revised NAAQS. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (67 FR 3821, January 21, 2011).

[4] *See,* "Area Designations for the 2010 Revised Primary Sulfur Dioxide National Ambient Air Quality Standards," memorandum to Regional Air Division Directors, Regions I–X, from Stephen D. Page, dated March 24, 2011.

[5] This notice refers to monitoring data for "calendar years 2009–2011" which includes data from January 2009 through December 2011.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action responds to the requirement to promulgate air quality designations after promulgation of a new or revised NAAQS. This requirement is prescribed in the CAA section 107 of title 1. This action does not establish any new information collection apart from that already required by law.

C. Regulatory Flexibility Act

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This action is not subject to notice-and-comment requirements under the APA or any other statute because the action is not subject to the APA. CAA section 107(d)(2)(B) does not require the EPA to issue a notice of proposed rulemaking before issuing this final action.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. It does not create any additional requirements beyond those of the CAA and SO_2 NAAQS (40 CFR 50.17); therefore, no UMRA analysis is needed. This action establishes nonattainment designations for certain areas of the country for the 2010 SO_2 NAAQS. The CAA requires states to develop plans, including control measures, based on the designations for areas within the state.

The EPA believes that any new controls imposed as a result of this action will not cost in the aggregate $100 million or more annually. Thus, this federal action will not impose mandates that will require expenditures of $100 million or more in the aggregate in any 1 year.

E. Executive Order 13132: Federalism

This final action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA establishes the process whereby states take primary responsibility in developing plans to meet the SO_2 NAAQS in areas designated nonattainment by this action. This action will not modify the relationship of the states and the EPA for purposes of developing programs to attain and maintain the SO_2 NAAQS. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action concerns the designation of certain areas as nonattainment for the 2010 SO_2 NAAQS, but no areas of Indian Country are being designated by this action. Because this action does not have tribal implications, Executive Order 13175 does not apply.

Although Executive Order 13175 does not apply to this rule, the EPA communicated with tribal leaders and environmental staff regarding the designations process. The EPA also sent individualized letters to all federally recognized tribes to explain the designation process for the 2010 SO_2 NAAQS, to provide the EPA designations guidance, and to offer consultation with the EPA. The EPA provided further information to tribes through presentations at the National Tribal Forum and through participation in National Tribal Air Association conference calls. The EPA also sent individualized letters to all federally recognized tribes that submitted recommendations to the EPA about the EPA's intended designations for the SO_2 standards and offered tribal leaders the opportunity for consultation. These communications provided opportunities for tribes to voice concerns to the EPA about the general designations process for the 2010 SO_2 NAAQS, as well as concerns specific to a tribe, and informed the EPA about key tribal concerns regarding designations as the rule was under development.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined in Executive Order 12866. While not subject to the Executive Order, this final action may be especially important for asthmatics, including asthmatic children, living in SO_2 nonattainment areas because respiratory effects in asthmatics are among the most sensitive health endpoints for SO_2 exposure. Because asthmatic children are considered a sensitive population, the EPA evaluated the potential health effects of exposure to SO_2 pollution among asthmatic children as part of the EPA's prior action establishing the 2010 SO_2 NAAQS. These effects and the size of the population affected are summarized in the EPA's final SO_2 NAAQS rules. *See http://www.epa.gov/ttn/naaqs/standards/so2/fr/20100622.pdf.*

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA of 1995, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs

federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the U.S.

The CAA requires that the EPA designate as nonattainment "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant." By designating as nonattainment areas where available information indicate a violation of the 2010 SO_2 NAAQS or a contribution to a nearby violation, this action protects all those residing, working, attending school, or otherwise present in those areas regardless of minority or economic status.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the U.S. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective October 4, 2013.

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This final action designating areas for the 2010 SO_2 NAAQS is "nationally applicable" within the meaning of section 307(b)(1). This final action establishes designations for areas across the U.S. for the 2010 SO_2 NAAQS. At the core of this final action is the EPA's interpretation of the definition of nonattainment under section 107(d)(1) of the CAA, and its application of that interpretation to areas across the country. For the same reasons, the Administrator also is determining that the final designations are of nationwide scope and effect for the purposes of section 307(b)(1). This is particularly appropriate because, in the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has a scope or effect beyond a single judicial circuit. H.R. Rep. No. 95–294 at 323, 324, *reprinted* in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this final action extends to numerous judicial circuits since the designations apply to areas across the country. In these circumstances, section 307(b)(1) and its legislative history calls for the Administrator to find the action to be of "nationwide scope or effect" and for venue to be in the DC Circuit.

Thus, any petitions for review of final designations must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: July 25, 2013.

Gina McCarthy,

EPA Administrator.

For the reasons set forth in the preamble, 40 CFR part 81 is amended as follows:

PART 81—DESIGNATIONS OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

Subpart C—Section 107 Attainment Status Designations

§ 81.301 [Amended]

■ 2. Section 81.301 is amended by revising the table heading for "Alabama—Sulfur Dioxide" to read "Alabama—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.302 [Amended]

■ 3. Section 81.302 is amended by revising the table heading for "Alaska—SO_2" to read "Alaska—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 4. Section 81.303 is amended as follows:

■ a. By revising the table heading for "Arizona—SO_2" to read "Arizona—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Arizona—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Arizona—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.303 Arizona.

* * * * *

ARIZONA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Hayden, AZ[1]	10–4–13	Nonattainment.
Gila County (part)		
The portions of Gila County that are bounded by: T4S, R14E; T4S, R15E; T4S, R16E; T5S, R15E; T5S, R16E		
Pinal County (part)		

ARIZONA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)—Continued

Designated area	Designation	
	Date	Type
The portions of Pinal County that are bounded by: T4S, R14E; T4S, R15E; T4S, R16E; T5S, R14E; T5S, R15E; T5S, R16E; T6S, R14E; T6S, R15E; T6S, R16E		
Miami, AZ [1]	10–4–13	Nonattainment.
Gila County (part)		
The portions of Gila County that are bounded by: T2N, R14E; T2N, R15E; T1N, R13E; T1N, R14E; T1N, R15E; T1S, R14E; T1S, R14 1/2E; T1S, R15E		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.304 [Amended]

■ 5. Section 81.304 is amended by revising the table heading for "Arkansas—SO_2" to read "Arkansas—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.305 [Amended]

■ 6. Section 81.305 is amended by revising the table heading for "California—SO_2" to read "California—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.306 [Amended]

■ 7. Section 81.306 is amended by revising the table heading for "Colorado—SO_2" to read "Colorado—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.307 [Amended]

■ 8. Section 81.307 is amended by revising the table heading for "Connecticut—SO_2" to read "Connecticut—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.308 [Amended]

■ 9. Section 81.308 is amended by revising the table heading for "Delaware—SO_2" to read "Delaware—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.309 [Amended]

■ 10. Section 81.309 is amended by revising the table heading for "District of Columbia—SO_2" to read "District of Columbia—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 11. Section 81.310 is amended as follows:

■ a. By revising the table heading for "Florida—SO_2" to read "Florida—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Florida—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Florida—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.310 Florida.

* * * * *

FLORIDA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Hillsborough County, FL [1]	10–4–13	Nonattainment.
Hillsborough County (part)		
That portion of Hillsborough County encompassed by the polygon with the vertices using Universal Traverse Mercator (UTM) coordinates in UTM zone 17 with datum NAD83 as follows: (1) vertices—UTM Easting (m) 35881, UTM Northing 3076066; (2) vertices—UTM Easting (m) 355673, UTM Northing 3079275; (3) UTM Easting (m) 360300, UTM Northing 3086380; (4) vertices—UTM Easting (m) 366850, UTM Northing 3086692; (5) vertices—UTM Easting (m) 368364, UTM Northing 3083760; and (6) vertices—UTM Easting (m) 365708, UTM Northing 3079121		
Nassau County, FL [1]	10–4–13	Nonattainment.
Nassau County, (part)		
That portion of Nassau County encompassing the circular boundary with the center being UTM Easting 455530 meters, UTM Northing 3391737 meters, UTM zone 17, using the NAD83 datum (the location of the violating ambient monitor) and the radius being 2.4 kilometers		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.311 [Amended]

■ 12. Section 81.311 is amended by revising the table heading for "Georgia—SO_2" to read "Georgia—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.312 [Amended]

■ 13. Section 81.312 is amended by revising the table heading for "Hawaii—SO_2" to read "Hawaii—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.313 [Amended]

■ 14. Section 81.313 is amended by revising the table heading for "Idaho—SO_2" to read "Idaho—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 15. Section 81.314 is amended as follows:

■ a. By revising the table heading for "Illinois—SO_2" to read "Illinois—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Illinois—2010 Sulfur Dioxide NAAQS

(Primary)" following the newly designated table "Illinois—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.314 Illinois.

* * * * *

ILLINOIS—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Lemont, IL[1]	10–4–13	Nonattainment.
Cook County (part)		
Lemont Township		
Will County (part)		
DuPage Township and Lockport Township		
Pekin, IL[1]	10–4–13	Nonattainment.
Tazewell County (part)		
Cincinnati Township and Pekin Township		
Peoria County (part)		
Hollis Township		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

■ 16. Section 81.315 is amended as follows:

■ a. By revising the table heading for "Indiana—SO_2" to read "Indiana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Indiana—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Indiana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.315 Indiana.

* * * * *

INDIANA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Indianapolis, IN[1]	10–4–13	Nonattainment.
Marion County (part)		
Wayne Township, Center Township, Perry Township		
Morgan County, IN[1]	10–4–13	Nonattainment.
Morgan County (part)		
Clay Township, Washington Township		
Southwest Indiana, IN[1]	10–4–13	Nonattainment.
Daviess County (part)		
Veale Township		
Pike County (part)		
Washington Township		
Terre Haute, IN[1]	10–4–13	Nonattainment.
Vigo County (part)		
Fayette Township, Harrison Township		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

■ 17. Section 81.316 is amended as follows:

■ a. By revising the table heading for "Iowa—SO_2" to read "Iowa—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Iowa—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Iowa—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.316 Iowa.

* * * * *

IOWA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Muscatine, IA[1]	10–4–13.	Nonattainment.
Muscatine County (part)		
Sections 1–3, 10–15, 22–27, 34–36 of T77N, R3W (Lake Township)		
Sections 1–3, 10–15, 22–27, 34–36 of T76N, R3W (Seventy-six Township)		
T77N, R2W (Bloomington Township).		
T76N, R2W (Fruitland Township)		
All sections except 1, 12, 13, 24, 25, 36 of T77N, R1W (Sweetland Township)		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.317 [Amended]

■ 18. Section 81.317 is amended by revising the table heading for "Kansas—SO_2" to read "Kansas—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 19. Section 81.318 is amended as follows:

■ a. By revising the table heading for "Kentucky—SO_2" to read "Kentucky—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Kentucky—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Kentucky—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.318 Kentucky.

* * * * *

KENTUCKY—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Campbell-Clermont Counties, KY–OH [1]	10–4–13	Nonattainment.
Campbell County (part)		
That portion of Campbell County which lies south and west of the Ohio River described as follows: Beginning at geographic coordinates 38.9735 North Latitude, 84.3017 West Longitude (NAD 1983) on the edge of the Ohio River running southwesterly to KY Highway 1566; thence continuing running southwesterly along KY Highway 1566 to KY Highway 9 (AA Highway); thence running north westerly along KY Highway 9 (AA Highway) from Hwy 1566 to Interstate 275; thence running northeasterly along Interstate 275 to Highway 2345 (John's Hill Road), Hwy 2345 to US–27, US–27 to I–275, I–275 to the Ohio River; thence running southeasterly along the Ohio River from Interstate 275 to geographic coordinates 38.9735 North Latitude, 84.3017 West Longitude (NAD 1983)		
Jefferson County, KY [1]	10–4–13	Nonattainment.
Jefferson County (part)		
That portion of Jefferson County compassed by the polygon with the vertices using Universal Traverse Mercator (UTM) coordinates in UTM zone 16 with datum NAD83 as follows:		
(1) Ethan Allen Way extended to the Ohio River at UTM Easting (m) 595738, UTM Northing 4214086 and Dixie Highway (US60 and US31W) at UTM Easting (m) 59751, UTM Northing 4212946;		
(2) Along Dixie Highway from UTM Easting (m) 597515, UTM Northing 4212946 to UTM Easting (m) 595859, UTM Northing 4210678;		
(3) Near the adjacent property lines of Louisville Gas and Electric—Mill Creek Electric Generating Station and Kosmos Cement where they join Dixie Highway at UTM Easting (m) 595859, UTM Northing 4210678 and the Ohio River at UTM Easting (m) 595326, UTM Northing 4211014;		
(4) Along the Ohio River from UTM Easting (m) 595326, UTM Northing 4211014 to UTM Easting (m) 595738, UTM Northing 4214086		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

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■ 20. Section 81.319 is amended as follows:

■ a. By revising the table heading for "Louisiana—SO_2" to read "Louisiana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Louisiana—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Louisiana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.319 Louisiana.

* * * * *

LOUISIANA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
St. Bernard Parish, LA [1]	10–4–13	Nonattainment.
St. Bernard Parish		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.320 [Amended]

■ 21. Section 81.320 is amended by revising the table heading for "Maine—SO_2" to read "Maine—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.321 [Amended]

■ 22. Section 81.321 is amended by revising the table heading for "Maryland—SO_2" to read "Maryland—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.322 [Amended]

■ 23. Section 81.322 is amended by revising the table heading for "Massachusetts—SO_2" to read "Massachusetts—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 24. Section 81.323 is amended as follows:

■ a. By revising the table heading for "Michigan—SO_2" to read "Michigan—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Michigan—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Michigan—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.323 Michigan.

* * * * *

MICHIGAN—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Detroit, MI [1] Wayne County (part)	10–4–13	Nonattainment.
The area bounded on the east by the Michigan-Ontario border, on the south by the Wayne County-Monroe County border, on the west by Interstate 75 north to Southfield Road, Southfield Road to Interstate 94, and Interstate 94 north to Michigan Avenue, and on the north by Michigan Avenue to Woodward Avenue and a line on Woodward Avenue extended to the Michigan-Ontario border		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.324 [Amended]

■ 25. Section 81.324 is amended by revising the table heading for "Minnesota—SO_2" to read "Minnesota—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.325 [Amended]

■ 26. Section 81.325 is amended by revising the table heading for "Mississippi—SO_2" to read "Mississippi—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 27. Section 81.326 is amended as follows:

■ a. By revising the table heading for "Missouri—SO_2" to read "Missouri—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Missouri—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Missouri—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.326 Missouri.

* * * * *

MISSOURI—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Jackson County, MO [1] Jackson County (part)	10–4–13	Nonattainment.
The portion of Jackson County bounded by I–70/I–670 and the Missouri River to the north; and, to the west of I–435 to the state line separating Missouri and Kansas		
Jefferson County, MO [1] Jefferson County (part)	10–4–13	Nonattainment.
That portion within Jefferson County described by connecting the following four sets of UTM coordinates moving in a clockwise manner:		
(Herculaneum USGS Quadrangle)		
718360.283 4250477.056		
729301.869 4250718.415		
729704.134 4236840.30		
718762.547 4236558.715		
(Festus USGS Quadrangle)		
718762.547 4236558.715		
729704.134 4236840.30		
730066.171 4223042.637		
719124.585 4222680.6		
(Selma USGS Quadrangle)		
729704.134 4236840.30		
730428.209 4236840.3		
741047.984 4223283.996		
730066.171 4223042.637		
(Valmeyer USGS Quadrangle)		
729301.869 4250718.415		
731474.096 4250798.868		
730428.209 4236840.3		
729704.134 4236840.30		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

■ 28. Section 81.327 is amended as follows:

■ a. By revising the table heading for "Montana—SO_2" to read "Montana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Montana—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Montana—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.327 Montana.

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MONTANA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Billings, MT [1]		
Yellowstone County (part)	10–4–13	Nonattainment.
The area originates at the point defined as the southwest corner of Section 11, Township 1S, Range 26E. From that point the boundary proceeds north along the western section line of Section 11 to the point of intersection with the midline of Interstate Highway 90. From that point the boundary follows the midline of Interstate Highway 90, across the Yellowstone River, to the point where the highway midline intersects the northern boundary of Section 35, Township 1N, Range 26E. From that point the boundary proceeds east along the northern section line of Sections 35 and 36 to the point where Old US 87/Hardin Road leaves the section line and turns southeast. The boundary follows the midline of Old US 87/Hardin Road southeast to the point where the road intersects the western boundary of the SE ¼ of the SE ¼ of Section 31, Township 1N, Range 27E. From that point the boundary proceeds south along the ¼ section line to the southern boundary of Township 1N, then east to the northeast corner of Section 5, Township 1S, Range 27E. The boundary then proceeds south along the eastern section line of sections 5 and 8 to the southeast corner of Section 8, Township 1S, Range 27E, where it turns west and follows the south section line of Sections 8 and 7, Township 1S, Range 27E; and Sections 12 and 11, Township 1S, Range 26E, back to the point of origin		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.328 [Amended]

■ 29. Section 81.328 is amended by revising the table heading for "Nebraska—SO_2" to read "Nebraska—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 30. Section 81.329 is amended by revising the table heading for "Nevada—SO_2" to read "Nevada—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 31. Section 81.330 is amended as follows:

■ a. By revising the table heading for "New Hampshire—SO_2" to read "New Hampshire—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "New Hampshire—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "New Hampshire—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.330 New Hampshire.

* * * * *

NEW HAMPSHIRE—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Central New Hampshire, NH [1]		
Hillsborough County (part)	10–4–13	Nonattainment.
Goffstown Town		
Merrimack County (part)		
Allenstown Town, Bow Town, Chichester Town, Dunbarton Town, Epsom Town, Hooksett Town, Loudon Town, Pembroke Town, Pittsfield Town, City of Concord		
Rockingham County (part)		
Candia Town, Deerfield Town, Northwood Town		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.331 [Amended]

■ 32. Section 81.331 is amended by revising the table heading for "New Jersey—SO_2" to read "New Jersey—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.332 [Amended]

■ 33. Section 81.332 is amended by revising the table heading for "New Mexico—SO_2" to read "New Mexico—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.333 [Amended]

■ 34. Section 81.333 is amended by revising the table heading for "New York—SO_2" to read "New York—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.334 [Amended]

■ 35. Section 81.334 is amended by revising the table heading for "North Carolina—SO_2" to read "North Carolina—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.335 [Amended]

■ 36. Section 81.335 is amended by revising the table heading for "North Dakota—SO_2" to read "North Dakota—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 37. Section 81.336 is amended as follows:

■ a. By revising the table heading for "Ohio—SO_2" to read "Ohio—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Ohio—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Ohio—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Campbell-Clermont Counties, KY–OH [1]		
Clermont County (part)	10–4–13	Nonattainment.
Lake County, OH [1]		
Lake County	10–4–13	Nonattainment.
Muskingum River, OH [1]	10–4–13	Nonattainment.
Morgan County (part)		
Center Township		
Washington County (part)		
Waterford Township		
Steubenville OH–WV [1]		
Jefferson County (part)	10–4–13	Nonattainment.
Cross Creek Township, Steubenville Township, Warren Township, Wells Township, Steubenville City		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.337 [Amended]

■ 38. Section 81.337 is amended by revising the table heading for "Oklahoma—SO_2" to read "Oklahoma—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.338 [Amended]

■ 39. Section 81.338 is amended by revising the table heading for "Oregon—SO_2" to read "Oregon—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 40. Section 81.339 is amended as follows:

■ a. By revising the table heading for "Pennsylvania—SO_2" to read "Pennsylvania—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Pennsylvania—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Pennsylvania—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.339 Pennsylvania.

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PENNSYLVANIA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Allegheny, PA [1]		
Allegheny County (part)	10–4–13	Nonattainment.
The area consisting of:		
Borough of Braddock		
Borough of Dravosburg		
Borough of East McKeesport		
Borough of East Pittsburgh		
Borough of Elizabeth		
Borough of Glassport		
Borough of Jefferson Hills		
Borough of Liberty		
Borough of Lincoln		
Borough of North Braddock		
Borough of Pleasant Hills		
Borough of Port Vue		
Borough of Versailles		
Borough of Wall		
Borough of West Elizabeth		
Borough of West Mifflin		
City of Clairton		
City of Duquesne		
City of McKeesport		
Elizabeth Township		
Forward Township		
North Versailles Township		
Beaver, PA [1]		
Beaver County (part)	10–4–13	Nonattainment.
Area consisting of Industry Borough, Shippingport Borough, Midland Borough, Brighton Township, Potter Township and Vanport Township		
Indiana, PA [1]	10–4–13	Nonattainment.
Indiana County		
Armstrong County (part)		
Area consisting of Plumcreek Township, South Bend Township, and Elderton Borough		
Warren, PA [1]		

PENNSYLVANIA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)—Continued

Designated area	Designation	
	Date	Type
Warren County (part)	10–4–13	Nonattainment
Area consisting of Conewango Township, Glade Township, Pleasant Township, and the City of Warren		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.340 [Amended]

■ 41. Section 81.340 is amended by revising the table heading for "Rhode Island—SO_2" to read "Rhode Island—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.341 [Amended]

■ 42. Section 81.341 is amended by revising the table heading for "South Carolina—SO_2" to read "South Carolina—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.342 [Amended]

■ 43. Section 81.342 is amended by revising the table heading for "South Dakota—SO_2" to read "South Dakota—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 44. Section 81.343 is amended as follows:

■ a. By revising the table heading for "Tennessee—SO_2" to read "Tennessee—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Tennessee—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Tennessee—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.343 Tennessee.

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TENNESSEE—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Sullivan County, TN [1]		
Sullivan County (part)	10–4–13	Nonattainment.
That portion of Sullivan County encompassing a circle having its center at the B–253 power house coordinates 36.5186 N; 82.5350 W and having a 3-kilometer radius		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.344 [Amended]

■ 45. Section 81.344 is amended by revising the table heading for "Texas—SO_2" to read "Texas—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.345 [Amended]

■ 46. Section 81.345 is amended by revising the table heading for "Utah—SO_2" to read "Utah—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.346 [Amended]

■ 47. Section 81.346 is amended by revising the table heading for "Vermont—SO_2" to read "Vermont—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.347 [Amended]

■ 48. Section 81.347 is amended by revising the table heading for "Virginia—SO_2" to read "Virginia—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.348 [Amended]

■ 49. Section 81.348 is amended by revising the table heading for "Washington—SO_2" to read "Washington—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

■ 50. Section 81.349 is amended as follows:

■ a. By revising the table heading for "West Virginia—SO_2" to read "West Virginia—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "West Virginia—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "West Virginia—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.349 West Virginia.

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WEST VIRGINIA—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Steubenville, OH–WV [1]		
Brooke County (part)	10–4–13	Nonattainment.
Area bounded by the Cross Creek Tax District		
Marshall, WV [1]		
Marshall County (part)	10–4–13	Nonattainment.
Area consisting of Clay Tax district, Franklin Tax District, and Washington Tax District		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

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■ 51. Section 81.350 is amended as follows:

■ a. By revising the table heading for "Wisconsin—SO_2" to read "Wisconsin—1971 Sulfur Dioxide NAAQS (Primary and Secondary)"; and

■ b. By adding a new table entitled "Wisconsin—2010 Sulfur Dioxide NAAQS (Primary)" following the newly designated table "Wisconsin—1971 Sulfur Dioxide NAAQS (Primary and Secondary)" to read as follows:

§ 81.350 Wisconsin.

* * * * *

WISCONSIN—2010 SULFUR DIOXIDE NAAQS (PRIMARY)

Designated area	Designation	
	Date	Type
Rhinelander, WI[1]		
Oneida County (part)	10–4–13	Nonattainment.
City of Rhinelander, Crescent Town, Newbold Town, Pine Lake Town, and Pelican Town		

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

§ 81.351 [Amended]

■ 52. Section 81.351 is amended by revising the table heading for "Wyoming—SO_2" to read "Wyoming—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.352 [Amended]

■ 53. Section 81.352 is amended by revising the table heading for "American Samoa—SO_2" to read "American Samoa—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.353 [Amended]

■ 54. Section 81.353 is amended by revising the table heading for "Guam—SO_2" to read "Guam—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.354 [Amended]

■ 55. Section 81.354 is amended by revising the table heading for "Northern Mariana Islands—SO_2" to read "Northern Mariana Islands—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.355 [Amended]

■ 56. Section 81.355 is amended by revising the table heading for "Puerto Rico—SO_2" to read "Puerto Rico—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

§ 81.356 [Amended]

■ 57. Section 81.356 is amended by revising the table heading for "Virgin Islands—SO_2" to read "Virgin Islands—1971 Sulfur Dioxide NAAQS (Primary and Secondary)".

[FR Doc. 2013–18835 Filed 8–2–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2000–0003; FRL 9842–7]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Direct Deletion of the Imperial Refining Company Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) Region 6 is publishing a direct final Notice of Deletion of the Imperial Refining Co. Superfund Site located in Ardmore, Carter County, Oklahoma, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of Oklahoma, through the Oklahoma Department of Environmental Quality (ODEQ), because EPA has determined that all appropriate response actions under CERCLA, other than operation, maintenance, and five-year reviews have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This direct final deletion is effective September 19, 2013 unless EPA receives adverse comments by September 4, 2013. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–2000–0003, by one of the following methods:

- *http://www.regulations.gov:* Follow internet on-line instructions for submitting comments.
- *Email:* Brian W. Mueller, *mueller.brian@epa.gov.*
- *Fax:* 214–665–6660.
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Exhibit 16

134 S.Ct. 1584
Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY et al., Petitioners
v.
EME HOMER CITY GENERATION, L.P., et al.;
and
American Lung Association et al., Petitioners
v.
EME Homer City Generation, L.P., et al.

Nos. 12–1182, 12–1183. | Argued Dec. 10, 2013. | Decided April 29, 2014. *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Synopsis

Background: Group of state and local governments, joined by industry and labor groups, petitioned for review of Environmental Protection Agency's (EPA) Transport Rule, which called for a cost-effective allocation of emission reductions among upwind states to improve air quality in polluted downwind areas under good neighbor provision of the Clean Air Act (CAA). The United States Court of Appeals for the District of Columbia Circuit, Kavanaugh, Circuit Judge, 696 F.3d 7, vacated the rule. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

[1] CAA did not command that states be given a second opportunity to file a state implementation plan (SIP) after EPA had quantified the state's good-neighbor obligations;

[2] good neighbor provision delegated authority to EPA to determine how to allocate responsibility for a downwind state's excess pollution;

[3] Transport Rule was a permissible construction of the good neighbor provision; and

[4] possibility that Transport Rule might exceed EPA's authority did not warrant judicial condemnation of the Rule in its entirety.

Reversed and remanded.

Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

Justice Alito did not participate.

1587** ***Syllabus *

* Together with No. 12–1183, *American Lung Association et al. v. EME Homer City Generation, L.P., et al.*, also on certiorari to the same court.

Congress and the Environmental Protection Agency (EPA or Agency) have, over the course of several decades, made many efforts to deal with the complex challenge of curtailing air pollution emitted in upwind States, but causing harm in other, downwind States. As relevant here, the Clean Air Act (CAA or Act) directs EPA to establish national ambient air quality standards (NAAQS) for pollutants at levels that will protect public health. 42 U.S.C. §§ 7408, 7409. Once EPA settles on a NAAQS, the Agency must designate "nonattainment" areas, *i.e.*, locations where the concentration of a regulated pollutant exceeds the NAAQS. § 7407(d). Each State must submit a State Implementation Plan, or SIP, to EPA within three years of any new or revised NAAQS. § 7410(a)(1). From the date EPA determines that a State SIP is inadequate, the Agency has two years to promulgate a Federal Implementation Plan, or FIP. § 7410(c)(1). Among other components, the CAA mandates SIP compliance with the Good Neighbor Provision, which requires SIPs to "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 with respect to any ... [NAAQS]." § 7410(a)(2)(D)(i).

Several times over the past two decades, EPA has attempted to delineate the Good Neighbor Provision's scope by identifying when upwind States "contribute significantly" to nonattainment downwind. The D.C. Circuit found fault with the Agency's 2005 attempt, the Clean Air Interstate Rule, or CAIR, which regulated both nitrogen oxide (NO_X) and sulfur dioxide (SO_2) emissions, the gasses at issue here. The D.C. Circuit nevertheless left CAIR temporarily in place, while encouraging EPA to act with dispatch in dealing with problems the court had identified.

EPA's response to that decision is the Cross–State Air Pollution Rule (Transport Rule), which curbs NO_X and SO_2emissions ***1588** in 27 upwind States to achieve downwind attainment of three NAAQS. Under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State and (2) could be eliminated cost-effectively, as determined by EPA. Upwind States are obliged to eliminate only emissions meeting both of these criteria. Through complex modeling, EPA created an annual emissions "budget" for each regulated State upwind, representing the total quantity of pollution an upwind State could produce in a given year under the Transport Rule. Having earlier determined each regulated State's SIP to be inadequate, EPA, contemporaneous with the Transport Rule, promulgated FIPs allocating each State's emissions budgets among its in-state pollution sources.

A group of state and local governments (State respondents), joined by industry and labor groups (Industry respondents), petitioned for review of the Transport Rule in the D.C. Circuit. The court vacated the rule in its entirety, holding that EPA's actions exceeded the Agency's statutory authority in two respects. Acknowledging that EPA's FIP authority is generally triggered when the Agency disapproves a SIP, the court was nevertheless concerned that States would be incapable of fulfilling the Good Neighbor Provision without prior EPA guidance. The court thus concluded that EPA must give States a reasonable opportunity to allocate their emission budgets before issuing FIPs. The court also found the Agency's two-part interpretation of the Good Neighbor Provision unreasonable, concluding that EPA must disregard costs and consider exclusively each upwind State's physically proportionate responsibility for air quality problems downwind.

Held:

1. The CAA does not command that States be given a second opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations. Pp. 1599 – 1602.

(a) The State respondents do not challenge EPA's disapproval of any particular SIP. Instead, they argue that, notwithstanding these disapprovals, the Agency was still obliged to grant upwind States an additional opportunity to promulgate adequate SIPs after EPA had set the State's emission budget. This claim does not turn on the validity of the prior SIP disapprovals, but on whether the CAA requires EPA do more than disapprove a SIP to trigger the Agency's authority to issue a FIP. Pp. 1599 – 1600.

(b) The CAA's plain text supports the Agency: Disapproval of a SIP, without more, triggers EPA's obligation to issue a FIP. The statute sets precise deadlines for the States and EPA. Once EPA issues any new or revised NAAQS, a State "shall" propose a SIP within three years, 42 U.S.C. § 7410(a)(1), and that SIP "shall" include, *inter alia,* provisions adequate to satisfy the Good Neighbor Provision, § 7410(a)(2). If the EPA finds a SIP inadequate, the Agency has a statutory duty to issue a FIP "at any time" within two years. § 7410(c)(1). However sensible the D.C. Circuit's exception to this strict time prescription may be, a reviewing court's "task is to apply the text [of the statute], not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438. Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Nor does the Act condition the duty to promulgate a FIP on ***1589** EPA's having first quantified an upwind State's good neighbor obligations. By altering Congress' SIP and FIP schedule, the D.C. Circuit allowed a delay Congress did not order and placed an information submission obligation on EPA Congress did not impose. Pp. 1599 – 1602.

(c) The fact that EPA had previously accorded upwind States a chance to allocate emission budgets among their in-state sources does not show that the Agency acted arbitrarily by refraining to do so here. EPA retained discretion to alter its course provided it gave a reasonable explanation for doing so. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443. Here, the Agency had been admonished by the D.C. Circuit to act with dispatch in amending or replacing CAIR. Endeavoring to satisfy that directive, EPA acted speedily, issuing FIPs and the Transport Rule contemporaneously. Pp. 1601 – 1602.

2. EPA's cost-effective allocation of emission reductions among upwind States is a permissible, workable, and equitable interpretation of the Good Neighbor Provision. Pp. 1602 – 1609.

(a) Respondents' attack on EPA's interpretation of the Good Neighbor Provision is not foreclosed by § 7607(d)(7)(B), which provides that "[o]nly an objection to a rule ... raised with reasonable specificity during the period for public comment ... may be raised during judicial review." Even assuming that respondents failed to object to the Transport Rule with "reasonable specificity," that lapse is not jurisdictional. Section 7607(d)(7)(B) is a "mandatory," but not "jurisdictional," rule, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097, which speaks to a party's procedural obligations, not a court's authority, see *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867. Because EPA did not press this argument unequivocally before the D.C. Circuit, it does not pose an impassable hindrance to this Court's review. Pp. 1602 – 1603.

(b) This Court routinely accords dispositive effect to an agency's reasonable interpretation of ambiguous statutory language. The Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. EPA's authority to reduce upwind pollution extends only to those "amounts" of pollution that "contribute significantly to nonattainment" in downwind States. § 7410(a)(2)(D)(i). Because a downwind State's excess pollution is often caused by multiple upwind States, however, EPA must address how to allocate responsibility among multiple contributors. The Good Neighbor Provision does not dictate a method of apportionment. Nothing in the provision, for example, directs the proportional allocation method advanced by the D.C. Circuit, a method that works neither mathematically nor in practical application. Under *Chevron,* Congress' silence effectively delegates authority to EPA to select from among reasonable options. See *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292.

EPA's chosen allocation method is a "permissible construction of the statute." *Chevron,* 467 U.S., at 843, 104 S.Ct. 2778. The Agency, tasked with choosing which among equal "amounts" to eliminate, has chosen sensibly to reduce the amount easier, *i.e.,* less costly, to eradicate. The Industry respondents argue that the final calculation cannot rely on costs, but nothing in the Good Neighbor Provision's text precludes that choice. And using costs in the Transport Rule calculus is an efficient ***1590** and equitable solution to the allocation problem the Good Neighbor Provision compels the Agency to address. Efficient because EPA can achieve the same levels of attainment, *i.e.,* of emission reductions, the proportional approach aims to achieve, but at

a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done less in the past to control their pollution. Pp. 1603 – 1608.

(c) Wholesale invalidation of the Transport Rule is not justified by either of the D.C. Circuit's remaining objections: that the Transport Rule leaves open the possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind State is in attainment, so-called "over-control"; and that EPA's use of costs does not foreclose the possibility that an upwind State would be required to reduce its emissions by so much that the State would be placed below the one-percent mark EPA set as the initial threshold of "significan[ce]." First, instances of "over-control" in particular downwind locations may be incidental to reductions necessary to ensure attainment elsewhere. As the Good Neighbor Provision seeks attainment in *every* downwind State, however, exceeding attainment in one State cannot rank as "over-control" unless unnecessary to achieving attainment in *any* downwind State. Second, the EPA must have leeway in fulfilling its statutory mandate to balance the possibilities of over-control and "under-control," *i.e.*, to maximize achievement of attainment downwind. Finally, in a voluminous record, involving thousands of upwind-to-downwind linkages, respondents point to only a few instances of "unnecessary" emission reductions, and even those are contested by EPA. Pp. 1607 – 1609.

696 F.3d 7, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. ALITO, J., took no part in the consideration or decision of the cases.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

These cases concern the efforts of Congress and the Environmental Protection Agency (EPA or Agency) to cope with a complex problem: air pollution emitted in one State, but causing harm in other States. Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs. See Revesz, Federalism and Interstate Environmental Externalities, 144 U. Pa. L.Rev. 2341, 2343 (1996). Conversely, downwind States to which the pollution travels are unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control. See S.Rep. No. 101–228, p. 49 (1989), 1990 U.S.C.C.A.N. 3385. To tackle the problem, Congress included a Good Neighbor Provision in the Clean Air Act (Act or CAA). That provision, in its current phrasing, instructs States to prohibit in-state sources "from emitting any air pollutant in amounts which will ... contribute significantly" to downwind States' "nonattainment ..., or interfere with maintenance," of any EPA-promulgated national air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i).

Interpreting the Good Neighbor Provision, EPA adopted the Cross–State Air Pollution Rule (commonly and hereinafter called the Transport Rule). The rule calls for consideration of costs, among other factors, when determining the emission reductions an upwind State must make to improve air quality in polluted downwind areas. The Court of Appeals for the D.C. Circuit vacated the rule in its entirety. It held, 2 to 1, that the Good Neighbor Provision requires EPA to consider only each upwind State's physically proportionate responsibility for each downwind State's air quality problem. That reading is demanded, according to the D.C. Circuit, so that no State will be required to decrease its emissions by more than its ratable share of downwind-state pollution.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we reversed a D.C. Circuit decision that failed to accord deference to EPA's reasonable interpretation of an ambiguous Clean Air Act provision. Satisfied that the Good Neighbor Provision does not command the Court of Appeals' cost-blind construction, and that EPA reasonably interpreted the provision, we reverse the D.C. Circuit's judgment.

I

A

Air pollution is transient, heedless of state boundaries. Pollutants generated by upwind sources are often transported by air currents, sometimes over hundreds of miles, to downwind States. As the pollution travels out of state, upwind States are relieved of the associated costs. Those costs are borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution.

For several reasons, curtailing interstate air pollution poses a complex challenge for environmental regulators. First, identifying the upwind origin of downwind air ***1594** pollution is no easy endeavor. Most upwind States propel pollutants to more than one downwind State, many downwind States receive pollution from multiple upwind States, and some States qualify as both upwind and downwind. See Brief for Federal Petitioners 6. The overlapping and interwoven linkages between upwind and downwind States with which EPA had to contend number in the thousands. [1]

[1] For the rule challenged here, EPA evaluated 2,479 separate linkages between downwind and upwind States. Brief for Federal Petitioners 6.

Further complicating the problem, pollutants do not emerge from the smokestacks of an upwind State and uniformly migrate downwind. Some pollutants stay within upwind States' borders, the wind carries others to downwind States, and some subset of that group drifts to States without air quality problems. "The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth." The Holy Bible, John 3:8 (King James Version). In crafting a solution to the problem of interstate air pollution, regulators must account for the vagaries of the wind.

Finally, upwind pollutants that find their way downwind are not left unaltered by the journey. Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. The offending gases at issue in these cases—nitrogen oxide (NO_X) and sulfur dioxide (SO_2)—often develop into ozone and fine particulate matter ($PM_{2.5}$) by the time they reach the atmospheres of downwind States. See 76 Fed.Reg. 48222–48223 (2011). See also 69 Fed.Reg. 4575–4576 (2004) (describing the components of ozone and $PM_{2.5}$). Downwind air quality must therefore be measured for ozone and $PM_{2.5}$concentrations. EPA's chore is to quantify the amount of upwind gases (NO_X and SO_2) that must be reduced to enable downwind States to keep their levels of ozone and $PM_{2.5}$in check.

B

Over the past 50 years, Congress has addressed interstate air pollution several times and with increasing rigor. In 1963, Congress directed federal authorities to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution." 77 Stat. 393, 42 U.S.C. § 1857a (1964 ed.). In 1970, Congress made this instruction more concrete, introducing features still key to the Act. For the first time, Congress directed EPA to establish national ambient air quality standards (NAAQS) for pollutants at levels that will protect public health. See 84 Stat. 1679–1680, as amended, 42 U.S.C. §§ 7408, 7409 (2006 ed.). Once EPA settles on a NAAQS, the Act requires the Agency to designate "nonattainment" areas, *i.e.*, locations where the concentration of a regulated pollutant exceeds the NAAQS. § 7407(d).

The Act then shifts the burden to States to propose plans adequate for compliance with the NAAQS. Each State must submit a State Implementation Plan, or SIP, to EPA within three years of any new or revised NAAQS. § 7410(a)(1). If EPA determines that a State has failed to submit an adequate SIP, either in whole or in part, the Act requires the Agency to promulgate a Federal Implementation Plan, or FIP, within two years of EPA's determination, "unless the State corrects the deficiency" before a FIP is issued. § 7410(c)(1).[2]

2 FIPs and SIPs were introduced in the 1970 version of the Act; the particular deadlines discussed here were added in 1990. See 104 Stat. 2409, 2422–2423, 42 U.S.C. §§ 7401(a)(1), 7410(c) (2006 ed.).

***1595** The Act lists the matters a SIP must cover. Among SIP components, the 1970 version of the Act required SIPs to include "adequate provisions for intergovernmental cooperation" concerning interstate air pollution. § 110(a)(2)(E), 84 Stat. 1681, 42 U.S.C. § 1857c–5(a)(2)(E). This statutory requirement, with its text altered over time, has come to be called the Good Neighbor Provision.

In 1977, Congress amended the Good Neighbor Provision to require more than "cooperation." It directed States to submit SIPs that included provisions "adequate" to "prohibi[t] any stationary source within the State from emitting any air pollutant in amounts which will ... prevent attainment or maintenance [of air quality standards] by any other State." § 108(a)(4), 91 Stat. 693, 42 U.S.C. § 7410(a)(2)(E) (1976 ed., Supp. II). The amended provision thus explicitly instructed upwind States to reduce emissions to account for pollution exported beyond their borders. As then written, however, the provision regulated only individual sources that, considered alone, emitted enough pollution to cause nonattainment in a downwind State. Because it is often "impossible to say that any single source or group of sources is the one which actually prevents attainment" downwind, S.Rep. No. 101–228, p. 21 (1989), 1990 U.S.C.C.A.N. 3385, 3407, the 1977 version of the Good Neighbor Provision proved ineffective, see *ibid.* (noting the provision's inability to curb the collective "emissions [of] multiple sources").

Congress most recently amended the Good Neighbor Provision in 1990. The statute, in its current form, requires SIPs to "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 with respect to any ... [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i) (2006 ed.). The controversy before us centers on EPA's most recent attempt to construe this provision.

C

Three times over the past two decades, EPA has attempted to delineate the Good Neighbor Provision's scope by identifying when upwind States "contribute significantly" to nonattainment downwind. In 1998, EPA issued a rule known as the "NO_X SIP Call." That regulation limited NO_X emissions in 23 upwind States to the extent such emissions contributed to nonattainment of ozone standards in downwind States. See 63 Fed.Reg. 57356, 57358. In *Michigan v. EPA*, 213 F.3d 663 (2000), the D.C. Circuit upheld the NO_X SIP Call, specifically affirming EPA's use of costs to determine when an upwind State's contribution was "significan[t]" within the meaning of the statute. *Id.*, at 674–679.

In 2005, EPA issued the Clean Air Interstate Rule, or CAIR. 70 Fed.Reg. 25162. CAIR regulated both NO_X and SO_2emissions, insofar as such emissions contributed to downwind nonattainment of two NAAQS, both set in 1997, one concerning the permissible annual measure of $PM_{2.5}$, and another capping the average ozone level gauged over an 8–hour period. See *id.*, at 25171. The D.C. Circuit initially vacated CAIR as arbitrary and capricious. See *North Carolina v. EPA*, 531 F.3d 896, 921 (C.A.D.C.2008) (*per curiam*). On rehearing, the court decided to leave the rule in place, while encouraging EPA to act with dispatch in dealing with problems the court had identified. See ***1596** *North Carolina v. EPA*, 550 F.3d 1176, 1178 (C.A.D.C.2008) (*per curiam*).

The rule challenged here—the Transport Rule—is EPA's response to the D.C. Circuit's *North Carolina* decision. Finalized in August 2011, the Transport Rule curtails NO_X and SO_2emissions of 27 upwind States to achieve downwind attainment of three different NAAQS: the two 1997 NAAQS previously addressed by CAIR, and the 2006 NAAQS for $PM_{2.5}$ levels measured on a daily basis. See 76 Fed.Reg. 48208–48209.

Under the Transport Rule, EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment," *id.*, at 48254, and therefore in "amounts" that had to be eliminated. At step one, called the "screening" analysis, the Agency excluded as *de minimis* any upwind State that contributed less than one percent of the three NAAQS [3] to any downwind State "receptor," a location at which EPA measures air quality. See *id.*, at 48236–48237. [4] If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have "contribute [d] significantly" to the nonattainment of any downwind State. *Id.*, at 48236. States in that category were screened out and exempted from regulation under the rule.

3 With respect to each NAAQS addressed by the rule, the one-percent threshold corresponded to levels of 0.15 micrograms per cubic meter ($\mu g/m^3$) for annual $PM_{2.5}$, 0.35 $\mu g/m^3$ for daily $PM_{2.5}$, and 0.8 parts per billion (ppb) for 8–hour ozone. See 76 Fed.Reg. 48236–48237.

4 If, for example, the NAAQS for ozone were 100 ppb, a contribution of less than 1 ppb to any downwind location would fall outside EPA's criteria for significance.

The remaining States were subjected to a second inquiry, which EPA called the "control" analysis. At this stage, the Agency sought to generate a cost-effective allocation of emission reductions among those upwind States "screened in" at step one.

The control analysis proceeded this way. EPA first calculated, for each upwind State, the quantity of emissions the State could eliminate at each of several cost thresholds. See *id.*, at 48248–48249. Cost for these purposes is measured as cost per ton of emissions prevented, for instance, by installing scrubbers on powerplant smokestacks. [5] EPA estimated, for example, the amount each upwind State's NO_X emissions would fall if all pollution sources within each State employed every control measure available at a cost of $500 per ton or less. See *id.*, at 48249–48251. The Agency then repeated that analysis at ascending cost thresholds. See *ibid.* [6]

5 To illustrate, a technology priced at $5,000 and capable of eliminating two tons of pollution would be stated to "cost" $2,500 per ton.

6 For SO_2, EPA modeled reductions that would be achieved at cost levels of $500, $1,600, $2,300, $2,800, $3,300, and $10,000 per ton eliminated. See *id.*, at 48251–48253.

Armed with this information, EPA conducted complex modeling to establish the combined effect the upwind reductions projected at each cost threshold would have on air quality in downwind States. See *id.*, at 48249. The Agency then identified "significant cost threshold[s]," points in its model where a "noticeable change occurred in downwind air quality, such as ... where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective." *Ibid.* For example, reductions of NO_X sufficient to resolve or significantly curb downwind air quality problems ***1597** could be achieved, EPA determined, at a cost threshold of $500 per ton (applied uniformly to all regulated upwind States). "Moving beyond the $500 cost threshold," EPA concluded, "would result in only minimal additional ... reductions [in emissions]." *Id.*, at 48256. [7]

7 For SO_2, EPA determined that, for one group of upwind States, all downwind air quality problems would be resolved at the $500 per ton threshold. See *id.*, at 48257. For another group of States, however, this level of controls would not suffice. For those States, EPA found that pollution controls costing $2,300 per ton were necessary. See *id.*, at 48259.

Finally, EPA translated the cost thresholds it had selected into amounts of emissions upwind States would be required to eliminate. For each regulated upwind State, EPA created an annual emissions "budget." These budgets represented the quantity

of pollution an upwind State would produce in a given year if its in-state sources implemented all pollution controls available at the chosen cost thresholds. See *id.*, at 48249. [8] If EPA's projected improvements to downwind air quality were to be realized, an upwind State's emissions could not exceed the level this budget allocated to it, subject to certain adjustments not relevant here.

8 In 2014, for example, pollution sources within Texas would be permitted to emit no more than 243,954 tons of SO_2, subject to variations specified by EPA. See *id.*, at 48269 (Table VI.F–1).

Taken together, the screening and control inquiries defined EPA's understanding of which upwind emissions were within the Good Neighbor Provision's ambit. In short, under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State (step one) and (2) could be eliminated cost-effectively, as determined by EPA (step two). See *id.*, at 48254. Upwind States would be obliged to eliminate all and only emissions meeting both of these criteria. [9]

9 Similarly, upwind States EPA independently determined to be "interfer[ing] with [the] maintenance" of NAAQS downwind were required to eliminate pollution only to the extent their emissions satisfied both of these criteria. See *id.*, at 48254.

For each State regulated by the Transport Rule, EPA contemporaneously promulgated a FIP allocating that State's emission budget among its in-state sources. See *id.*, at 48271, 48284–48287. [10] For each of these States, EPA had determined that the State had failed to submit a SIP adequate for compliance with the Good Neighbor Provision. These determinations regarding SIPs became final after 60 days, see 42 U.S.C. § 7607(b)(1)(2006 ed., Supp. V), and many went unchallenged. [11] EPA views the SIP determinations as having triggered its statutory obligation to promulgate a FIP within two ***1598** years, see § 7410(c), a view contested by respondents, see Part II, *infra*.

10 These FIPs specified the maximum amount of pollution each in-state pollution source could emit. Sources below this ceiling could sell unused "allocations" to sources that could not reduce emissions to the necessary level as cheaply. See *id.*, at 48271–48272. This type of "cap-and-trade" system cuts costs while still reducing pollution to target levels.

11 Three States did challenge EPA's determinations. See Petition for Review in *Ohio v. EPA*, No. 11–3988 (CA6); Petition for Review in *Kansas v. EPA*, No. 12–1019 (CADC); Notice in *Georgia v. EPA*, No. 11–1427 (CADC). Those challenges were not consolidated with this proceeding, and they remain pending (held in abeyance for these cases) in the Sixth and D.C. Circuits. See Twelfth Joint Status Report in *Ohio v. EPA*, No. 11–3988 (CA6); Order in *Kansas v. EPA*, No. 11–1333 (CADC, May 10, 2013); Order in *Georgia v. EPA*, No. 11–1427 (CADC, May 10, 2013).

D

A group of state and local governments (State respondents), joined by industry and labor groups (Industry respondents), petitioned for review of the Transport Rule in the U.S. Court of Appeals for the D.C. Circuit. Over the dissent of Judge Rogers, the Court of Appeals vacated the rule in its entirety. See 696 F.3d 7, 37 (2012).

EPA's actions, the appeals court held, exceeded the Agency's statutory authority in two respects. By promulgating FIPs before giving States a meaningful opportunity to adopt their own implementation plans, EPA had, in the court's view, upset the CAA's division of responsibility between the States and the Federal Government. In the main, the Court of Appeals acknowledged, EPA's FIP authority is triggered at the moment the Agency disapproves a SIP. See *id.*, at 30. Thus, when a State proposes a SIP inadequate to achieve a NAAQS, EPA could promulgate a FIP immediately after disapproving that SIP. See *id.*, at 32.

But the Court of Appeals ruled that a different regime applies to a State's failure to meet its obligations under the Good Neighbor Provision. While a NAAQS was a "clear numerical target," a State's good neighbor obligation remained "nebulous and unknown," the court observed, until EPA calculated the State's emission budget. *Ibid.* Without these budgets, the Court of Appeals said, upwind States would be compelled to take a "stab in the dark" at calculating their own significant contribution

to interstate air pollution. *Id.*, at 35. The D.C. Circuit read the Act to avoid putting States in this position: EPA had an implicit statutory duty, the court held, to give upwind States a reasonable opportunity to allocate their emission budgets among in-state sources before the Agency's authority to issue FIPs could be triggered. *Id.*, at 37.

The D.C. Circuit also held that the Agency's two-part interpretation of the Good Neighbor Provision ignored three "red lines ... cabin[ing the] EPA's authority." *Id.*, at 19. First, the D.C. Circuit interpreted the Good Neighbor Provision to require upwind States to reduce emissions in "a manner proportional to their contributio[n]" to pollution in downwind States. *Id.*, at 21. The Transport Rule, however, treated all regulated upwind States alike, regardless of their relative contribution to the overall problem. See *id.*, at 23. It required all upwind States "screened in" at step one to reduce emissions in accord with the uniform cost thresholds set during the step two control analysis. Imposing these uniform cost thresholds, the Court of Appeals observed, could force some upwind States to reduce emissions by more than their "fair share." *Id.*, at 27.

According to the Court of Appeals, EPA had also failed to ensure that the Transport Rule did not mandate upwind States to reduce pollution unnecessarily. The Good Neighbor Provision, the D.C. Circuit noted, "targets [only] those emissions from upwind States that 'contribute significantly *to nonattainment*' " of a NAAQS in downwind States. *Id.*, at 22. Pollution reduction beyond that goal was "unnecessary over-control," outside the purview of the Agency's statutory mandate. *Ibid.* Because the emission budgets were calculated by reference to cost alone, the court concluded that EPA had done nothing to guard against, or even measure, the "over-control" potentially imposed by the Transport Rule. See *ibid.*

Finally, by deciding, at the screening analysis, that upwind contributions below ***1599** the one-percent threshold were insignificant, EPA had established a "floor" on the Agency's authority to act. See *id.*, at 20, and n. 13. Again pointing to the rule's reliance on costs, the Court of Appeals held that EPA had failed to ensure that upwind States were not being forced to reduce emissions below the one-percent threshold. See *ibid.*

In dissent, Judge Rogers criticized the majority for deciding two questions that were not, in her view, properly before the court. See *id.*, at 40–46, 51–58. First, she addressed the majority's insistence that FIPs abide a State's opportunity to allocate its emission budget among in-state sources. She regarded the respondents' plea to that effect as an untimely attack on EPA's previous SIP disapprovals. See *id.*, at 40–46. Second, in Judge Rogers' assessment, the respondents had failed to raise their substantive objections to the Transport Rule with the specificity necessary to preserve them for review. See *id.*, at 51–58. On the merits, Judge Rogers found nothing in the Act to require, or even suggest, that EPA must quantify a State's good neighbor obligations before it promulgated a FIP. See *id.*, at 46–51. She also disagreed with the court's conclusion that the Transport Rule unreasonably interpreted the Act. See *id.*, at 58–60.

We granted certiorari to decide whether the D.C. Circuit had accurately construed the limits the CAA places on EPA's authority. See 570 U.S. ——, 133 S.Ct. 2857, 186 L.Ed.2d 907 (2013).

II

A

Once EPA has calculated emission budgets, the D.C. Circuit held, the Agency must give upwind States the opportunity to propose SIPs allocating those budgets among in-state sources before issuing a FIP. 696 F.3d, at 37. As the State respondents put it, a FIP allocating a State's emission budget "must issue *after* EPA has quantified the States' good-neighbor obligations [in an emission budget] and given the States a reasonable opportunity to meet those obligations in SIPs." Brief for State Respondents 20.

[1] Before reaching the merits of this argument, we first reject EPA's threshold objection that the claim is untimely. According to the Agency, this argument—and the D.C. Circuit's opinion accepting it—rank as improper collateral attacks on EPA's prior

SIP disapprovals. As earlier recounted, see *supra,* at 1597 – 1598, EPA, by the time it issued the Transport Rule, had determined that each regulated upwind State had failed to submit a SIP adequate to satisfy the Good Neighbor Provision. Many of those determinations, because unchallenged, became final after 60 days, see 42 U.S.C. § 7607(b)(1), and did so before the petitions here at issue were filed. EPA argues that the Court cannot question exercise of the Agency's FIP authority without subjecting these final SIP disapprovals to untimely review.

[2] We disagree. The gravamen of the State respondents' challenge is not that EPA's disapproval of any particular SIP was erroneous. Rather, respondents urge that, notwithstanding these disapprovals, the Agency was obliged to grant an upwind State a second opportunity to promulgate adequate SIPs once EPA set the State's emission budget. This claim does not depend on the validity of the prior SIP disapprovals. Even assuming the legitimacy of those disapprovals, the question remains whether EPA was required to do more than disapprove a SIP, as the State respondents urge, to trigger the Agency's statutory authority to issue a FIP. [12]

12 The State respondents make a second argument we do not reach. They urge that EPA could not impose FIPs on several upwind States whose SIPs had been previously approved by the Agency under CAIR. EPA changed those approvals to disapprovals when it issued the Transport Rule, see 76 Fed.Reg. 48220, and the States assert that the process by which EPA did so was improper. That argument was not passed on by the D.C. Circuit, see 696 F.3d 7, 31, n. 29 (2012), and we leave it for the Court of Appeals to consider in the first instance on remand.

***1600 B**

[3] Turning to the merits, we hold that the text of the statute supports EPA's position. As earlier noted, see *supra,* at 1594 – 1595, the CAA sets a series of precise deadlines to which the States and EPA must adhere. Once EPA issues any new or revised NAAQS, a State has three years to adopt a SIP adequate for compliance with the Act's requirements. See 42 U.S.C. § 7410(a)(1). Among those requirements is the Act's mandate that SIPs "shall" include provisions sufficient to satisfy the Good Neighbor Provision. § 7410(a)(2).

[4] If EPA determines a SIP to be inadequate, the Agency's mandate to replace it with a FIP is no less absolute:

> "[EPA] shall promulgate a [FIP] at any time within 2 years after the [Agency]
>
> "(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum [relevant] criteria ..., or
>
> "(B) disapproves a [SIP] in whole or in part,
>
> "unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before the [Agency] promulgates such [FIP]." § 7410(c)(1).

In other words, once EPA has found a SIP inadequate, the Agency has a statutory duty to issue a FIP "at any time" within two years (unless the State first "corrects the deficiency," which no one contends occurred here).

The D.C. Circuit, however, found an unwritten exception to this strict time prescription for SIPs aimed at implementing the Good Neighbor Provision. Expecting any one State to develop a "comprehensive solution" to the "collective problem" of interstate air pollution without first receiving EPA's guidance was, in the Court of Appeals' assessment, "set[ting] the States up to fail." 696 F.3d, at 36–37. The D.C. Circuit therefore required EPA, after promulgating each State's emission budget, to give the State a "reasonable" period of time to propose SIPs implementing its budget. See *id.,* at 37.

[5] However sensible (or not) the Court of Appeals' position, [13] a reviewing court's "task is to apply the text [of the statute], not to improve upon it." ***1601** *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.,* 493

U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Rather, the statute speaks without reservation: Once a NAAQS has been issued, a State "shall" propose a SIP within three years, § 7410(a)(1), and that SIP "shall" include, among other components, provisions adequate to satisfy the Good Neighbor Provision, § 7410(a)(2).

13 On this point, the dissent argues that it is "beyond responsible debate that the States cannot possibly design FIP-proof SIPs without knowing the EPA-prescribed targets at which they must aim." *Post,* at 1619. Many of the State respondents thought otherwise, however, when litigating the matter in *Michigan v. EPA,* 213 F.3d 663 (C.A.D.C.2000). See Final Brief for Petitioning States in No. 98–1497 (CADC), p. 34 ("EPA has the responsibility to establish NAAQS," but without further intervention by EPA, "States [have] the duty and right to develop ... SIPs ... to meet those NAAQS."). See also *id.,* at 37 ("EPA's role is to determine whether the SIP submitted is 'adequate' ... not to dictate contents of the submittal in the first instance.... [E]ach State has the right and the obligation to write a SIP that complies with § [74]10(a)(2), including the 'good neighbor' provision.").

[6] [7] Nor does the Act condition the duty to promulgate a FIP on EPA's having first quantified an upwind State's good neighbor obligations. As Judge Rogers observed in her dissent from the D.C. Circuit's decision, the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues. See 696 F.3d, at 47. Instead, a SIP's failure to satisfy the Good Neighbor Provision, without more, triggers EPA's obligation to issue a federal plan within two years. § 7410(c). After EPA has disapproved a SIP, the Agency can wait up to two years to issue a FIP, during which time the State can "correc[t] the deficiency" on its own. *Ibid.* But EPA is not obliged to wait two years or postpone its action even a single day: The Act empowers the Agency to promulgate a FIP "at any time" within the two-year limit. *Ibid.* Carving out an exception to the Act's precise deadlines, as the D.C. Circuit did, "rewrites a decades-old statute whose plain text and structure establish a clear chronology of federal and State responsibilities." 696 F.3d, at 47 (Rogers, J., dissenting).

The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text. See *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 461–462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (We "must presume that a legislature says in a statute what it means and means in a statute what it says there." (internal quotation marks omitted)). When Congress elected to make EPA's input a prerequisite to state action under the Act, it did so expressly. States developing vehicle inspection and maintenance programs under the CAA, for example, must await EPA guidance before issuing SIPs. 42 U.S.C. § 7511a(c)(3)(B). A State's obligation to adopt a SIP, moreover, arises only after EPA has first set the NAAQS the State must meet. § 7410(a)(1). Had Congress intended similarly to defer States' discharge of their obligations under the Good Neighbor Provision, Congress, we take it, would have included a similar direction in that section. See *Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

In short, nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations. By altering the schedule Congress provided for SIPs and FIPs, the D.C. Circuit stretched out the process. It allowed a delay Congress did not order and placed an information submission obligation on EPA Congress did not impose. The D.C. Circuit, we hold, had no warrant thus to revise the CAA's action-ordering prescriptions.

C

[8] At oral argument, the State respondents emphasized EPA's previous decisions, in the NO_X SIP Call and CAIR, to quantify the emission reductions required ***1602** of upwind States before the window to propose a SIP closed. See Tr. of Oral Arg. 37–39, 42–43, 45–46. In their view, by failing to accord States a similar grace period after issuing States' emission budgets, EPA acted arbitrarily. See *ibid.*

[9] Whatever pattern the Agency followed in its NO_X SIP call and CAIR proceedings, EPA retained discretion to alter its course provided it gave a reasonable explanation for doing so. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm*

Mut. Automobile Ins. Co., 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The Agency presented such an explanation in the Transport Rule. As noted, see *supra,* at 1595 – 1596, the D.C. Circuit's *North Carolina* decision admonished EPA to act with dispatch in amending or replacing CAIR, the Transport Rule's predecessor. See 550 F.3d, at 1178 (warning EPA that the stay of the court's decision to vacate CAIR would not persist "indefinite[ly]"). Given *North Carolina* 's stress on expeditious action to cure the infirmities the court identified in CAIR, EPA thought it "[in]appropriate to establish [the] lengthy transition period" entailed in allowing States time to propose new or amended SIPs implementing the Transport Rule emission budgets. See 76 Fed.Reg. 48220 (citing *North Carolina,* 550 F.3d 1176). Endeavoring to satisfy the D.C. Circuit's directive, EPA acted speedily, issuing FIPs contemporaneously with the Transport Rule. In light of the firm deadlines imposed by the Act, which we hold the D.C. Circuit lacked authority to alter, we cannot condemn EPA's decision as arbitrary or capricious. [14]

14 In light of the CAA's "core principle" of cooperative federalism, the dissent believes EPA abused its discretion by failing to give States an additional opportunity to submit SIPs in satisfaction of the Good Neighbor Provision. *Post,* at 1619 – 1620. But nothing in the statute so restricts EPA. To the contrary, as earlier observed, see *supra,* at 1601, the plain text of the CAA grants EPA plenary authority to issue a FIP "at *any* time" within the two-year period that begins the moment EPA determines a SIP to be inadequate. § 7410(c)(1) (emphasis added).

III

A

The D.C. Circuit also held that the Transport Rule's two-step interpretation of the Good Neighbor Provision conflicts with the Act. Before addressing this holding, we take up a jurisdictional objection raised by EPA.

The CAA directs that "[o]nly an objection to a rule ... raised with reasonable specificity during the period for public comment ... may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). Respondents failed to state their objections to the Transport Rule during the comment period with the "specificity" required for preservation, EPA argues. See Brief for Federal Petitioners 34–42. This failure at the administrative level, EPA urges, forecloses judicial review. *Id.,* at 34.

[10] **[11]** Assuming, without deciding, that respondents did not meet the Act's "reasonable specificity" requirement during the comment period, we do not regard that lapse as "jurisdictional." This Court has cautioned against "profligate use" of the label "jurisdictional." *Sebelius v. Auburn Regional Medical Center,* 568 U.S. ——, ——, 133 S.Ct. 817, 824, 184 L.Ed.2d 627 (2013). A rule may be "mandatory," yet not "jurisdictional," we have explained. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court's authority, but only to a party's procedural obligations. See *Kontrick v.* ***1603** *Ryan,* 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Had EPA pursued the "reasonable specificity" argument vigorously before the D.C. Circuit, we would be obligated to address the merits of the argument. See *Gonzalez v. Thaler,* 565 U.S. ——, ——, 132 S.Ct. 641, 650–651, 181 L.Ed.2d 619 (2012). But EPA did not press the argument unequivocally. Before the D.C. Circuit, it indicated only that the "reasonable specificity" prescription might bar judicial review. Brief for Respondent EPA et al. in No. 11–1302 (CADC), p. 30. See also *id.,* at 32. We therefore do not count the prescription an impassable hindrance to our adjudication of the respondents' attack on EPA's interpretation of the Transport Rule. We turn to that attack mindful of the importance of the issues respondents raise to the ongoing implementation of the Good Neighbor Provision.

B

We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is the pathmarking decision, and it bears a notable resemblance to the cases before us. *Chevron* concerned EPA's definition of the term "source,"

as used in the 1977 Amendments to the CAA. *Id.*, at 840, n. 1, 104 S.Ct. 2778. Those amendments placed additional restrictions on companies' liberty to add new pollution "sources" to their factories. See *id.*, at 840, 104 S.Ct. 2778. Although "source" might have been interpreted to refer to an individual smokestack, EPA construed the term to refer to an entire plant, thereby "treat[ing] all of the pollution-emitting devices within the [plant] as though they were encased within a single 'bubble.' " *Ibid.* Under the Agency's interpretation, a new pollution-emitting device would not subject a plant to the additional restrictions if the "alteration [did] not increase the total emissions [produced by] the plant." *Ibid.*

[12] This Court held EPA's interpretation of "source" a reasonable construction of an ambiguous statutory term. When "Congress has not directly addressed the precise [interpretative] question at issue," we cautioned, a reviewing court cannot "simply impose its own construction o[f] the statute." *Id.*, at 843, 104 S.Ct. 2778. Rather, the agency is charged with filling the "gap left open" by the ambiguity. *Id.*, at 866, 104 S.Ct. 2778. Because " 'a full understanding of the force of the statutory policy ... depend [s] upon more than ordinary knowledge' " of the situation, the administering agency's construction is to be accorded "controlling weight unless ... arbitrary, capricious, or manifestly contrary to the statute." *Id.*, at 844, 104 S.Ct. 2778 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)). Determining that none of those terms fit EPA's interpretation of "source," the Court deferred to the Agency's judgment.

[13] We conclude that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron*. The statute requires States to eliminate those "amounts" of pollution that "contribute significantly to *nonattainment*" in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's task [15] is to reduce upwind pollution, but only in "amounts" that push ***1604** a downwind State's pollution concentrations above the relevant NAAQS. As noted earlier, however, the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States. See *supra*, at 1593 – 1594. The statute therefore calls upon the Agency to address a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution?

15 Though we speak here of "EPA's task," the Good Neighbor Provision is initially directed to upwind States. As earlier explained, see Part II–B, *supra*, only after a State has failed to propose a SIP adequate for compliance with the provision is EPA called upon to act.

A simplified example illustrates the puzzle EPA faced. Suppose the Agency sets a NAAQS, with respect to a particular pollutant, at 100 parts per billion (ppb), and that the level of the pollutant in the atmosphere of downwind State A is 130 ppb. Suppose further that EPA has determined that each of three upwind States—X, Y, and Z—contributes the equivalent of 30 ppb of the relevant pollutant to State A's airspace. The Good Neighbor Provision, as just observed, prohibits only upwind emissions that contribute significantly to downwind *nonattainment*. EPA's authority under the provision is therefore limited to eliminating a *total* of 30 ppb, [16] *i.e.*, the overage caused by the collective contribution of States X, Y, and Z. [17]

16 Because of the uncertainties inherent in measuring interstate air pollution, see *supra*, at 1593 – 1594, reductions of *exactly* 30 ppb likely are unattainable. See *infra*, at 1609.

17 For simplicity's sake, the hypothetical assumes that EPA has not required any emission reductions by the downwind State itself.

How is EPA to divide responsibility among the three States? Should the Agency allocate reductions proportionally (10 ppb each), on a per capita basis, on the basis of the cost of abatement, or by some other metric? See Brief for Federal Petitioners 50 (noting EPA's consideration of different approaches). The Good Neighbor Provision does not answer that question for EPA. Cf. *Chevron*, 467 U.S., at 860, 104 S.Ct. 2778 ("[T]he language of [the CAA] simply does not compel any given interpretation of the term 'source.' "). Under *Chevron*, we read Congress' silence as a delegation of authority to EPA to select from among reasonable options. See *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). [18]

18 The statutory gap identified also exists in the Good Neighbor Provision's second instruction. That instruction requires EPA to eliminate amounts of upwind pollution that "interfere with maintenance" of a NAAQS by a downwind State. § 7410(a)(2)(D)(i). This mandate contains no qualifier analogous to "significantly," and yet it entails a delegation of administrative authority of the same character

as the one discussed above. Just as EPA is constrained, under the first part of the Good Neighbor Provision, to eliminate only those amounts that "contribute ... to *nonattainment,*" EPA is limited, by the second part of the provision, to reduce only by "amounts" that "interfere with *maintenance,*" *i.e.,* by just enough to permit an already-attaining State to maintain satisfactory air quality. (Emphasis added.) With multiple upwind States contributing to the maintenance problem, however, EPA confronts the same challenge that the "contribute significantly" mandate creates: How should EPA allocate reductions among multiple upwind States, many of which contribute in amounts sufficient to impede downwind maintenance? Nothing in *either* clause of the Good Neighbor Provision provides the criteria by which EPA is meant to apportion responsibility.

[14] Yet the Court of Appeals believed that the Act speaks clearly, requiring EPA to allocate responsibility for reducing emissions in "a manner proportional to" each State's "contributio[n]" to the problem. 696 F.3d, at 21. Nothing in the text of the Good Neighbor Provision propels EPA down this path. Understandably so, for as EPA notes, the D.C. Circuit's proportionality ***1605** approach could scarcely be satisfied in practice. See App. in No. 11–1302 etc. (CADC), p. 2312 ("[W]hile it is possible to determine an emission reduction percentage if there is a single downwind [receptor], most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one.").

To illustrate, consider a variation on the example set out above. Imagine that States X and Y now contribute air pollution to State A in a ratio of one to five, *i.e.,* State Y contributes five times the amount of pollution to State A than does State X. If State A were the only downwind State to which the two upwind States contributed, the D.C. Circuit's proportionality requirement would be easy to meet: EPA could require State Y to reduce its emissions by five times the amount demanded of State X.

The realities of interstate air pollution, however, are not so simple. Most upwind States contribute pollution to multiple downwind States in varying amounts. See 76 Fed.Reg. 48239–48246. See also Brief for Respondent Calpine Corp. et al. in Support of Petitioners 48–49 (offering examples). Suppose then that States X and Y also contribute pollutants to a second downwind State (State B), this time in a ratio of seven to one. Though State Y contributed a relatively larger share of pollution to State A, with respect to State B, State X is the greater offender. Following the proportionality approach with respect to State B would demand that State X reduce its emissions by seven times as much as State Y. Recall, however, that State Y, as just hypothesized, had to effect five times as large a reduction with respect to State A. The Court of Appeals' proportionality edict with respect to *both* State A and State B appears to work neither mathematically nor in practical application. Proportionality as to one downwind State will not achieve proportionality as to others. Quite the opposite. And where, as is generally true, upwind States contribute pollution to more than two downwind receptors, proportionality becomes all the more elusive.

Neither the D.C. Circuit nor respondents face up to this problem. The dissent, for its part, strains to give meaning to the D.C. Circuit's proportionality constraint as applied to a world in which multiple upwind States contribute emissions to multiple downwind locations. In the dissent's view, upwind States must eliminate emissions by "whatever minimum amount reduces" their share of the overage in each and every one of the downwind States to which they are linked. See *post,* at 1613 – 1614. In practical terms, this means each upwind State will be required to reduce emissions by the amount necessary to eliminate that State's largest downwind contribution. The dissent's formulation, however, does not account for the combined and cumulative effect of each upwind State's reductions on attainment in multiple downwind locations. See *ibid.* ("Under a proportional-reduction approach, State X would be required to eliminate emissions of that pollutant by whatever minimum amount reduces *both* State A's level by 0.2 unit and State B's by 0.7 unit." (emphasis added)). The result would be costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment. [19]

19 To see why, one need only slightly complicate the world envisioned by the dissent. Assume the world is made up of only four States —two upwind (States X and Y), and two downwind (States A and B). Suppose also, as the dissent allows, see *post,* at 1614, that the reductions State X must make to eliminate its share of the amount by which State A is in nonattainment are more than necessary for State X to eliminate its share of State B's nonattainment. As later explained, see *infra,* at 1608 – 1609, this kind of "over-control," we agree with the dissent, is acceptable under the statute. Suppose, however, that State Y also contributes to pollution in both State A and State B such that the reductions it must make to eliminate its proportion of State B's overage exceed the reductions it must make to bring State A into attainment. In this case, the dissent would have State X reduce by just enough to eliminate its share of State A's nonattainment and more than enough to eliminate its share of State B's overage. The converse will be true as to State Y: Under the dissent's approach, State Y would have to reduce by the "minimum" necessary to eliminate its proportional share of State

B's nonattainment and more than enough to eliminate its proportion of State A's overage. The result is that the total amount by which both States X and Y are required to reduce will exceed what is necessary for attainment *in all downwind States involved* (*i.e.*, in both State A and State B). Over-control thus unnecessary to achieving attainment in all involved States is impermissible under the Good Neighbor Provision. See *infra,* at 1609, n. 23. The problem would worsen were the hypothetical altered to include more than two downwind States and two upwind States, the very real circumstances EPA must address.

***1606** In response, the dissent asserts that EPA will "simply be required to make allowance for" the overregulation caused by its "proportional-reduction" approach. *Post,* at 1615. What criterion should EPA employ to determine which States will have to make those "allowance[s]" and by how much? The dissent admits there are "multiple ways" EPA might answer those questions. *Ibid.* But proportionality cannot be one of those ways, for the proportional-reduction approach is what led to the overregulation in the first place. And if a nonproportional approach can play a role in setting the final allocation of reduction obligations, then it is hardly apparent why EPA, free to depart from proportionality at the back end, cannot do so at the outset.

[15] Persuaded that the Good Neighbor Provision does not dictate the particular allocation of emissions among contributing States advanced by the D.C. Circuit, we must next decide whether the allocation method chosen by EPA is a "permissible construction of the statute." *Chevron,* 467 U.S., at 843, 104 S.Ct. 2778. As EPA interprets the statute, upwind emissions rank as "amounts [that] ... contribute significantly to nonattainment" if they (1) constitute one percent or more of a relevant NAAQS in a nonattaining downwind State and (2) can be eliminated under the cost threshold set by the Agency. See 76 Fed.Reg. 48254. In other words, to identify which emissions were to be eliminated, EPA considered both the magnitude of upwind States' contributions and the cost associated with eliminating them.

The Industry respondents argue that, however EPA ultimately divides responsibility among upwind States, the final calculation cannot rely on costs. The Good Neighbor Provision, respondents and the dissent emphasize, "requires each State to prohibit only those *'amounts'* of air pollution emitted within the State that 'contribute significantly' to another State's nonattaintment." Brief for Industry Respondents 23 (emphasis added). See also *post,* at 1612 – 1613. The cost of preventing emissions, they urge, is wholly unrelated to the actual "amoun[t]" of air pollution an upwind State contributes. Brief for Industry Respondents 23. Because the Transport Rule considers costs, respondents argue, "States that contribute identical 'amounts' ... may be deemed [by EPA] to have [made] substantially *different* " contributions. *Id.,* at 30.

But, as just explained, see *supra,* at 1603 – 1604, the Agency cannot avoid the task of choosing which among equal ***1607** "amounts" to eliminate. The Agency has chosen, sensibly in our view, to reduce the amount easier, *i.e.,* less costly, to eradicate, and nothing in the text of the Good Neighbor Provision precludes that choice.

Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, *i.e.,*of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested.

Suppose, for example, that the industries of upwind State A have expended considerable resources installing modern pollution-control devices on their plants. Factories in upwind State B, by contrast, continue to run old, dirty plants. Yet, perhaps because State A is more populous and therefore generates a larger sum of pollution overall, the two States' emissions have equal effects on downwind attainment. If State A and State B are required to eliminate emissions proportionally (*i.e.,* equally), sources in State A will be compelled to spend far more per ton of reductions because they have already utilized lower cost pollution controls. State A's sources will also have to achieve greater reductions than would have been required had they not made the cost-effective reductions in the first place. State A, in other words, will be tolled for having done more to reduce pollution in the past.[20] EPA's cost-based allocation avoids these anomalies.

20 The dissent's approach is similarly infirm. It, too, would toll those upwind States that have already invested heavily in means to reduce the pollution their industries cause, while lightening the burden on States that have done relatively less to control pollution emanating from local enterprises.

Obligated to require the elimination of only those "amounts" of pollutants that contribute to the nonattainment of NAAQS in downwind States, EPA must decide how to differentiate among the otherwise like contributions of multiple upwind States. EPA found decisive the difficulty of eliminating each "amount," *i.e.*, the cost incurred in doing so. Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a "reasonable" way of filling the "gap left open by Congress." *Chevron*, 467 U.S., at 866, 104 S.Ct. 2778. [21]

21 The dissent, see *post*, at 1615 – 1616, relies heavily on our decision in *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). In *Whitman*, we held that the relevant text of the CAA "unambiguously bars" EPA from considering costs when determining a NAAQS. *Id.*, at 471, 121 S.Ct. 903. Section 7409(b)(1) commands EPA to set NAAQS at levels "requisite to protect the public health" with "an adequate margin of safety." This mandate, we observed in *Whitman*, was "absolute," and precluded any other consideration (*e.g.*, cost) in the NAAQS calculation. *Id.*, at 465, 121 S.Ct. 903 (internal quotation marks omitted). Not so of the Good Neighbor Provision, which grants EPA discretion to eliminate "amounts [of pollution that] ... contribute significantly to nonattainment" downwind. On the particular "amounts" that should qualify for elimination, the statute is silent. Unlike the provision at issue in *Whitman*, which provides express criteria by which EPA is to set NAAQS, the Good Neighbor Provision, as earlier explained, fails to provide *any* metric by which EPA can differentiate among the contributions of multiple upwind States. See *supra*, at 1603 – 1604.

***1608 C**

The D.C. Circuit stated two further objections to EPA's cost-based method of defining an upwind State's contribution. Once a State was screened in at step one of EPA's analysis, its emission budget was calculated solely with reference to the uniform cost thresholds the Agency selected at step two. The Transport Rule thus left open the possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind State is in attainment, a phenomenon the Court of Appeals termed "over-control." 696 F.3d, at 22; see *supra*, at 1598 – 1599. Second, EPA's focus on costs did not foreclose, as the D.C. Circuit accurately observed, the possibility that an upwind State would be required to reduce its emissions by so much that the State no longer contributed one percent or more of a relevant NAAQS to any downwind State. This would place the State below the mark EPA had set, during the screening phase, as the initial threshold of "significan[ce]." See *id.*, at 20, and n. 13.

[16] **[17]** We agree with the Court of Appeals to this extent: EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set. If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked, the Agency will have overstepped its authority, under the Good Neighbor Provision, to eliminate those "amounts [that] contribute ... to nonattainment." Nor can EPA demand reductions that would drive an upwind State's contribution to every downwind State to which it is linked below one percent of the relevant NAAQS. Doing so would be counter to step one of the Agency's interpretation of the Good Neighbor Provision. See 76 Fed.Reg. 48236 ("[S]tates whose contributions are below th[e] thresholds do not significantly contribute to nonattainment ... of the relevant NAAQS.").

[18] Neither possibility, however, justifies wholesale invalidation of the Transport Rule. First, instances of "over-control" in particular downwind locations, the D.C. Circuit acknowledged, see 696 F.3d, at 22, may be incidental to reductions necessary to ensure attainment elsewhere. Because individual upwind States often "contribute significantly" to nonattainment in multiple downwind locations, the emissions reduction required to bring one linked downwind State into attainment may well be large enough to push other linked downwind States over the attainment line. [22] As ***1609** the Good Neighbor Provision seeks attainment in *every* downwind State, however, exceeding attainment in one State cannot rank as "over-control" unless

unnecessary to achieving attainment in *any* downwind State. Only reductions unnecessary to downwind attainment *anywhere* fall outside the Agency's statutory authority. [23]

22 The following example, based on the record, is offered in Brief for Respondent Calpine Corp. et al. in Support of Petitioners 52–54. Ohio, West Virginia, Pennsylvania, and Indiana each contribute in varying amounts to five different nonattainment areas in three downwind States. *Id.*, at 52. Implementation of the Transport Rule, EPA modeling demonstrates, will bring three of these five areas into attainment by a comfortable margin, and a fourth only barely. See *id.*, at 53, fig. 2. The fifth downwind receptor, however, will still fall short of attainment despite the reductions the rule requires. See *ibid.* But if EPA were to lower the emission reductions required of the upwind States to reduce over-attainment in the first three areas, the area barely achieving attainment would no longer do so, and the area still in nonattainment would fall even further behind. Thus, "over-control" of the first three downwind receptors is essential to the attainment achieved by the fourth and to the fifth's progress toward that goal.

23 The dissent suggests that our qualification of the term "over-control" is tantamount to an admission that "nothing stands in the way of [a] proportional-reduction approach." *Post,* at 1614. Not so. Permitting "over-control" as to one State for the purpose of achieving attainment in another furthers the stated goal of the Good Neighbor Provision, *i.e.,* attainment of NAAQS. By contrast, a proportional-reduction scheme is neither necessary to achieve downwind attainment, nor mandated by the terms of the statute, as earlier discussed, see *supra,* at 1603 – 1606. Permitting "over-control" for the purpose of achieving proportionality would thus contravene the clear limits the statute places on EPA's good neighbor authority, *i.e.,* to eliminate only those "amounts" of upwind pollutants essential to achieving attainment downwind.

Second, while EPA has a statutory duty to avoid over-control, the Agency also has a statutory obligation to avoid "under-control," *i.e.,* to maximize achievement of attainment downwind. For reasons earlier explained, see *supra,* at 1593 – 1594, a degree of imprecision is inevitable in tackling the problem of interstate air pollution. Slight changes in wind patterns or energy consumption, for example, may vary downwind air quality in ways EPA might not have anticipated. The Good Neighbor Provision requires EPA to seek downwind attainment of NAAQS notwithstanding the uncertainties. Hence, some amount of over-control, *i.e.,* emission budgets that turn out to be more demanding than necessary, would not be surprising. Required to balance the possibilities of under-control and over-control, EPA must have leeway in fulfilling its statutory mandate.

Finally, in a voluminous record, involving thousands of upwind-to-downwind linkages, respondents point to only a few instances of "unnecessary" emission reductions, and even those are contested by EPA. Compare Brief for Industry Respondents 19 with Reply Brief for Federal Petitioners 21–22. EPA, for its part, offers data, contested by respondents, purporting to show that few (if any) upwind States have been required to limit emissions below the one-percent threshold of significance. Compare Brief for Federal Petitioners 37, 54–55, with Brief for Industry Respondents 40.

If any upwind State concludes it has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attainment, that State may bring a particularized, as-applied challenge to the Transport Rule, along with any other as-applied challenges it may have. Cf. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 699–700, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (approving agency's reasonable interpretation of statute despite possibility of improper applications); *American Hospital Assn. v. NLRB,* 499 U.S. 606, 619, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991) (rejecting facial challenge to National Labor Relations Board rule despite possible arbitrary applications). Satisfied that EPA's cost-based methodology, on its face, is not "arbitrary, capricious, or manifestly contrary to the statute," *Chevron,* 467 U.S., at 844, 104 S.Ct. 2778, we uphold the Transport Rule. The possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety.

In sum, we hold that the CAA does not command that States be given a second ***1610** opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations. We further conclude that the Good Neighbor Provision does not require EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem. EPA's cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, workable, and equitable interpretation of the Good Neighbor Provision.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the D.C. Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO took no part in the consideration or decision of these cases.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.
Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress. With the statute involved in the present cases, however, Congress did it right. It specified quite precisely the responsibility of an upwind State under the Good Neighbor Provision: to eliminate those *amounts of pollutants* that it contributes to downwind problem areas. But the Environmental Protection Agency was unsatisfied with this system. Agency personnel, perhaps correctly, thought it more efficient to require reductions not in proportion to the *amounts of pollutants* for which each upwind State is responsible, but on the basis of how *cost-effectively* each can decrease emissions.

Today, the majority approves that undemocratic revision of the Clean Air Act. The Agency came forward with a textual justification for its action, relying on a farfetched meaning of the word "significantly" in the statutory text. That justification is so feeble that today's majority does not even recite it, much less defend it. The majority reaches its result ("Look Ma, no hands!") without benefit of text, claiming to have identified a remarkable "gap" in the statute, which it proceeds to fill (contrary to the plain logic of the statute) with cost-benefit analysis—and then, with no pretended textual justification at all, simply extends cost-benefit analysis beyond the scope of the alleged gap.

Additionally, the majority relieves EPA of any obligation to announce novel interpretations of the Good Neighbor Provision before the States must submit plans that are required to comply with those interpretations. By according the States primacy in deciding how to attain the governing air-quality standards, the Clean Air Act is pregnant with an obligation for the Agency to set those standards before the States can be expected to achieve them. The majority nonetheless approves EPA's promulgation of federal plans implementing good-neighbor benchmarks before the States could conceivably have met those benchmarks on their own.

I would affirm the judgment of the D.C. Circuit that EPA violated the law both in crafting the Transport Rule and in implementing it. [1]

1 I agree with the majority's analysis turning aside EPA's threshold objections to judicial review. See *ante,* at 1599 – 1600, 1602 – 1603.

I. The Transport Rule

"It is axiomatic that an administrative agency's power to promulgate legislative ***1611** regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). Yet today the majority treats the text of the Clean Air Act not as the source and ceiling of EPA's authority to regulate interstate air pollution, but rather as a difficulty to be overcome in pursuit of the Agency's responsibility to "craf[t] a solution to the problem of interstate air pollution." *Ante,* at 1594. In reality, Congress itself has crafted the solution. The Good Neighbor Provision requires each State to eliminate whatever "amounts" of "air pollutant[s]" "contribute significantly to nonattainment" or "interfere with maintenance" of national ambient air-quality standards (NAAQS) in other States. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The statute addresses solely the environmental consequences of emissions, *not* the facility of reducing them; and it requires States to shoulder burdens in proportion to the size of their contributions, *not* in proportion to the ease of bearing them. EPA's utterly fanciful "from each according to its ability" construction sacrifices democratically adopted text to bureaucratically

favored policy. It deserves no deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

A. Alleged Textual Support: "Significantly"

In the Government's argument here, the asserted textual support for the efficient-reduction approach adopted by EPA in the Transport Rule is the ambiguity of the word "significantly" in the statutory requirement that each State eliminate those "amounts" of pollutants that "contribute *significantly* to nonattainment" in downwind States. § 7410(a)(2)(D)(i)(I) (emphasis added). As described in the Government's briefing:

> "[T]he term 'significantly' ... is ambiguous, and ... EPA may permissibly determine the amount of a State's 'significant' contribution by reference to the amount of emissions reductions achievable through application of highly cost-effective controls." Reply Brief for Federal Petitioners 15–16 (emphasis added; some internal quotation marks omitted).

And as the Government stated at oral argument:

> "[I]n terms of the language, 'contribute significantly,' ... EPA reasonably construed that term to include a component of difficulty of achievement [*i.e.*, cost]; that is, in common parlance, we might say that dunking a basketball is a more *significant* achievement for somebody who is 5 feet 10 than for somebody who is 6 feet 10." Tr. of Oral Arg. 9 (emphasis added).

But of course the statute does not focus on whether the upwind State has "achieved significantly"; it asks whether the State has "contributed significantly" to downwind pollution. The provision addresses the physical effects of physical causes, and it is only the magnitude of the relationship sufficient to trigger regulation that admits of some vagueness. Stated differently, the statute is ambiguous as to *how much* of a contribution to downwind pollution is "significant," but it is not at all ambiguous as to whether factors unrelated to the *amounts of pollutants* that make up a contribution affect the analysis. Just as "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple,' " *United States v. Home Concrete & Supply, LLC*, 566 U.S. ——, ——, n. 1, 132 S.Ct. 1836, 1847, n. 1, 182 L.Ed.2d 746 (2012) (SCALIA, J., concurring in part and concurring in judgment), it does not matter whether the phrase "amounts which ... contribute ***1612** significantly [to downwind NAAQS nonattainment]" is ambiguous when EPA has interpreted it to mean "amounts which are inexpensive to eliminate."

It would be extraordinary for Congress, by use of the single word "significantly," to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most efficient. We have repeatedly said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

The statute's history demonstrates that "significantly" is not code for "feel free to consider compliance costs." The previous version of the Good Neighbor Provision required each State to prohibit emissions that would "*prevent* attainment or maintenance by any other State of any [NAAQS]." 91 Stat. 693 (emphasis added). It is evident that the current reformulation (targeting "any air pollutant in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]") was meant simply to eliminate any implication that the polluting State had to be a but-for rather than merely a contributing cause of the downwind nonattainment or maintenance problem—not to allow cost concerns to creep in through the back door.

In another respect also EPA's reliance upon the word "significantly" is plainly mistaken. The Good Neighbor Provision targets for elimination not only those emissions that "contribute significantly to nonattainment [of NAAQS] in ... any other State,"

but also those that "interfere with maintenance [of NAAQS] by ... any other State." § 7410(a)(2)(D)(i)(I). The wiggle-word "significantly" is absent from the latter phrase. EPA does not—cannot—provide any textual justification for the conclusion that, when the same amounts of a pollutant travel downwind from States X and Y to a single area in State A, the emissions from X but not Y can be said to "interfere with maintenance" of the NAAQS in A just because they are cheaper to eliminate. Yet EPA proposes to use the "from each according to its ability" approach for nonattainment areas *and* maintenance areas.

To its credit, the majority does not allude to, much less try to defend, the Government's "significantly" argument. But there is a serious downside to this. The sky-hook of "significantly" was called into service to counter the criterion of upwind-state responsibility plainly provided in the statute's text: *amounts of pollutants* contributed to downwind problem areas. See Brief for Federal Petitioners 42–45. Having forsworn reliance on "significantly" to convert responsibility for amounts of pollutants into responsibility for easy reduction of pollutants, the majority is impaled upon the statutory text.

B. The Alleged "Gap"

To fill the void created by its abandonment of EPA's "significantly" argument, the majority identifies a supposed gap in the text, which EPA must fill: While the text says that each upwind State must be responsible for its own contribution to downwind pollution, it does not say how responsibility is to be divided among multiple States when the total of their combined contribution to downwind pollution in a ***1613** particular area exceeds the reduction that the relevant NAAQS requires. In the example given by the majority, *ante,* at 1603 – 1604, when each of three upwind States contributes 30 units of a pollutant to a downwind State but the reduction required for that State to comply with the NAAQS is only 30 units, how will responsibility for that 30 units be apportioned? Wow, that's a hard one—almost the equivalent of asking who is buried in Grant's Tomb. If the criterion of responsibility is *amounts of pollutants,* then surely shared responsibility must be based upon *relative amounts of pollutants*—in the majority's example, 10 units for each State. The statute makes no sense otherwise. The Good Neighbor Provision contains a gap only for those who blind themselves to the obvious in order to pursue a preferred policy.

But not only does the majority bring in cost-benefit analysis to fill a gap that does not really exist. Having filled that "gap," it then extends the efficiency-based principle to situations *beyond the imaginary gap*—that is, situations *where no apportionment is required.* Even where only a *single* upwind State contributes pollutants to a downwind State, its annual emissions "budget" will be based not upon the amounts of pollutants it contributes, but upon what "pollution controls [are] available at the chosen cost thresholds." *Ante,* at 1597. EPA's justification was its implausible (and only half-applicable) notion that "significantly" imports cost concerns into the provision. The majority, having abandoned that absurdity, is left to deal with the no-apportionment situation with no defense—not even an imaginary gap—against a crystal-clear statutory text.

C. The Majority's Criticisms of Proportional Reduction

1. Impossibility

The majority contends that a proportional-reduction approach "could scarcely be satisfied in practice" and "appears to work neither mathematically nor in practical application," *ante,* at 1605 —in essence, that the approach is impossible of application. If that were true, I know of no legal authority and no democratic principle that would derive from it the consequence that EPA could rewrite the statute, rather than the consequence that the statute would be inoperative. "There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fail." 3 R. Pound, Jurisprudence 493 (1959) (footnote omitted). In other words, the impossibility argument has no independent force: It is relevant only if the majority's textual interpretation is permissible. But in any event, the argument is wrong.

The impossibility theorem rests upon the following scenario: "Imagine that States X and Y ... contribute air pollution to State A in a ratio of one to five...." *Ante,* at 1605. And suppose that "States X and Y also contribute pollutants to a second downwind State (State B), this time in a ratio of seven to one." *Ibid.* The majority concludes that "[t]he Court of Appeals' proportionality edict with respect to *both* State A and State B appears to work neither mathematically nor in practical application." *Ibid.* But why not? The majority's model relies on two faulty premises—one an oversimplification and the other a misapprehension.

First, the majority's formulation suggests that EPA measures the comparative downwind drift of pollutants in free-floating proportions between States. In reality, however, EPA assesses quantities (in physical units), not proportions. So, the majority's illustration of a 1–to–5 ratio describing ***1614** the relative contributions of States X and Y to State A's pollution might mean (for example) that X is responsible for 0.2 unit of some pollutant above the NAAQS in A and that Y is responsible for 1 unit. And the second example, assuming a 7–to–1 ratio underlying State X's and Y's contributions to State B's pollution, might mean that State X supplies 0.7 unit of the same pollutant above the NAAQS and State Y, 0.1 unit. Under a proportional-reduction approach, State X would be required to eliminate emissions of that pollutant by whatever minimum amount reduces both State A's level by 0.2 unit and State B's by 0.7 unit. State Y, in turn, would be required to curtail its emissions by whatever minimum amount decreases both State A's measure by 1 unit and State B's by 0.1 unit.

But, the majority objects, the reductions that State X must make to help bring State B into compliance may be more than those necessary for it to help bring State A into compliance, resulting in "over-control" of X with respect to A. See *ante,* at 1604 – 1606, and n. 19. This objection discloses the second flaw in the impossibility theorem. Echoing EPA, see Brief for Federal Petitioners 47–48, the majority believes that the D.C. Circuit's interpretation of the Good Neighbor Provision forbids over-control with respect to even a single downwind receptor. That is the only way in which the proportional-reduction approach could be deemed "to work neither mathematically nor in practical application" on its face. *Ante,* at 1605. But the premise is incorrect. Although some of the D.C. Circuit's simplified examples might support that conclusion, its opinion explicitly acknowledged that the complexity of real-world conditions demands the contrary: "To be sure, ... there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions enough to meet the NAAQS in other downwind States." 696 F.3d 7, 22 (2012). Moreover, the majority itself recognizes that the Good Neighbor Provision does not categorically prohibit over-control. "As the Good Neighbor Provision seeks attainment in *every* downwind State, ... exceeding attainment in one State cannot rank as 'over-control' unless unnecessary to achieving attainment in *any* downwind State." *Ante,* at 1590. The majority apparently fails to appreciate that, having cleared up that potential point of confusion, nothing stands in the way of the proportional-reduction approach.

The majority relies on an EPA document preceding the Transport Rule to establish the Agency's supposed belief that the proportional-reduction approach "could scarcely be satisfied in practice." *Ante,* at 1605. But the document says no such thing. Rather, it shows that the Agency rejected a proportion-based, "air[-]quality-only" methodology not because it was impossible of application, but because it failed to account for costs. See App. in No. 11–1302 etc. (CADC), pp. 2311–2312. The document labels as a "technical difficulty" (not an impossibility) the fact that "most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one." *Id.,* at 2312. The Clean Air Act is full of technical difficulties, and this one is overcome by requiring each State to make the greatest reduction necessary with respect to any downwind area.

2. Over–Control

Apparently conceding that the proportional-reduction approach may not be impossible of application after all, the majority alternatively asserts that it would cause "costly overregulation unnecessary to, indeed ***1615** in conflict with, the Good Neighbor Provision's goal of attainment." *Ante,* at 1605. This assertion of massive overregulation assumes that a vast number of downwind States will be the accidental beneficiaries of collateral pollution reductions—that is, nontargeted reductions that occur as a consequence of required reductions targeted at neighboring downwind States. (Collateral pollution reduction is the opposite of collateral damage, so to speak.) The majority contends that the collateral pollution reductions enjoyed by a

downwind State will cause the required upwind reductions actually targeting that State to exceed the level necessary to assure attainment or maintenance, thus producing unnecessary over-control. I have no reason to believe that the problem of over-control is as extensive and thus "costly" as the majority alleges, and the majority provides none.

But never mind that. It suffices to say that over-control is no more likely to occur when the required reductions are apportioned among upwind States on the basis of *amounts of pollutants* contributed than when they are apportioned on the basis of *cost*. There is no conceivable reason why the efficient-reduction States that bear the brunt of the majority's (and EPA's) approach are less likely to be over-controlled than the major-pollution-causing States that would bear the brunt of my (and the statute's) approach. Indeed, EPA never attempted to establish that the Transport Rule did not produce gross over-control. See 696 F.3d, at 27. What causes the problem of over-control is not the *manner of apportioning* the required reductions, but the *composite volume* of the required reductions in each downwind State. If the majority's approach reduces over-control (it admittedly does not entirely eliminate it), that is only because EPA applies its cost-effectiveness principle not just to determining the proportions of required reductions that each upwind State must bear, but to determining the volume of those required reductions. See *supra,* at 1596.

In any case, the solution to over-control under a proportional-reduction system is not difficult to discern. In calculating good-neighbor responsibilities, EPA would simply be required to make allowance for what I have called collateral pollution reductions. The Agency would set upwind States' obligations at levels that, after taking into account those reductions, suffice to produce attainment in all downwind States. Doubtless, there are multiple ways for the Agency to accomplish that task in accordance with the statute's amounts-based, proportional focus. [2] The majority itself invokes an unexplained device to prevent over-control "in uncommon particular applications" of its scheme. *Ante,* at 1609. Whatever that device is, it can serve just as well to prevent over-control under the approach I have outlined.

2 The majority insists that "proportionality cannot be one of those ways." *Ante,* at 1606. But it is easy to imagine precluding unnecessary over-control by reducing in a percent-based manner the burdens of each upwind State linked to a given downwind area, which would retain the proportionality produced by my approach.

I fully acknowledge that the proportional-reduction approach will demand some complicated computations where one upwind State is linked to multiple downwind States and vice versa. I am confident, however, that EPA's skilled number-crunchers can adhere to the statute's *quantitative* (rather than efficiency) mandate by crafting *quantitative* solutions. Indeed, those calculations can be performed at the desk, whereas the "from each according to its ability" approach requires the unwieldy field examination of ***1616** many pollution-producing sources with many sorts of equipment.

D. Our Precedent

The majority agrees with EPA's assessment that "[u]sing costs in the Transport Rule calculus ... makes good sense." *Ante,* at 1607. Its opinion declares that "[e]liminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *Ibid.* Efficient, probably. Equitable? Perhaps so, but perhaps not. See Brief for Industry Respondents 35–36. But the point is that whether efficiency should have a dominant or subordinate role is for Congress, not this Court, to determine.

This is not the first time parties have sought to convert the Clean Air Act into a mandate for cost-effective regulation. *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), confronted the contention that EPA should consider costs in setting NAAQS. The provision at issue there, like this one, did not expressly bar cost-based decisionmaking —and unlike this one, it even contained words that were arguably ambiguous in the relevant respect. Specifically, § 7409(b)(1) instructed EPA to set primary NAAQS "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety." One could hardly overstate the capaciousness of the word "adequate," and the phrase "public health" was at least equally susceptible (indeed, much more susceptible) of permitting cost-benefit analysis as the word "significantly" is here. As the respondents in *American Trucking* argued, setting NAAQS without considering costs

may bring about failing industries and fewer jobs, which in turn may produce poorer and less healthy citizens. See *id.*, at 466, 121 S.Ct. 903. But we concluded that "in the context of" the entire provision, that interpretation "ma[de] no sense." *Ibid.* As quoted earlier, we said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ... hide elephants in mouseholes." *Id.*, at 468, 121 S.Ct. 903.

In *American Trucking*, the Court "refused to find implicit in ambiguous sections of the [Clear Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted," *id.*, at 467, 121 S.Ct. 903, citing a tradition dating back to *Union Elec. Co. v. EPA*, 427 U.S. 246, 257, and n. 5, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). There are, indeed, numerous Clean Air Act provisions explicitly permitting costs to be taken into account. See, *e.g.*, § 7404(a)(1); § 7521(a)(2); § 7545(c)(2); § 7547(a)(3); § 7554(b)(2); § 7571(b); § 7651c(f)(1)(A). *American Trucking* thus demanded "a textual commitment of authority to the EPA to consider costs," 531 U.S., at 468, 121 S.Ct. 903—a hurdle that the Good Neighbor Provision comes nowhere close to clearing. Today's opinion turns its back upon that case and is incompatible with that opinion. [3]

3 The majority shrugs off *American Trucking* in a footnote, reasoning that because it characterized the provision there in question as "absolute," it has nothing to say about the Good Neighbor Provision, which is not absolute. See *ante*, at 1607 – 1608, n. 21. This is a textbook example of begging the question: Since the Good Neighbor Provision is not absolute (the very point at issue here), *American Trucking*, which dealt with a provision that is absolute, is irrelevant. To the contrary, *American Trucking* is right on point. As described in text, the provision at issue here is even more categorical ("absolute") than the provision at issue in *American Trucking*.

II. Imposition of Federal Implementation Plans

The D.C. Circuit vacated the Transport Rule for the additional reason that EPA ***1617** took the reins in allocating emissions budgets among pollution-producing sources through Federal Implementation Plans (FIPs) without first providing the States a meaningful opportunity to perform that task through State Implementation Plans (SIPs). The majority rejects that ruling on the ground that "the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues." *Ante*, at 1601. "[N]othing in the statute," the majority says, "places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." *Ante*, at 1601. This remarkably expansive reasoning makes a hash of the Clean Air Act, transforming it from a program based on cooperative federalism to one of centralized federal control. Nothing in the Good Neighbor Provision suggests such a stark departure from the Act's fundamental structure.

A. Implications of State Regulatory Primacy

Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy. The Act begins by declaring that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is *the primary responsibility of States and local governments*." § 7401(a)(3) (emphasis added). State primacy permeates Title I, which addresses the promulgation and implementation of NAAQS, in particular. Under § 7409(a), EPA must promulgate NAAQS for each pollutant for which air-quality criteria have been issued pursuant to § 7408. Section 7410(a)(1), in turn, requires each State, usually within three years of each new or revised NAAQS, to submit a SIP providing for its "implementation, maintenance, and enforcement." EPA may step in to take over that responsibility if, and only if, a State discharges it inadequately. Specifically, if the Agency finds that a State has failed to make a required or complete submission or disapproves a SIP, it "shall promulgate a [FIP] at any time within 2 years ..., unless the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision." § 7410(c)(1).

To describe the effect of this statutory scheme in simple terms: After EPA sets numerical air-quality benchmarks, "Congress plainly left with the States ... the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co.*, 427 U.S., at 269, 96 S.Ct. 2518. The States are to present their chosen means of achieving EPA's benchmarks

in SIPs, and only if a SIP fails to meet those goals may the Agency commandeer a State's authority by promulgating a FIP. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975). EPA, we have emphasized, "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [NAAQS] are to be met." *Ibid.*

The Good Neighbor Provision is one of the requirements with which SIPs must comply. § 7410(a)(2)(D)(i)(I). The statutory structure described above plainly demands that EPA afford States a meaningful opportunity to allocate reduction responsibilities among the sources within their borders. But the majority holds that EPA may in effect force the States ***1618** to guess at what those responsibilities might be by requiring them to submit SIPs before learning what the Agency regards as a "significan[t]" contribution—with the consequence of losing their regulatory primacy if they guess wrong. EPA asserts that the D.C. Circuit "was wrong as a factual matter" in reasoning that States cannot feasibly implement the Good Neighbor Provision without knowing what the Agency considers their obligations to be. Brief for Federal Petitioners 29. That is literally unbelievable. The only support that EPA can muster are the assertions that "States routinely undertake technically complex air quality determinations" and that "emissions information from all States is publicly available." *Ibid.* As respondents rightly state: "All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify 'significan[ce].' " Brief for State Respondents 50.

Call it "punish[ing] the States for failing to meet a standard that EPA had not yet announced and [they] did not yet know," 696 F.3d, at 28; asking them "to hit the target ... *before* EPA defines [it]," *id.*, at 32; requiring them "to take [a] stab in the dark," *id.*, at 35; or "set[ting] the States up to fail," *id.*, at 37. Call it "hid[ing] the ball," Brief for State Respondents 20; or a "shell game," *id.*, at 54. Call it "pin the tail on the donkey." Tr. of Oral Arg. 24. As we have recently explained:

> "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time ... and demands deference." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ——, ——, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012).

That principle applies *a fortiori* to a regulatory regime that rests on principles of cooperative federalism.

B. Past EPA Practice

EPA itself has long acknowledged the proposition that it is nonsensical to expect States to comply with the Good Neighbor Provision absent direction about what constitutes a "significan[t]" contribution to interstate pollution.

The Agency consistently adopted that position prior to the Transport Rule. In 1998, when it issued the NO_X SIP Call under § 7410(k)(5), EPA acknowledged that "[w]ithout determining an acceptable level of NO_X reductions, the upwind State would not have guidance as to what is an acceptable submission." 63 Fed.Reg. 57370. EPA deemed it "most efficient—indeed necessary—for the Federal government to establish the overall emissions levels for the various States." *Ibid.* Accordingly, the Agency quantified good-neighbor responsibilities and then allowed States a year to submit SIPs to implement them. *Id.*, at 57450–57451.

Similarly, when EPA issued the Clean Air Interstate Rule (CAIR) in 2005 under § 7410(c), it explicitly "recognize[d] that States would face great difficulties in developing transport SIPs to meet the requirements of today's action without th[e] data and policies" provided by the Rule, including "judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under [§ 74]10(a)(2)(D)." 70 *id.*, at 25268–25269. The Agency thus gave the States 18 months to submit SIPs implementing their new good-neighbor responsibilities. See *id.*, at 25166–25167, 25176. Although EPA published FIPs before that window ***1619** closed, it specified that they were meant to

serve only as a "Federal backstop" and would not become effective unless necessary "a year after the CAIR SIP submission deadline." 71 *id.*, at 25330–25331 (2006).

Even since promulgating the Transport Rule, EPA has repeatedly reaffirmed that States cannot be expected to read the Agency's mind. In other proceedings, EPA has time and again stated that although "[s]ome of the elements of the [SIP-submission process] are relatively straightforward, ... others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." 76 *id.*, at 58751 (2011). As an example of the latter, the Agency has remarked that the Good Neighbor Provision "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution," citing CAIR. *Ibid.*, n. 6. In fact, EPA repeated those precise statements not once, not twice, but *30 times* following promulgation of the Transport Rule. [4]

4 In addition to the citations in text, see 77 Fed.Reg. 50654, and n. 7 (2012); *id.*, at 47577, and n. 7; *id.*, at 46363, and n. 7; *id.*, at 46356, and n. 9; *id.*, at 45323, and n. 7; *id.*, at 43199, and n. 7; *id.*, at 38241, and n. 6; *id.*, at 35912, and n. 7; *id.*, at 34909, and n. 7; *id.*, at 34901, and n. 8; *id.*, at 34310, and n. 7; *id.*, at 34291, and n. 8; *id.*, at 33384, and n. 7; *id.*, at 33375, and n. 7; *id.*, at 23184, and n. 7; *id.*, at 22543, and n. 4; *id.*, at 22536, and n. 7; *id.*, at 22253, and n. 8; *id.*, at 21915, and n. 7; *id.*, at 21706, and n. 6; *id.*, at 16788, and n. 4; *id.*, at 13241, and n. 5; *id.*, at 6715, and n. 7; *id.*, at 6047, and n. 4; *id.*, at 3216, and n. 7; 76 *id.*, at 77955, and n. 7 (2011); *id.*, at 75852, and n. 7; *id.*, at 70943, and n. 6; *id.*, at 62636, and n. 3.

Notwithstanding what parties may have argued in other litigation many years ago, it is beyond responsible debate that the States cannot possibly design FIP-proof SIPs without knowing the EPA-prescribed targets at which they must aim. EPA insists that it enjoys significant discretion—indeed, that it can consider essentially whatever factors it wishes—to determine what constitutes a "significan[t]" contribution to interstate pollution; and it simultaneously asserts that the States ought to know what quantities it will choose. The Agency—and the majority—cannot have it both ways.

C. Abuse of Discretion

The majority attempts to place the blame for hollowing out the core of the Clean Air Act on "the Act's plain text." *Ante,* at 1601. The first textual element to which it refers is § 7410(c)'s requirement that after EPA has disapproved a SIP, it "shall promulgate a[FIP] at any time within 2 years." That is to say, the Agency has discretion whether to act at once or to defer action until some later point during the 2–year period. But it also has discretion to work within the prescribed timetable to respect the rightful role of States in the statutory scheme by delaying the issuance or enforcement of FIPs pending the resubmission and approval of SIPs—as EPA's conduct surrounding CAIR clearly demonstrates. And all of this assumes that the Agency insists on disapproving SIPs before promulgating the applicable good-neighbor standards—though in fact EPA has discretion to publicize those metrics before the window to submit SIPs closes in the first place.

The majority states that the Agency "retained discretion to alter its course" from the one pursued in the NO_X SIP Call and CAIR, *ante,* at 1601 – 1602, but that misses the point. The point is that EPA has discretion to arrange things so as to preserve the Clean Air Act's core principle of ***1620** state primacy—and that it is an *abuse of discretion* to refuse to do so. See § 7607(d)(9)(A); see also 5 U.S.C. § 706(2)(A) (identical text in the Administrative Procedure Act). Indeed, the proviso in § 7410(c)(1) that the Agency's authority to promulgate a FIP within the 2–year period terminates if "the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision" explicitly contemplates just such an arrangement. [5]

5 I am unimpressed, by the way, with the explanation that the majority accepts for EPA's about-face: that the D.C. Circuit admonished it to "act with dispatch in amending or replacing CAIR." *Ante,* at 1602 (citing *North Carolina v. EPA,* 550 F.3d 1176, 1178 (C.A.D.C.2008) (*per curiam*)). Courts of Appeals' raised eyebrows and wagging fingers are not law, least so when they urge an agency to take ultra vires action. Nor can the encouragement to act illegally qualify as a "good reaso[n]" for an agency's alteration of course under *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009).

The majority's conception of administrative discretion is so sprawling that it would allow EPA to subvert state primacy not only with respect to the interstate-pollution concerns of the Good Neighbor Provision, but with respect to the much broader concerns of the NAAQS program more generally. States must submit SIPs "within 3 years" of each new or revised NAAQS "*or such shorter period as [EPA] may prescribe*." § 7410(a)(1) (emphasis added). Because there is no principled reason to read that scheduling provision in a less malleable manner than the one at issue here, under the majority's view EPA could demand that States submit SIPs within a matter of days—or even hours—after a NAAQS publication or else face the immediate imposition of FIPs.

The second element of "plain text" on which the majority relies is small beer indeed. The Good Neighbor Provision does not expressly state that EPA must publish target quantities before the States are required to submit SIPs—even though the Clean Air Act does so for NAAQS more generally and for vehicle inspection and maintenance programs, see § 7511a(c)(3)(B). From that premise, the majority reasons that "[h]ad Congress intended similarly to defer States' discharge of their obligations under the Good Neighbor Provision, Congress ... would have included a similar direction in that section." *Ante,* at 1601. Perhaps so. But EPA itself read the statute differently when it declared in the NO_X SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State *is comparable to determining [NAAQS],* which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed.Reg. 57369 (emphasis added).

The negative implication suggested by a statute's failure to use consistent terminology can be a helpful guide to determining meaning, especially when all the provisions in question were enacted at the same time (which is not the case here). But because that interpretive canon, like others, is just one clue to aid construction, it can be overcome by more powerful indications of meaning elsewhere in the statute. It is, we have said, "no more than a rule of thumb that can tip the scales when a statute could be read in multiple ways." *Sebelius v. Auburn Regional Medical Center,* 568 U.S. ——, ——, 133 S.Ct. 817, 825, 184 L.Ed.2d 627 (2013) (internal quotation marks and brackets omitted). The Clean Air Act simply cannot be read to make EPA the primary regulator in this context. The negative-implication canon is easily ***1621** overcome by the statute's state-respecting structure —not to mention the sheer impossibility of submitting a sensible SIP without EPA guidance. Negative implication is the tiniest mousehole in which the majority discovers the elephant of federal control.

* * *

Addressing the problem of interstate pollution in the manner Congress has prescribed—or in any other manner, for that matter—is a complex and difficult enterprise. But "[r]egardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Brown & Williamson,* 529 U.S., at 125, 120 S.Ct. 1291 (quoting *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988)). The majority's approval of EPA's approach to the Clean Air Act violates this foundational principle of popular government.

I dissent.

Parallel Citations

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End of Document

Exhibit 17

ILLINOIS POLLUTION CONTROL BOARD
June 18, 2009

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE	)	R09-10
225: CONTROL OF EMISSIONS FROM	)	(Rulemaking - Air)
LARGE COMBUSTION SOURCES	)	
(MERCURY MONITORING)	)	

Proposed Rule. Final Notice.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Today the Board adopts its final notice in this rulemaking amending Part 225 of its air pollution regulations. On October 3, 2008, the Illinois Environmental Protection Agency (Agency) initiated this proceeding by filing a proposal under the general rulemaking provisions of Sections 27 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/27 (2006)). Generally, the Agency proposed to recreate certain monitoring provisions of the federal Clean Air Mercury Rule (CAMR), which the United States Court of Appeals recently vacated, by adopting those provisions in Illinois' mercury rule.

In an order dated November 5, 2008, the Board among other actions granted the Agency's motion for expedited review. The Board also sent the Agency's proposal to first notice publication in the *Illinois Register* without commenting on the substantive merits of the proposal. *See* 32 Ill. Reg. 18507-18826 (Dec. 5, 2008). After holding two hearings, the Board on April 16, 2009, adopted its second-notice opinion and order. At its meeting on May 19, 2009, the Joint Committee on Administrative Rules (JCAR) considered the Board's second-notice proposal and issued its "Certificate of No Objection to Proposed Rulemaking."

Below, the Board first provides the procedural history of this rulemaking. The Board then provides a brief background of the proposal. The Board then discusses the proposal before making its findings on economic reasonableness and technical feasibility. Finally, the Board directs the Clerk to file the proposed amendments to Part 225 with the Secretary of State for publication in the *Illinois Register*.

PROCEDURAL HISTORY

On October 3, 2008, the Agency filed a rulemaking proposal (Prop.) under the general rulemaking provisions of Sections 27 and 28 of the Act (415 ILCS 5/27, 28 (2006)). A Statement of Reasons (Statement) and Technical Support Document (TSD) accompanied the proposal. A motion for waiver of various filing requirements also accompanied the proposal. On October 28, 2008, the Agency filed a motion for expedited review.

In an order dated November 5, 2008, the Board accepted the Agency's proposal for hearing and granted the Agency's motions for waiver of filing requirements and expedited

2) The owners or operators of EGUs in an MPS Group must not sell or trade to any person or otherwise exchange with or give to any person SO_2 allowances allocated to the EGUs in the MPS Group for vintage years 2013 and beyond that would otherwise be available for sale or trade as a result of actions taken to comply with the standards in subsection (e) of this Section. Such allowances that are not retired for compliance, or otherwise surrendered pursuant to a consent decree to which the State of Illinois is a party, must be surrendered to the Agency on an annual basis, beginning in calendar year 2014. This provision does not apply to the use, sale, exchange, gift, or trade of allowances among the EGUs in an MPS Group.

3) The provisions of this subsection (f) do not restrict or inhibit the sale or trading of allowances that become available from one or more EGUs in a MPS Group as a result of holding allowances that represent over-compliance with the NO_x or SO_2 standard in subsection (e) of this Section, once such a standard becomes effective, whether such over-compliance results from control equipment, fuel changes, changes in the method of operation, unit shut downs, or other reasons.

4) For purposes of this subsection (f), NO_x and SO_2 allowances mean allowances necessary for compliance with Sections 225.310, 225.410, or 225.510, 40 CFR 72, or ~~subparts~~ Subparts AA and AAAA of 40 CFR 96, or any future federal NO_x or SO_2 emissions trading programs that modify or replace these programs~~.~~. This Section does not prohibit the owner or operator of EGUs in an MPS Group from purchasing or otherwise obtaining allowances from other sources as allowed by law for purposes of complying with federal or state requirements, except as specifically set forth in this Section.

5) By ~~by Before~~ March 1, 2010, and continuing each year thereafter, the owner or operator of EGUs in an MPS Group must submit a report to the Agency that demonstrates compliance with the requirements of this subsection (f) for the previous calendar year, and which includes identification of any allowances that have been surrendered to the USEPA or to the Agency and any allowances that were sold, gifted, used, exchanged, or traded because they became available due to over-compliance. All allowances that are required to be surrendered must be surrendered by August 31, unless USEPA has not yet deducted the allowances from the previous year. A final report must be submitted to the Agency by August 31 of each year, verifying that the actions described in the initial report have taken place or, if such actions have not taken place, an explanation of all changes that have occurred and the reasons for such changes. If USEPA has not deducted the allowances from the previous year by August 31, the final report will ~~must~~ be due, and all