

Nos. 12-1182 and 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.
AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF *AMICI CURIAE* STATE OF WEST
VIRGINIA AND 8 OTHER STATES IN
SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

Through its provisions governing “state implementation plans” (“SIPs”), the Clean Air Act gives States the first opportunity to satisfy, consistent with their unique regulatory agendas, the bottom-line air-quality obligations that EPA mandates. 42 U.S.C. § 7410(a). If the States fail to satisfy those obligations and certain other conditions are met, EPA may promulgate “federal implementation plans” (“FIPs”), which serve as federal backstops to satisfy EPA requirements that the States could have satisfied, but did not satisfy, in SIPs. *Id.* § 7410(c)(1). In the rule at issue here (the “Transport Rule,” 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a)), EPA defined a new region of 27 upwind States and announced new obligations for those States to mitigate interstate transport of air pollution under the Act’s “good neighbor” provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But instead of giving the Transport Rule States a chance to satisfy those new obligations through SIPs, EPA immediately imposed FIPs on all of them.

The questions presented are:

1. Whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule.
2. Whether the court of appeals correctly vacated the Transport Rule for imposing FIPs to implement obligations that EPA had not previously announced.
3. Whether the court of appeals correctly vacated the Transport Rule for exceeding the substantive limits of the good-neighbor provision.

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DEFINITIONS

CAIR	Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,162, 25,167 (May 12, 2005).
EPA	United States Environmental Protection Agency
IPM	Integrated Planning Model
FIP	Federal Implementation Plan
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
NEEDS	National Electric Energy Data System
RPO	Regional Planning Organization
SIP	State Implementation Plan
Transport Rule	Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), Pet. App. 117a–1458a.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici States address a critical issue within the second question presented: EPA’s attempt to usurp the States by imposing federal implementation plans before the States had an opportunity to develop state plans. This power grab by the agency relies on a significant distortion of the Clean Air Act and contravenes the agency’s own longstanding pronouncements. EPA argues that the States waived their right to submit state plans by waiting for the agency to quantify each State’s good-neighbor obligations. Despite having pledged since 1998 to undertake that task itself, the agency now contends that the States should have determined those obligations themselves and developed state plans accordingly. Because the States did not do so, EPA asserts, it was permitted to immediately impose federal plans on the States.

This brief shows that the agency’s novel view of the Clean Air Act is fundamentally at odds with the Act’s cooperative federalism, as it would enable EPA to shut out the States entirely. The States are set up to fail. The task of quantifying each State’s good-neighbor obligations, while well suited to EPA, is too complicated and expensive for the States to complete. And even if the impossible were accomplished, EPA claims the right to reject whatever the States did.

Amici States—which include States covered by the Transport Rule and States outside the rule—submit this brief because all States have reason to be concerned about the broader threat posed by EPA’s

position in this case.¹ Congress expressly reserved to state and local governments the primary responsibility for controlling air pollution at its source, recognizing the value of local experience and flexibility. EPA's unprecedented assault on this principle in the Transport Rule portends a new approach by the agency to the relationship between state and federal implementation plans. If EPA prevails, all States are likely to find the agency aggressively imposing federal implementation plans on the theory that the States waived their right to submit state plans. *Amici* States urge this Court to prevent the agency from unilaterally and fundamentally transforming the Clean Air Act.

SUMMARY OF ARGUMENT

This case concerns an attempt by EPA to take over the States' role in the Clean Air Act. In the Act, Congress adopted a cooperative federalism structure—where the States and the federal government each play a specific part. EPA's job is to use federal resources to identify air pollution problems and set goals for cleaner air. The States' job is to achieve those goals while working through local problems and conditions.

State leadership in implementation is where cooperative federalism yields real benefits. State-level implementation ensures that local circumstances and needs are not lost in the press to meet national air quality standards. States can structure air pollution cuts to encourage local energy sources, reward efficient energy producers, or address state economic problems.

¹ The Transport Rule covers *amici* Arkansas, Kentucky, Missouri, and West Virginia. *Amici* Arizona, Montana, North Dakota, South Dakota, and Wyoming are outside of the rule.

For this reason, Congress gave the States wide discretion in developing implementation plans and sharply limited EPA's ability to reject proposed state implementation plans.

In the Transport Rule, EPA has turned this structure on its head and departed from its own longstanding view of the Act. According to the agency, it was the *States'* job to quantify the amount of cross-state air pollution in each State. And because the States failed to do so, *EPA* now has the right to take the lead on implementation and impose a federal plan.

As explained more fully below, EPA's novel theory is not only backwards, but an attempt to shut out the States entirely. *First*, it is impossible for the States to quantify cross-state air pollution for regional pollutants. The effort would require a massive and unprecedented multi-state collaboration, necessitating the cooperation of at least thirty States with competing interests, as well as significant money, expertise, and technology. In addition, according to EPA, the States would have to complete the task in just three short years—much faster than EPA's own efforts in this case. These obstacles—jointly and severally—prevent the States from being able to quantify cross-state air pollution for regional pollutants.

Second, even if the States could pull off the impossible, EPA claims to have an effectively unlimited veto over the States' conclusions. The parties supporting EPA contend that EPA has the right to reject a proposed state plan if the agency disagrees in any way with the States' quantification efforts. That is a sweeping assertion of authority, given the vast number of technical and legal judgment

calls the States would have had to make. All of these decisions give EPA virtually unlimited ability to disagree with the States and to render meaningless any effort and expense.

The judgment of the court of appeals should be affirmed.

ARGUMENT

Cooperative federalism under the Clean Air Act is in some ways like baseball. In baseball, the batter stands ready to hit the ball as soon as the pitcher throws it to him. And the batter always has the chance to take at least one swing before he's out. The Clean Air Act is similar. The States stand ready to respond as soon as EPA decides how much pollution to cut. And the States always have a reasonable time to make their own unique plans for cutting that much pollution before EPA gets a turn.

Now imagine if EPA pitched the way it handled the Transport Rule. EPA would be like a pitcher who stops pitching and simply decides it's his turn to bat. The batter has lost his chance to swing, the pitcher explains to the surprised batter, because the batter failed to pitch himself a ball to hit.

That is not how baseball works, nor is it how the Clean Air Act works. There is a necessary, sequential structure to baseball just like the necessary, sequential structure to the Clean Air Act. Both the batter and the pitcher—like the States and EPA—have their roles to play. The batter does not and cannot pitch to himself, just as the States do not and cannot do EPA's job. EPA is attempting to fundamentally change the game and

take over the States' role. This Court should not allow it to do so.

I. CONGRESS RESERVED TO THE STATES A CRITICAL ROLE IN THE CLEAN AIR ACT.

The Clean Air Act “creates a partnership between the states and the federal government.” *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). “The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance.” *Ibid.* Once EPA has set the national ambient air standards, “it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations.” *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). That secondary role includes approving a state implementation plan “if it meets all of the CAA’s requirements,” *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (citing 42 U.S.C. § 7410(k)(3)), or promulgating a federal plan if a State fails to act or acts inadequately, 42 U.S.C. § 7410(c)(1).

The division of responsibility ensures that “air pollution prevention . . . and air pollution control at its source” remains “the primary responsibility” of those closest to it. *Id.* § 7401(a)(3). Congress determined that there was a need for “[f]ederal financial assistance and leadership,” but also recognized the importance of state and local participation. *Id.* § 7401(a)(4). This structure respects the principles of federalism on which

this country was founded. *See Ala. Env'tl. Council v. Adm'r, U.S. E.P.A.*, 711 F.3d 1277, 1280 (11th Cir. 2013) (“The Clean Air Act . . . provides a cooperative-federalism approach to air quality regulation.”); *Bethlehem Steel Corp.*, 742 F.2d at 1036 (“The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states.”). It also reflects an important understanding that “varying conditions and needs” require local experience and flexibility in implementation. 42 U.S.C. § 7402(a).

As EPA itself has previously acknowledged, it “makes sense” to give the States primary responsibility for implementation because the agency is unfamiliar with local circumstances and priorities. EPA, *Understanding the Clean Air Act*, <http://www.epa.gov/air/caa/peg/understand.html>. States are “able to develop solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors.” *Ibid.* One State may choose to allocate pollution cuts by power output to reward efficiency. Another may do so by fuel type to encourage some sources of power and discourage others. And yet another might want to make cuts in a fuel-neutral manner. Local needs could warrant dividing cuts among existing and future sources of pollution to ensure, for example, the construction of new power plants. Or they might prompt a State to institute an auction for the right to emit pollutants and let a market-trading scheme determine how cuts will be made. *See generally* Pet. App. 7a; Ca. Econ. & Allocation Advisory Comm., *Allocating Emissions Allowances Under a Cal. Cap-and-Trade Program: Recommendations to the Ca. Air*

Res. Bd. & Ca. Env'tl. Prot. Agency 8–21 (Mar. 2010), available at http://www.climatechange.ca.gov/eaac/documents/eaac_reports/2010-03-22_EAAC_Allocation_Report_Final.pdf (describing different mechanisms for distributing emissions allocations and setting their value).

In the past, EPA recognized that this cooperative structure extended to the good-neighbor obligations that the Clean Air Act imposes on States. The agency determined fifteen years ago that it must first “determine[] the overall level of reductions” through multi-state regional programs for regional pollutants like fine particulates (PM_{2.5}) and ozone, after which “it falls to the State to determine the appropriate mix of controls to achieve those reductions.” 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998). As EPA explained:

Determining the overall level of air pollutants allowed to be emitted in a State is comparable to determining overall standards of air quality, 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.

Ibid.

II. EPA'S NEW VISION OF THE CLEAN AIR ACT GIVES IT THE ABILITY TO SHUT OUT THE STATES ENTIRELY.

In promulgating the Transport Rule, however, EPA has ignored its own previous statements and taken an unprecedented view of state-federal relations under the Clean Air Act. On the day it issued the rule, the agency simultaneously imposed fifty-nine federal implementation plans mandating how the States subject to the rule must meet EPA's goals. Without allowing the States an opportunity to submit state plans, the agency forced power plants in twenty-seven states into EPA-designed cap-and-trade programs at a cost of \$2.4 billion per year to the power plants and utilities. 76 Fed. Reg. 48,208, 48,212, 48,217 n.10, 48,220 n.12 (Aug. 8, 2011); EPA, Fact Sheet: The Cross-State Air Pollution Rule, <http://www.epa.gov/airtransport/CSAPR/index.html>. EPA justifies this approach on the ground that the States should have determined their good-neighbor obligations on their own and promulgated implementation plans long before EPA did so in the Transport Rule. See EPA Br. 29–30; NY Pet. Br. 24–27; 29–35. In other words, the States should have pitched the ball to themselves and hit it.

As described in more detail below, EPA's novel theory is not only backwards, but an attempt to shut out the States entirely. *First*, the agency would require the States to do the impossible—to get a consortium of thirty-plus States with limited money, expertise, and technology to run a complicated atmospheric model, agree on each State's pollution responsibility, and develop and submit state plans for EPA review all within three years. *Second*, even if the impossible

were accomplished, EPA claims the right to reject whatever the States did.

This attack on competitive federalism cannot stand. EPA understandably may feel that it has wasted years in litigation over prior rules and that it must now impose federal implementation plans to make up for lost time. ALA Br. 5–6, 27, 57, 67–68 (complaining that “[t]he court of appeals” had made “interstate transport regulation an endless cycle of delay and failure, . . . thwart[ing] timely attainment of the nation’s health-based air quality standards” for “over a decade,” such that “[t]he notion that EPA was obligated to defer action in these circumstances is untenable”); *see also* EPA Br. 27–29, 32; NY Br. 27–29. But that does not permit the agency to fundamentally transform the state-federal partnership that *Congress* mandated in the Clean Air Act. Nor should it allow EPA to conveniently ignore that it expressly took on for itself the job of quantifying cross-state air pollution, while promising to give the States “real choice” in determining how to achieve EPA’s reductions within their borders. Tex. Br. 5–8; Br. of Utility Air Regulatory Group, *et al.* 7–8.

A. The States Cannot Possibly Quantify the Amount of Cross-State Air Pollution to Cut in Each State.

As EPA determined years ago, Congress gave the agency the responsibility to quantify cross-state air pollution because it is a classically federal problem. By its nature, *cross-state* air pollution is a multi-state issue. Quantifying and addressing it requires data and participation from numerous states, as well as

sophisticated technology and significant resources. It is the sort of issue Congress envisioned when it found, in enacting the Clean Air Act, that “[f]ederal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.” 42 U.S.C. § 7401(a)(4); *see also* 63 Fed. Reg. at 57,370 (describing need for a federal “solution to a multi-state problem while preserving the maximum amount of state flexibility in . . . the specific control measures to be adopted”).

To suggest that the States must handle the task, as EPA now argues, is to ask for the impossible. While EPA has authority and tools from Congress to compel or encourage multi-state cooperation, a consortium of voluntary states cannot overcome all the practical and legal problems that arise when a group of equals with competing interests attempts to collaborate. In addition, as discussed further below, the States do not have sufficient money, expertise, or time.

1. The States Cannot Overcome the Problems Inherent in a Multi-State Consortium of Unprecedented Size.

a. Quantifying and addressing air pollution from regional pollutants requires data and participation from a very large group of states. As EPA’s own modeling for the Transport Rule shows in the figure below, cross-state air pollution is not just a problem between bordering States. Air pollution can travel great distances, and a large number of disconnected States can combine to pollute another State’s air.

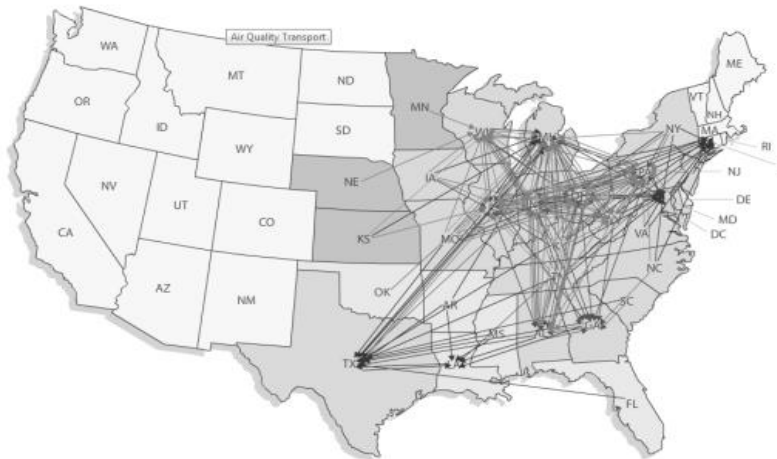


FIGURE 1
TRANSPORT RULE MAP OF CROSS-STATE AIR
POLLUTION²

Sorting through the tangled web and pinpointing any one State's good-neighbor obligations requires knowledge of every State's contributions to each of its downwind States. For instance, EPA concluded that air pollution enters Texas from States as far away as Illinois, Indiana, South Carolina, Georgia, and Florida. EPA, Office of Air and Radiation, Presentation, Cross-State Air Pollution Rule, 22, available at <http://www.epa.gov/airtransport/pdfs/CSAPRPresentation.pdf>. And, according to EPA, West Virginia pollutes the air of thirty-three different States, fourteen of which send their own air pollution back into West Virginia. EPA, *Benefits and Costs of the Clean Air Act, Cross-State Air Pollution Rule in*

² EPA, Office of Air and Radiation, Presentation, Cross-State Air Pollution Rule, 22, available at <http://www.epa.gov/airtransport/pdfs/CSAPRPresentation.pdf>.

West Virginia, <http://www.epa.gov/cleanairactbenefits/whereyoulive/wv.html>.

To make matters more difficult, the exact composition of the group is difficult to determine, as it is largely unknowable at the outset which States are polluting which others and to what degree. For example, the Transport Rule covers twenty-seven States, but EPA had considered at least thirty-one. 76 Fed. Reg. at 48,208. The agency ultimately excluded three eastern States—Delaware, Connecticut, and Massachusetts—that had been included under the agency’s earlier cross-state air pollution rule, the Clean Air Interstate Rule (CAIR). 76 Fed. Reg. 2,853, 2,856–58 (Jan. 18, 2011); *see also* 76 Fed. Reg. at 48,212–15; 70 Fed. Reg. 25,162, 25,167 (May 12, 2005). At the same time, EPA included three western States—Oklahoma, Kansas, and Nebraska—that had been excluded from CAIR. *Ibid.*

Importantly, each State must actively contribute the time and efforts of its air quality experts. EPA makes available raw data from state emissions inventories, *see, e.g.*, 40 C.F.R. Pt. 51 *et seq.*; 78 Fed. Reg. 37,164 (June 20, 2013); 73 Fed. Reg. 76,539 (Dec. 17, 2008), but that data must be reviewed and revised for quality assurance. State air quality teams must be available during the modeling process to see if the numbers square with what the State knows about its pollution, to identify collection errors, and to compare the data to other States’ inventories. As a map of emissions density shows, air pollution can vary significantly from county to county, making local expertise critical.

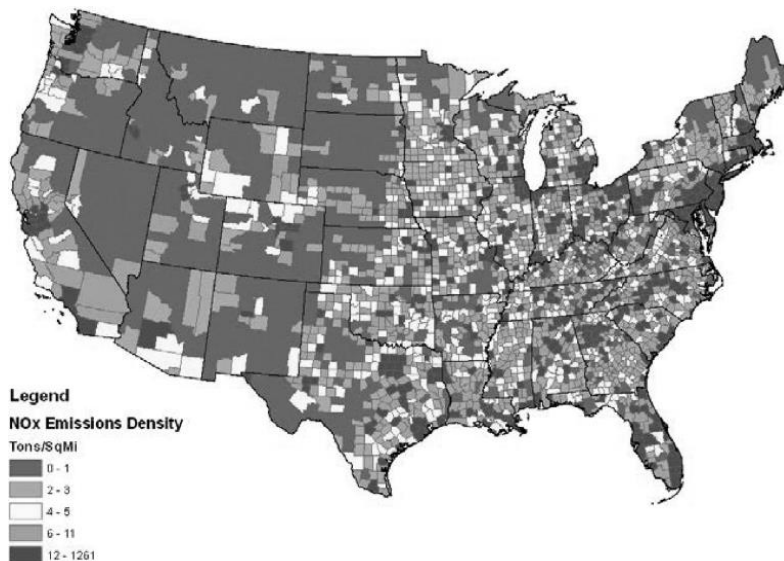


FIGURE 2
 EMISSIONS DENSITY³

Contrary to the suggestion of the parties supporting EPA and the dissent below, no single State can reliably work with other States' data. *See* NY Br. 31 (stressing that States have access “to data from upwind and downwind States”); ALA Br. 54–55 (“[A]ir quality data for each NAAQS pollutant are freely and publicly available on a monitor-by-monitor basis for each county in the country.”); Pet. App. 90a–91a (asserting that States have “capability ... to access [emissions] information from other States to independently determine emission reduction budgets”). Only a State's own air quality team can effectively review a State's data because only they have the

³ EPA, 2008 National Emissions Inventory: Review, Analysis and Highlights 18, available at <http://www.epa.gov/ttnchie1/net/2008report.pdf>

necessary local expertise to critically evaluate the raw data at different stages of modeling. Even EPA relies on individual States' experts to vet its national emissions inventory data, *see* EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, The National Emissions Inventory, <http://www.epa.gov/ttn/chief/net/2011inventory.html> (releasing the 2011 national emissions inventory for public review), and looked specifically to the States for help while developing the Transport Rule, *see, e.g.*, 75 Fed. Reg. 45, 210, 45,217 (Aug. 2, 2010); JA 251 (submitting technical corrections to EPA's Transport Rule model and stating that "EPA has acknowledged inaccurate or flawed data in the initial development of the proposed Transport Rule").

b. EPA is well-suited to the task of quantifying cross-state air pollution because Congress has given it tools and authority to encourage or compel multi-state cooperation. Through its rulemaking power, EPA can require States to make emissions data available to the agency, and it has done so. 40 C.F.R. § 51.30. Moreover, any time the agency uses that data to develop or propose substantive rules, the States have a strong incentive to participate in the process, as they will be primarily responsible for implementing and complying with those rules. At least thirty-six States participated in the development of the Transport Rule, many of them providing multiple sets of comments and large spreadsheets of data requested by EPA. *E.g.*, Comments of John A. Benedict, W. Va. Dep't of Env'tl. Prot., Docket ID: EPA-HQ-OAR-2009-0491-3848 (Nov. 29, 2010), available at regulations.gov (Tracking Number: 80ba2f8b).

In addition, EPA has express statutory authority to create and lead multi-state regional commissions to work on cross-state pollution issues—though it did not use this specific authority in developing the Transport Rule. 42 U.S.C. § 7506a. Under Section 7506a, the EPA Administrator “may add any State or portion of a State to any region established under this subsection whenever the Administrator has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region.” *Ibid.* Any such commission would consist of national and regional EPA officials, as well as state governors and state air quality officials, and could be funded in significant part by EPA. *Id.* §§ 7506a(b), 7406. The commission would make decisions by majority rule and transmit its recommendations and requests to EPA, which would have the final say. *Id.* § 7506a(b), (c).

c. In contrast to EPA, the States could not overcome all the problems that arise when a group of equals with competing interests attempts to collaborate. To begin with, it is extremely unlikely that all necessary States would even be interested in collaboration. Based on the Transport Rule, thirty-plus States would have to be involved. But as shown in this case, some of those States are willing to acquiesce to EPA. *See generally* NY Br. 29.

The absence of one or more necessary States could be fatal to the collaboration. Significantly, the remaining collaborators would not have the assistance of the missing States’ air experts. Without their knowledge and adjustments, their States’ data would be unreliable, which would likely distort the results of

the model. As the saying goes: garbage in, garbage out. At a minimum, EPA could use the absence of one or more critical States as an excuse to disapprove any resulting state plans. *See infra* Part II.B.

Even if every State were interested, the sheer number of States required could be an insurmountable hurdle. The States would need to negotiate an agreement to govern—at a minimum—funding, staff, equipment, and the management of day-to-day operations. It is easy to imagine such negotiations consuming valuable months and eventually falling apart. Without an agreement, however, the logistical challenges of the collaboration would surely kill it.

Finally, assuming an agreement could be reached in a reasonable amount of time, the States' conflicting interests would likely cripple the collaboration. No State will be willing to give up entirely its right as an equal sovereign to veto certain decisions or withdraw from the collaboration unilaterally. That power is most likely to become a problem when the time comes to agree on how much air pollution each State must cut. Cross-state air pollution is a zero-sum game. For some States to benefit, others must lose. When it starts to become clear which States will pay the higher price, at least some of those States could decide to take their chances with whatever federal plan EPA might impose and pull out of the collaboration.

Collectively, these structural problems make it impossible for the States to determine the amount of cross-state air pollution each State must cut. As EPA explained previously, “[w]here many States are involved and the choices of each individual State could

affect the choices and decisions of the other States the need for initial federal action is manifest.” 63 Fed. Reg. at 57,370. The agency thus seriously “doubt[ed]” that such “disagreements” among States over the amount of their good-neighbor obligations “could ever be resolved by consensus.” *Ibid.* Instead, EPA concluded that “[i]t is most efficient—indeed necessary—for the Federal government to establish the overall emissions levels for the various States.” *Ibid.*

d. EPA now suggests, together with its supporters and the dissent below, that existing state models and collaborations show that States can undertake the necessary multi-state collaboration. Pet App. 90a–91a; EPA Br. 29; ALA Br. 53–54; NY Br. 31. But EPA is asking for something unprecedented in size and scope. States have previously pooled resources through Regional Planning Organizations (RPOs) to hire contractors to conduct emissions inventories and photochemical modeling. As the following map shows, however, the largest of these collaborations includes only fifteen States. *Cf.* Ross & Associates and Industrial Economics, Final Report to EPA, Evaluation of National Air Quality Regional Planning Organization Program 8–9 (July 7, 2011), available at <http://www.westar.org/Docs/Business%20Meetings/Fal11/04.1%20RPO%20Program%20Evaluation%20FINAL%20Sept%2028th%202011.pdf> (hereinafter EPA RPO Report) (listing the different past sizes of all regional collaborations). All *four* non-Western regional collaborations would need to be combined to achieve a group of States as large as that covered by the Transport Rule.

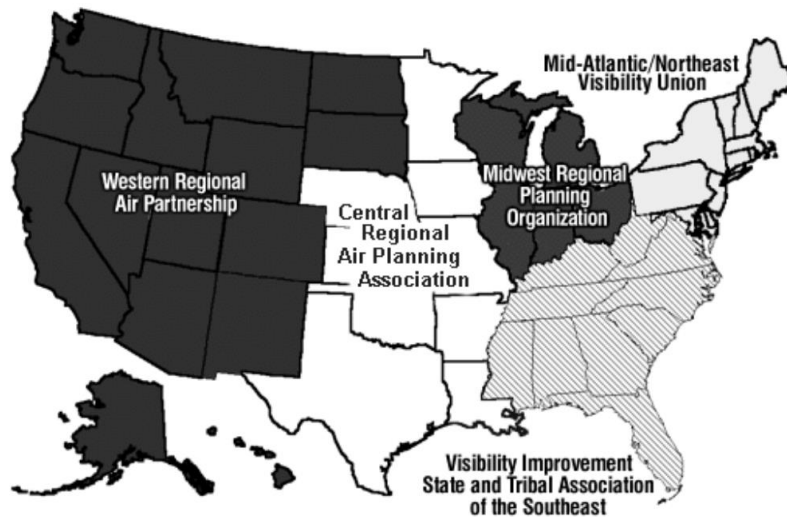


FIGURE 3
REGIONAL PLANNING ORGANIZATIONS⁴

The vast difference in size is significant. The problems with collaboration become exponentially more difficult as a group grows larger. Each additional State dramatically increases the logistical challenges, the likelihood of conflict, and the difficulty in reaching consensus. *Id.* at 39 (reporting that “having more than seven [States collaborate] would likely exacerbate costs and fragment important geographic areas with shared needs”).

Nor is it the case that the RPOs or any other existing regional collaborations (such as Multi-Jurisdictional Organizations) could simply band together to work on cross-state air pollution. *See ibid.*

⁴ EPA, Regional Planning Organizations, <http://www.epa.gov/visibility/regional.html>.

For starters, these regional organizations have worked in the past on local issues in which the States were not in competition with each other, such as regional haze. *Ibid.* In addition, none of these organizations has any mandate to work on cross-state air pollution. Indeed, EPA funds these RPOs and specifically limits them to regional haze issues. *Id.* at 19, 42–43. Finally, some of these organizations include non-state stakeholders, which introduces a variety of potential problems and concerns.

2. The States Do Not Have the Necessary Resources.

a. Even if the States could overcome the obstacles to collaboration, an atmospheric model requires significant resources that the States do not have. It is not simply a matter of downloading a computer program to a laptop. The States must create a complex atmospheric model that predicts what cross-state air pollution will look like in the future. Much like a weather storm model, EPA’s Transport Rule model simulated in 3-D “the numerous physical and chemical processes involved in the formation, transport, and destruction” of pollutants. EPA, Regulatory Impact Analysis (RIA) for the Transport Rule at 35–40, 60–62, 142–45, Docket ID No. EPA-HQ-OAR-2009-0491, available at <http://www.epa.gov/air-transport/CSAPR/pdfs/FinalRIA.pdf> (hereinafter RIA). The “photochemical” model could show how regulatory control programs, economic growth, climate change, or any other factor affected cross-state pollution over future years, right down to the hour and 12-kilometer squares within States. RIA 402–408 (summarizing results). Such a model requires a large cluster of

computers or a supercomputer, as well as people with the special expertise to use the software, usually scientists and statisticians with advanced degrees. See CAMx, CAMx User's Guide Version 6.0 2.1.2 (May 2013), http://www.camx.com/files/camxusersguide_v6-00.pdf.

EPA is a large federal agency with abundant resources, including the necessary computer software, equipment, and personnel. Its budget appropriations in FY 2012 was \$8.45 billion, and it employed 17,106 people. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. E, tit. II, 125 Stat. 786, 1015–1020 (2011); EPA, EPA's Budget and Spending, <http://www2.epa.gov/planandbudget/budget>. Among the many laboratories, research centers, and supercomputers available to the agency, EPA has an Environmental Modeling and Visualization Laboratory staffed with experts that can “support EPA's scientific modeling and large-scale data management research programs through the application of High Performance Computing (HPC) and visualization tools.” EPA, Environmental Modeling and Visualization Laboratory, <http://www.epa.gov/nesc/>; see generally EPA, Labs and Research Centers, <http://www2.epa.gov/aboutepa#pane-5> (listing twenty-five different EPA environmental research laboratories across the country). It also has the money, when necessary, to contract with private companies for expensive proprietary models. See *infra* Part II.B.2.

The States do not have those resources. Most States' existing models can only model tiny areas near their States' large point sources. Arkansas, Kentucky and West Virginia, for example, can model the local

impact of a single smokestack, but they cannot conduct broader photochemical modeling. Any state collaboration would need to purchase or get access to a networked cluster of computer servers with enormous storage capacity (probably hundreds to thousands of Terabytes of data).

Individual States would also need to hire and train additional personnel with expertise in regional photochemical modeling, as their small staffs are already fully occupied. Kentucky has six employees dedicated to the development of state implementation plans for air quality, plus four additional employees dedicated to keeping state law up to date, with a collective operating and personnel budget of \$900,000 annually. West Virginia has a staff of four people that focus on SIP planning and related rule development, with an approximate budget of \$300,000-\$400,000. Arkansas has three employees dedicated to the administrative side of SIP development, plus additional staff as needed, with a total budget of \$385,000 for SIP obligations in FY 2012.⁵

All of this costs money—a lot of money. The costs of the much-smaller RPOs have been as much as \$10 million per year—funded in significant part by federal dollars. EPA RPO Report 57. Kentucky estimates that its additional costs alone would total \$500,000 to \$1,000,000 at a minimum.

⁵ Other States have similar resource limitations. For example, North Dakota has a SIP development and processing budget of \$ 150,000 per year and a staff of 1.5 full-time employees. Wyoming has only two full-time staff for SIP planning.

And even assuming the States have the financial resources, it would be difficult to persuade State legislatures to voluntarily spend it on a multi-state collaboration, given that EPA already requires the States to dedicate significant resources to collecting ambient air quality monitoring data for EPA. Kentucky has two sections of nineteen employees and forty-one monitoring stations, with ninety-nine monitors in twenty-seven counties collecting air quality data that is reported to EPA. Collectively, these tasks cost the State \$2.5 million per year. West Virginia has a team of nine to ten people with about fifty monitors collecting its air quality data for EPA. W.V. Dep't Env'tl. Protection, Emissions Inventory, <http://www.dep.wv.gov/daq/planning/inventory/Pages/default.aspx>. Arkansas coordinates thirty-six monitors at sixteen locations, with eight employees involved in monitoring emissions and assembling inventories. This air pollution monitoring and modeling costs the State \$367,000 per year.⁶ With all these dollars working at EPA's behest, state legislatures are likely to wonder why the agency could not simply do the job itself—especially if, as happened here, the agency repeatedly said it would do so. *E.g.*, 63 Fed. Reg. at 57,369; 70 Fed. Reg. at 25,263-64.

⁶ Other States have similar resources dedicated to data collection. For example, North Dakota has seventeen sites that it monitors or audits, which costs the State an estimated \$500,000 per year to operate. Wyoming has 30 long-term monitoring sites and 4 mobile monitoring stations, costing the State approximately \$2 million per year, not counting the cost of employees.

b. The resource most lacking is time. EPA asserts that the States would have to quantify their good-neighbor obligations and submit state plans no later than three years after a national air quality standard is announced. *See* EPA Br. 16, 26–28 (“The statutory language here could not be clearer. Under the Act, each State ‘shall’ submit a state plan to the EPA within three years after the promulgation of a new or revised air quality standard, and ‘[e]ach such plan shall’ contain adequate provisions to control emissions from the State that significantly contribute to nonattainment or interfere with maintenance in another State.”). That is simply impossible, in light of everything that must happen. Even EPA could not have met that deadline with the Transport Rule. The three air quality standards at issue in the Transport Rule were announced in 1997 and 2006. But EPA did not release the rule and its FIP until late summer 2011.

The first problem, as already discussed, is the forming of a multi-state consortium. Significant time is needed to negotiate the terms of such a consortium. With notice from EPA, it is possible that the States could begin such discussions before the announcement of an air quality standard, but even so, there is no way to be sure that an agreement would be reached by the time the announcement is made.

Next, the development of the atmospheric model alone could take years. The States would need to allocate funds (potentially through their legislatures), undergo a procurement process for contractors, train any new staff, and assemble the computer resources. To do regional photochemical modeling, Kentucky

estimates that it would need at least five years to acquire and train staff and obtain and set up computer resources.

Data quality assurance also requires significant time. By rule, the States develop emissions databases for EPA every three years. 40 C.F.R. § 51.30. But it then takes EPA years to finalize that data through a public review process. For example, the most recent national emissions inventory is for 2008, which EPA did not release to the public in final form until March 2013. EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, Emission Inventories, available at <http://www.epa.gov/ttnchie1/einformation.html>. States have taken a similar amount of time when putting together independent regional inventories. *E.g.*, W. Va. Dep't of Env'tl. Prot., Proposed State Implementation Plan Revision: Regional Haze 5-Year Periodic Report 63 (March 2013), <http://www.dep.wv.gov/daq/publicnoticeandcomment/Documents/WV%20RH%20Midcourse%20Review%20PROPOSED%202013-03-18.pdf> (reporting that the southeastern RPO takes five years to finalize its regional emissions inventories).

The States will then need another year or more to run the data through the model. West Virginia state air pollution experts report that it regularly takes at least a year to put data into a multi-state model and evaluate how realistic the model is. Moreover, in their experience, these sorts of complex atmospheric models often crash or give strange results at least the first time. It is impossible to predict how many runs would be required to weed out all the bad data and obtain reliable scientific predictions.

Once they have the model's results, the States will need further time to agree on their obligations and develop their state plans. As noted earlier, the States would likely have difficulty reaching consensus on how much pollution each State must cut and how soon. Then, each State would need to develop a plan for achieving those cuts within its borders. Because complex SIP revisions often require extensive consultation with stakeholder industries, developing individual state plans could take years.

After that, depending on each State's rulemaking process, it could take months to write a new state plan into law. The West Virginia Constitution, for instance, requires the State to enact all rules through its part-time citizen legislature. W. Va. Code § 29A-1-1 et seq. After the time required to develop a state plan, it can take the West Virginia Department of Environmental Protection a year to propose the plan to the state legislature and have it passed into law and ready for submission to EPA. *See* W. Va. Sec'y of State, Summary of Regular Rule Making Steps, <http://www.sos.wv.gov/administrative-law/rulemaking/Pages/stepsummary.aspx>. Under a similar process in Arkansas, the average SIP revision takes eighteen months or more.

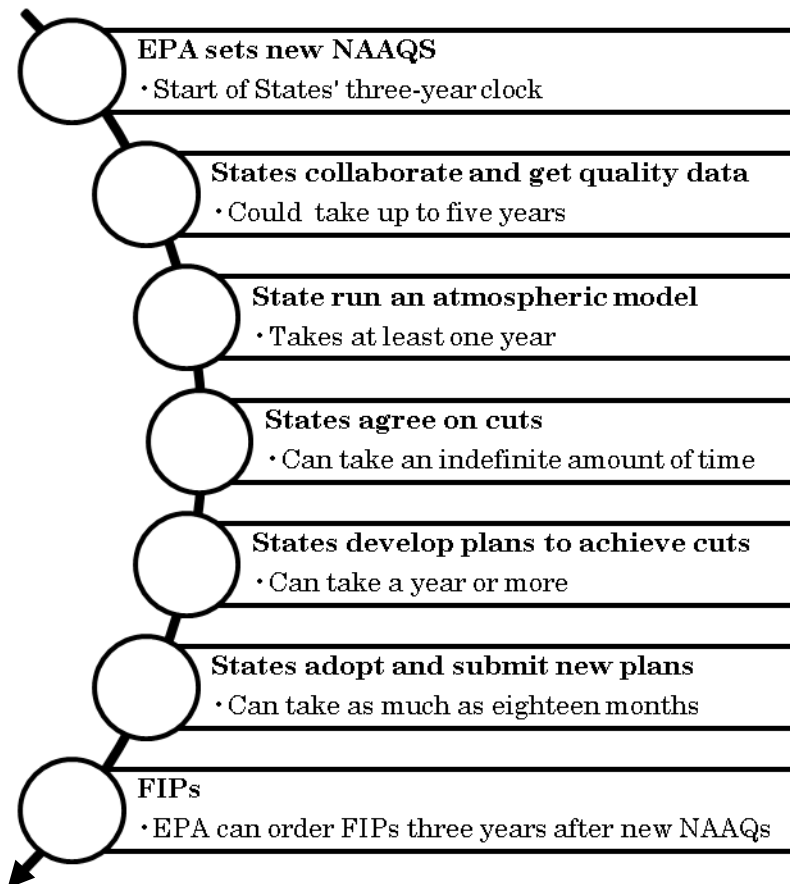


FIGURE 4
STATE OBLIGATIONS COMPARED TO EPA'S
THREE-YEAR TIMELINE

All of these steps together will span well more than three years, as evidenced by EPA's own history in developing its cross-state air pollution rules. *Eight* years elapsed between the announcement in 1997 of two national ambient air quality standards ("NAAQS") and the issuance in 2005 of CAIR, EPA's cross-state air pollution rule that covered those NAAQS. *See* 62 Fed.

Reg. 38,856 (July 18, 1997); 62 Fed. Reg. 38,652 (July 18, 1997) (PM_{2.5} NAAQS); 70 Fed. Reg. 25,162, 25,167 (May 12, 2005). After EPA announced a third air quality standard in 2006, it did not issue the Transport Rule for another *five* years. See 76 Fed. Reg. 48,208 (Aug. 8, 2011) (using 1997 annual PM_{2.5} and 1997 ozone NAAQS as the basis of the Transport Rule); 76 Fed. Reg. 48,208 (using 2006 daily PM_{2.5} NAAQS as a further basis of the Transport Rule); 71 Fed. Reg. 61,144 (Oct. 17, 2006). Even if part of this time is due to litigation and not regulatory delays, there is no reason to expect a multi-state collaboration to be immune from similar court challenges and other related setbacks.

In sum, numerous structural obstacles and resources deficiencies—jointly and severally—make it impossible for the States to do what EPA plainly can. To quantify each States’ good-neighbor obligation would require an unprecedented multi-state consortium, fraught with all the difficulties that arise when a group of equals with conflicting interests attempts to cooperate. On top of that, the States simply lack the money, manpower, and time to get the job done.

B. EPA Reserves an Effectively Unlimited Veto Over the States’ Conclusions.

Even if the States could accomplish the impossible, EPA claims to have an effectively unlimited veto over the States’ conclusions. By statute, EPA has limited authority to reject a SIP and replace it with a FIP. 42 U.S.C. § 7410(c)(1), (k). The Clean Air Act grants the States “*broad authority* to determine the

methods and particular control strategies they will use to achieve the statutory requirements.” *BCCA Appeal Grp.*, 355 F.3d at 822 (emphasis added). EPA is charged only with ensuring that “the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air.” *Train*, 421 U.S. at 60; *see also* 42 U.S.C. § 7410(k)(3) (“[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.”).

But the States supporting EPA contend that, under their novel view of the Act, this authority includes the power to reject a SIP if the agency disagrees with the States’ assessment of their good-neighbor obligations. *See* NY Br. 33 (“To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State’s determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution.”); *see also* ALA Br. 53 (recognizing that “a State’s assessment of its contribution might diverge from subsequent federal findings”).

This is a sweeping assertion of agency power, given the vast number of technical and legal judgment calls that the States would have to make. As EPA and its *amici* acknowledge, determining how much a State pollutes another State’s air is an incredibly complicated task. *See* Calpine Br. 21–25, 48 (explaining why the analysis is “more complex” than even EPA suggests); *see also* EPA Br. 6–7, 10–12, 46, 51–52; ALA Br. 15–20, 36; Law Professors’ Amicus Br. 25. The process of creating the necessary atmospheric model involves numerous decisions and judgment calls

about the right data, forecasts, and software for the model. All of these decisions give EPA virtually unlimited ability to disagree with the States and to render meaningless all of their efforts and expense.

1. One key decision is to determine the base year for data from the national emissions inventory. As noted earlier, every three years States report to EPA data for all emissions in their States over one year. 40 C.F.R. § 51.30; EPA, Emissions Factors & AP 42, *Compilation of Air Pollutant Emission Factors*, <http://www.epa.gov/ttn/chief/ap42/index.html>. This data includes direct measurements from large industrial sources of pollution, like the smokestacks at power plants (known as point sources). W. Va. Code St. R. § 45-29-1; W.Va. Dep't Env'tl. Prot., Emissions Inventory, <http://www.dep.wv.gov/daq/planning/inventory/Pages/default.aspx>. States also estimate emissions from on-road mobile sources (like cars and trucks), off-road mobile sources (like airplanes, boats, construction equipment, and agricultural field equipment), biogenic sources (like trees and wild deer), and non-point sources (like wildfires, field burning, and residential fuel combustion through stoves and backyard barbeque grills). EPA, 2008 National Emissions Inventory: Review, Analysis and Highlights 11–13, available at <http://www.epa.gov/ttnchie1/net/2008report.pdf>. A full set of data from one year can then be the “base year” for a model, which will project future emissions from that year’s data.

The choice of base year can significantly affect modeling results. Some years may be hotter, leading to unusually high emissions. *See* EPA, *Development of 2011 Modeling Platform and Early Release of*

Emissions Inventories, Briefing for RPOs/States 8 (Aug. 15, 2013). Years that precede an economic downturn can become quickly outdated, due to subsequently shuttered power plants and generally lower industrial production. Still other years may, for a variety of subjective reasons, be deemed to have better data than others. 76 Fed. Reg. at 48,230 (describing several reasons for EPA’s selection of base year 2005 data for the Transport Rule, including that “it was an appropriate meteorological year” providing “a sufficient number of ‘high’ modeled days to project to the future”).

2. Another set of judgment calls are the economic, regulatory, and climate forecasts necessary to project future emissions. 76 Fed. Reg. at 48,250–54; RIA 54. These forecasts touch on nearly every factor that might bear on future emissions, including the growth of different industries, the effect of future laws, and climate and weather patterns. RIA 50, 60–64. The forecast for electricity is critical, as the generation of electricity creates the lion’s share of emissions. RIA 228–229, 237.

States would need to make a number of different decisions with respect to forecast data. For example, what data or predictions should be used? To forecast electricity for the Transport Rule, EPA used information about power plants from the National Electric Energy Data System (NEEDS) database, as well as predictions from the Energy Information Administration about the future of energy. *See* EPA, Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model, Modeling and Data Structures in EPA Base Case v.4.10 4-1–4-45 (Aug.

2010), available at <http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html> (hereinafter IPM Base Data). The States could also rely on this publicly available information, but it fluctuates and is often revised, giving EPA ample grounds for second-guessing.

Further, should the data be run through a sub-model? EPA employed a complex sub-model called the Integrated Planning Model (IPM) to combine the NEEDS and EIA electricity forecasts with a variety of other forecasts. IPM Base Data at 2-1; RIA 249. Given their sparse fiscal resources, the States could not easily do the same, as the IPM is proprietary and must be purchased. ICF International, ICF at a Glance, <http://www.icfi.com/about>; ICF International, Integrated Planning Model, <http://www.icfi.com/insights/products-and-tools/ipm>. Nor is the sub-model available from EPA, which specially updated and revised the IPM throughout the Transport Rule process for quality assurance. EPA, Notice of Data Availability Supporting Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 53,613 (Sept. 1, 2010); 76 Fed. Reg. at 48,229. Yet failure to utilize the sub-model could be another ground for later disagreement.

3. Selecting and developing the software for the atmospheric model raises yet more judgment calls. The States would have to make on-going decisions about upgrading, supplementing, or changing the modeling software. *See* 76 Fed. Reg. at 48,229; *see also* EPA, Development of 2011 Modeling Platform and Early Release of Emissions Inventories, Briefing for RPOs/States at 5 (Aug. 15, 2013) (explaining that the

“[c]omponents of modeling platform are, by their very nature, ‘evolutionary’ and not static”).

If EPA were later to create its own model to assess the States’ model, there would be numerous possibilities for divergence. EPA might use an older or a more upgraded model than that used by the States. Or, the agency might augment its model in a unique way, as it did while developing the Transport Rule by creating its own add-on assessment tool. 76 Fed. Reg. at 48,249, 48,253; *see* ALA Br. 15–17.

4. Finally, the States would have to make a legal judgment call that they have no authority to make. The good-neighbor obligation only applies to those States that “contribute significantly” to another State’s nonattainment. 42 U.S.C. § 7410(a)(2)(D)(i)(I). In the Transport Rule, EPA chose specific significance thresholds for each NAAQS. 76 Fed. Reg. at 48,236.

Under EPA’s novel approach, the States would have to decide for themselves what constitutes a “significant” contribution in order to complete the process and submit their SIPs. But as the State Respondents explain and the agency has previously acknowledged, only EPA has the authority to make that determination. Tex. Br. 49–60; 63 Fed. Reg. at 57,368–70 (stating that EPA “interpret[s] the ambiguity in section 110(a)(2)(D)(i)(I) to include this determination among EPA’s responsibilities”); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 468 U.S. 837 (1984). By requiring the States to make an initial determination, EPA has reserved for itself yet another trump card over the States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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