ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2015

No. 11-1302 (and consolidated cases) – Complex

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

EME HOMER CITY GENERATION, L.P.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents.

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

BRIEF FOR PUBLIC HEALTH RESPONDENT-INTERVENORS ON REMAND

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent-Intervenors American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club (collectively, "Public Health Intervenors") hereby certify as follows:

Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Opening Brief of Industry and Labor Petitioners on Remand.

Rulings Under Review. The ruling under review is a final rule issued by the U.S. Environmental Protection Agency, "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 Fed. Reg. 48208 (Aug. 8, 2011).

Related Cases. All cases consolidated with No. 11-1302 are listed in in the Brief for Industry and Labor Petitioners. The Court issued a previous opinion in this case in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The Supreme Court granted petitions for a writ of certiorari and, in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), reversed this Court's judgment and remanded the cases for further proceedings.

This Court severed certain issues concerning the Rule's electronic data reporting requirements, which were placed in *Utility Air Regulatory Group v. EPA*, No. 12-1043, which is being held in abeyance.

Review of three EPA regulations that supplement or modify the rule under review are pending in this Court in *Public Service Co. v. EPA*, No. 12-1023 and consolidated cases; *Wisconsin Public Service Corp. v. EPA*, No. 12-1163 and consolidated cases; and *Utility Air Regulatory Group v. EPA*, No. 12-1346 and consolidated cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Public Health Intervenors provide the following corporate disclosure statement:

Respondent-Intervenors Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club state that they are nonprofit organizations focused on protection of public health and the environment.

Respondent-Intervenor American Lung Association states that it is a national not-for-profit public health organization dedicated to saving lives by improving lung health and preventing lung disease.

Public Health Intervenors have no outstanding shares or debt securities in the hands of the public, nor any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

DATED: January 23, 2015

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OTHER AUTHORITIES

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

GLOSSARY

Act, CAA	Clean Air Act
CAIR	Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25162 (May 12, 2005)
EPA Br.	Brief for Respondents
Indus. Br.	Opening brief for Industry and Labor Petitioners on Remand
Good Neighbor Provision	42 U.S.C. 7410(a)(2)(D)(i)(I)
$\mu g/m^3$	Micrograms per cubic meter
NAAQS	National Ambient Air Quality Standard
NOx	Nitrogen oxides
$PM_{2.5}$	Fine particulate matter
SO_2	Sulfur dioxide
State Br.	State and Local Petitioners' Opening Brief on Remand
Transport Rule	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208 (Aug. 8, 2011)

JURISDICTION

This Court's jurisdiction rests upon 42 U.S.C. 7607(b)(1).

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in Industry Petitioners' addendum.

STATEMENT OF THE CASE

Intervenors adopt the Statement of the Case in EPA's Brief.

STANDARD OF REVIEW

Intervenors adopt the Standard of Review in EPA's Brief.

SUMMARY OF ARGUMENT

Petitioners' as-applied challenges to the Transport Rule all lack merit. Petitioners' over-control arguments[1] are an attempt to re-litigate issues clearly decided by the Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), and are also contrary to: the Good Neighbor Provision, 42 U.S.C. 7410(a)(2)(D)(i)(I), and other Clean Air Act provisions; this Court's decisions in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) and *North Carolina*

[1] The Supreme Court described two categories of impermissible "over-control" under the Good Neighbor Provision: "EPA cannot require a State to reduce its output 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." *EME Homer City*, 134 S. Ct. at 1608. While the latter, "one percent" issue was once their leading argument (*see* Doc.1357526, Section I.A.), the industry petitioners are "not pressing" it on remand, Indus. Br. 9 n.3. Accordingly, this brief's discussion of over-control is limited to the former category.

v. EPA, 531 F.3d 896 (D.C. Cir. 2008); and the data in the record. The Supreme Court clearly affirmed the Transport Rule's use of uniform cost thresholds as an efficient and equitable solution to the collective problem of interstate air pollution, and EPA lawfully and reasonably applied those thresholds to the upwind states at issue here.

State petitioners also argue that the Good Neighbor Provision's protections only apply to areas that EPA has formally designated as being in nonattainment. The Good Neighbor Provision does not include a designation requirement, and requiring this intermediate step to trigger upwind states' Good Neighbor obligations would disrupt the "series of precise deadlines to which the States and EPA must adhere" after a new national ambient air quality standard ("NAAQS") issues. *See EME Homer City*, 134 S. Ct. at 1600.

ARGUMENT

I. THE TRANSPORT RULE'S EMISSIONS BUDGETS FOR TEXAS, ALABAMA, GEORGIA, AND SOUTH CAROLINA DO NOT IMPERMISSIBLY OVER-CONTROL UNDER THE CLEAN AIR ACT OR *EPA V. EME HOMER CITY*

A. Industry's Over-Control Arguments as to Texas, Alabama, Georgia, and South Carolina Are Meritless

The Supreme Court unequivocally upheld the Transport Rule's use of uniform cost thresholds as a means of allocating emissions reductions amongst the upwind states that EPA determined significantly contribute to nonattainment or

interfere with maintenance of the NAAQS in downwind states. *See* 134 S. Ct. at 1597 (describing how the Rule's cost thresholds apply "uniformly to all regulated upwind States"); *id*. at 1607 (Rule's use of costs "makes good sense" and is "an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address"). The Court found the Rule's uniform cost thresholds to be efficient because they enable the same emissions reductions as a proportional reduction approach, "but at a much lower overall cost," *id.*, and equitable because they "subject[] to stricter regulation those States that have done relatively less in the past to control their pollution," *id*.

Despite the Supreme Court's affirmation of the Transport Rule's uniform cost thresholds, industry petitioners argue that EPA should have imposed lower cost thresholds and lesser Good Neighbor obligations on Texas, Alabama, Georgia, and South Carolina. *See* Indus. Br. 11–12 (arguing that Madison, Illinois' air quality problems could be resolved if Texas and other upwind states implemented SO_2 controls costing only $100 per ton); *id*. 12–13 (claiming that Texas's contribution to the air quality problems at Allegan, Michigan and Baton Rouge, Louisiana could be resolved using the Clean Air Interstate Rule's ("CAIR") less stringent emissions budgets); *id*. 13–14 (stating that the downwind locations to which Alabama, Georgia, and South Carolina were linked would attain and maintain the NAAQS with SO_2 controls costing less than $500 per ton). By

relying solely on air quality projections for a few selected downwind receptors, industry petitioners improperly disregard the air quality problems that the Rule attempts to address at other downwind locations. EPA chose uniform cost thresholds aimed at resolving all or most downwind nonattainment and maintenance problems in the covered region. *See* 76 Fed. Reg. 48,208, 48,210 (Aug. 8, 2011). As a result, downwind locations with less persistent air quality problems—like those to which Texas, Alabama, Georgia, and South Carolina are linked—are incidental beneficiaries of the reductions required to address more stubborn pollution problems elsewhere. *See EME Homer City*, 134 S. Ct. at 1608 ("instances of 'over-control' in particular downwind locations . . . may be incidental to reductions necessary to ensure attainment elsewhere.")

For example, industry petitioners rely upon EPA projections that Madison, Illinois would attain and maintain the annual and 24-hour fine particulate standards at sulfur dioxide ("SO_2") cost thresholds of $100 per ton. *See* Indus. Br. 11–12 n.8. The same EPA projections also show, however, that at the $100 per ton SO_2 threshold, numerous other downwind locations would still have trouble attaining or maintaining the NAAQS, and that those more stubborn problems would only be resolved at higher cost thresholds. *See* JA2231–32, tbl.3-1(at the $100 per ton SO_2 threshold, projecting 2012 average or maximum design values exceeding the annual fine particulate standard of 15 micrograms per cubic meter ("$\mu g/m^3$") in the

following counties: Allegheny, Pennsylvania; Jefferson, Alabama; Wayne, Michigan; Cuyahoga, Ohio; New York, New York; Harris, Texas); JA2237–40, tbl.3-4 (at the $100 per ton SO_2 threshold, projecting 2012 average or maximum design values exceeding the 24-hour fine particulate standard of 35 $\mu g/m^3$ in 13 locations).

In addition to affirming EPA's use of uniform cost thresholds, the Supreme Court found that incidental "over-control" resulting from such thresholds was permissible under the statute: "[a]s 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." 134 S. Ct. at 1608–09. The Transport Rule does not run afoul of this limitation: EPA's projections show that even after the Transport Rule's reductions, there would be residual nonattainment and maintenance problems at some downwind locations. *See* 76 Fed. Reg. at 48,210 (remaining problems in Houston, Baton Rouge, Chicago, Detroit, and Lancaster County). Moreover, EPA has a "statutory obligation to avoid 'under-control,' *i.e.*, to maximize achievement of attainment downwind." 134 S. Ct. at 1609. By seeking individually-tailored, lower cost thresholds for Texas, Alabama, Georgia, and South Carolina, industry petitioners seek either to jettison the Rule's uniform cost thresholds in favor of a

proportional reduction approach or to disregard the Good Neighbor Provision's mandate to maximize achievement of attainment in *every* downwind state.

Industry petitioners' argument that the Transport Rule should subject Texas, Alabama, Georgia, and South Carolina to lesser cost thresholds than other upwind states also ignores this Court's response to the same claim in *Michigan v. EPA*. The petitioners in *Michigan* objected that "EPA's uniform control strategy is irrational" because "where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures." 213 F.3d at 679. In response, this Court concluded that "[t]his of course flows ineluctably from the EPA's decision to draw the 'significant contribution' line on a basis of cost differentials." *Id*.

Once EPA permissibly chose to use uniform cost thresholds to address the Good Neighbor Provision's "allocation problem," *EME Homer City*, 134 S. Ct. at 1607, the inevitable result was not impermissible over-control, as industry petitioners allege, but an "efficient and equitable solution," *id*., whereby each upwind "significant contributor" or "maintenance interferor" exerts an equal level of effort (as measured by the cost per ton of emissions reduction) to address its downwind pollution problems. Moreover, the decision where to draw the cost threshold lines is squarely within EPA's discretion, *see id*. at 1603 ("the Good

Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron*"), and EPA's exercise of that discretion here was perfectly reasonable.

B. State Petitioners' Over-Control Arguments as to Texas are Also Meritless

State petitioners argue that Texas's Transport Rule emissions budgets are "based on unlawful linkages," requiring vacatur of Texas's budgets.[2] *See* State Br. 25. On the contrary, EPA found that the downwind location linked to Texas for fine particulate (Madison) was projected to not attain the standard of 15 μg/m^3 in 2012 without Good Neighbor reductions from upwind states. *See* 76 Fed. Reg. at 48,233, Tbl.V.C-1. EPA also found that Texas made a significant contribution to that nonattainment problem, exceeding the one-percent threshold the agency had set. 76 Fed. Reg. at 48,240–41. Thus, EPA properly applied the remedy the Supreme Court approved: requiring Texas to reduce its emissions to the level achievable at the uniform cost thresholds.

At its root, the states' argument amounts to the untenable position that, though Texas sends significant amounts of fine particulates to Madison, those emissions do not count for Good Neighbor purposes because other states are sending emissions there too. *See* State Br. 25; Indus. Br. 10–11. But multiple

[2] This section focuses on fine particulates. As to ozone, *see* EPA Br. 21–22 (petitioners' challenge to Texas's linkage with Allegan lacks merit).

contributors are still contributors. *See Catawba Cnty. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009) ("[W]e still disagree that 'significantly contribute' unambiguously means 'strictly cause.' . . . [A] contribution may simply exacerbate a problem rather than cause it . . . ."); *see also* Black's Law Dictionary (9th ed. 2009) ("contributing cause": "A factor that—though not the primary cause—plays a part in producing a result."); *Olympic Airways v. Husain*, 540 U.S. 644, 653 (2004) ("[T]he very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as *the* 'injury producing event.'") (emphasis in original). Indeed, the reason why the 1990 Congress added the word "contribute" to the Good Neighbor Provision is that the prior provision, applicable only where upwind emissions "prevent" attainment, proved unworkable:

> 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*").

EME Homer City, 134 S. Ct. at 1595 (emphasis added).

Moreover, the Good Neighbor Provision requires "each" state plan to "prohibit[] . . . any source or other type of emissions activity *within the State*" that contributes significantly to nonattainment or interferes with maintenance in other states. 42 U.S.C. 7410(a)(2) (emphasis added). So Texas must prohibit its own

contributions to downwind air quality problems in Madison and cannot rely upon emissions reductions in other upwind states to fulfill this statutory obligation.

State petitioners' argument also contravenes the Supreme Court's decision, which authorized the approach petitioners now protest and recognized the practical and regulatory complexities inherent to the interstate air pollution problem. As the Court found, the "overlapping and interwoven linkages between upwind and downwind States with which EPA had to contend number in the thousands." *EME Homer City*, 134 S. Ct. at 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?" *Id*. at 1604 (emphasis added). The Good Neighbor Provision requires EPA to address this thorny problem in a way that makes sense not only for Madison and its several upwind contributors, but also for the legion of other overlapping and interwoven pollution contributions that are hampering the ability of other downwind communities to attain and maintain the health-based air quality standards. Rejecting arguments like those reprised here on remand, the Supreme Court held that the solution devised by EPA—uniform cost thresholds at which most or all downwind air quality problems were resolved in the covered region—was "efficient," "equitable," and "makes good sense." *Id*. at 1607.

Furthermore, because the initial Good Neighbor compliance obligation falls upon upwind states rather than EPA, *see id*. at 1603 n.15, petitioners' approach would, upon EPA's issuance of a new NAAQS, provide each upwind state with an incentive (indeed a legal basis) to omit Good Neighbor protections from its state plan or delay its submission of a state plan while relying on other states to fix problems to which they all contribute. *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 975 (1997) (describing "holdout" and "free-rider" problems); *see also EME Homer City*, 134 S. Ct. at 1595 (describing amendments to Good Neighbor Provision to "curb the collective emissions [of] multiple sources"); *id*. at 1607 (affirming EPA's use of uniform cost thresholds because, in part, "[u]pwind 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.") Requiring each upwind state to cost-effectively prohibit its own contributions to downwind air quality problems fulfills the Good Neighbor Provision's mandate and helps resolve this underlying collective contribution dynamic that has made interstate air pollution such an intractable problem.

II. THE TRANSPORT RULE PROPERLY REQUIRED EMISSIONS REDUCTIONS IN 2012 AND BEYOND FOR ALL STATES THAT CONTRIBUTED ABOVE THE SCREENING THRESHOLD TO DOWNWIND OZONE PROBLEMS

Industry petitioners also argue unpersuasively that the Transport Rule over-controlled 14 upwind states for ozone because the Rule's 2014 base case modeling projected that the downwind receptors linked to those 14 states would attain and maintain the NAAQS in 2014 without any Good Neighbor reductions (*i.e.*, without CAIR or the Transport Rule in place). Indus. Br. 14–15. This argument too should be rejected. EPA Br. 60–61.

EPA's rigorous source-apportionment modeling for the Rule projected that emissions from these 14 states would contribute to downwind nonattainment or interfere with maintenance in 2012. 76 Fed. Reg. at 48,229, 48,239. The statute required the states or EPA to prohibit these emissions, 42 U.S.C. 7410(a)(2)(D)(i), and to do so as expeditiously as practicable, *see*, *e.g.*, 42 U.S.C. 7502(a)(2)(A), 7511(a)(1), 7513(c); *see also Train v. NRDC, Inc.*, 421 U.S. 60, 66 (1975) (characterizing the timely attainment obligation as the "heart" of the Act). Furthermore, this Court in *North Carolina v. EPA* found that upwind states' Good Neighbor obligations must be harmonized with downwind states' mandatory attainment deadlines so that downwind states are not "forc[ed] . . . to make greater reductions than *section 110(a)(2)(D)(i)(I)* requires." 531 F.3d at 911–12 (emphasis in original). In other words, upwind states must share the burden of achieving

timely attainment with the downwind states, and cannot be relieved of this obligation if the downwind states will eventually achieve attainment on their own. In summary, there is no legal basis for petitioners' argument that EPA should have relied upon air quality improvements projected to occur years later (in 2014) as grounds to exempt these 14 upwind states from the Transport Rule and their statutory obligations in 2012.

III. CONTRIBUTIONS TO DOWNWIND NONATTAINMENT TRIGGER THE GOOD NEIGHBOR PROVISION, WHETHER OR NOT THE AFFECTED AREA HAS BEEN DESIGNATED AS A NONATTAINMENT AREA

State petitioners argue that the Transport Rule impermissibly requires 13 upwind states to reduce emissions based upon their pollution contributions to locations that EPA has not designated as being in nonattainment. State Br. 26–27. Even if the contention is properly before the Court (*see* EPA Br. 22–23), it lacks merit. EPA properly determined the downwind nonattainment receptors for which upwind reductions would be required based upon projected air quality in 2012 and not formal designation status. The Good Neighbor Provision requires upwind states to prohibit emissions within their borders "which will contribute significantly to nonattainment in . . . any other State." 42 U.S.C. 7410(a)(2)(D)(i)(I). No reference is made to a "nonattainment area" or to the designation of such an area. Accordingly, EPA reasonably determined that upwind

Good Neighbor obligations do not depend on whether the affected downwind location has been designated as a nonattainment area.

Other Clean Air Act provisions expressly condition EPA or state action upon a formal nonattainment designation, but the Good Neighbor provision does not. *See generally Levin v. U.S.*, 133 S. Ct. 1224, 1233 (2013) (disparate inclusion and exclusion of language within same statute is significant). Indeed, one such provision, 42 U.S.C. 7410(a)(2)(I), is found within the very same Clean Air Act sub-section as the Good Neighbor provision. *See also* 63 Fed. Reg. 57,356, 57,370–71 (Oct. 27, 1998) (citing examples from elsewhere in the Act, including 42 U.S.C. 7502(b), 7511(b)(2)(A)). Lastly, requiring formal designation as a trigger for application of the Good Neighbor Provision would add a prerequisite for state action not found in the statute and would disrupt the "series of precise deadlines to which the States and EPA must adhere," *EME Homer City*, 134 S. Ct. at 1600. *See also id*. at 1601 (holding that 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 . . . provisions adequate to satisfy the Good Neighbor Provision, §7410(a)(2)"); 63 Fed. Reg. at 57,372 ("not sensible" to treat nonattainment designations in downwind areas as prerequisite to good neighbor obligations "because those designations may not be made until 3 years

after the promulgation of a new or revised NAAQS, and the section 110(a)(2)(D) submittals are due within 3 years").

CONCLUSION

The petitions for review should be denied in their entirety.

Respectfully submitted,

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Dated: January 23, 2015

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that, according to the word-count program in Microsoft Word 2010, the portions of the foregoing brief that count against the word limit total 2,972 words, and that, together with the briefs filed by the State and Municipal respondent-intervenors and the Industry respondent-intervenors, the respondent-intervenors' briefs together do not exceed the "combined total of 8,750 words" specified in the Court's briefing format order of October 23, 2014.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief electronically via this Court's CM/ECF system, which will automatically serve copies upon registered counsel.

January 23, 2015

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