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

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

The Clean Air Act (Act), 42 U.S.C. 7401 *et seq.*, requires the Environmental Protection Agency (EPA) to establish national ambient air quality standards (air quality standards or standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation" of a standard, each State must adopt a state implementation plan (state plan) with "adequate provisions" that will, inter alia, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the air quality standard. 42 U.S.C. 7410(a)(1) and (2)(D)(i)(I). If a State fails to submit a state plan or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1).

The questions presented are as follows:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

2. Whether States are excused from adopting state plans prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDINGS

Petitioners in 12-1182 are the United States Environmental Protection Agency (EPA) and EPA Administrator Gina McCarthy. Petitioners in 12-1183 are the American Lung Association, the Clean Air Council, the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club.

Respondents who were petitioners in the court of appeals are: City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, doing business as City Water, Light & Power; Louisiana Department of Environmental Quality; Louisiana Public Service Commission; Mississippi Public Service Commission; Public Utility Commission of Texas; Railroad Commission of Texas; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; Commonwealth of Virginia; State of Wisconsin; Texas Commission on Environmental Quality; Texas General Land Office; AEP Texas North Co; Alabama Power Co.; American Coal Co.; American Energy Corp.; Appalachian Power Co.; ARIPPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; Columbus Southern Power Co.; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP.; Entergy Corp.; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Co.; Gulf Power Co.; Indiana Michigan Power Co.; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Uni-

fied Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Co.; Kenamerican Resources, Inc.; Kentucky Power Co.; Lafayette Utilities System; Louisiana Chemical Association; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors Association; Midwest Ozone Group; Mississippi Power Co.; Municipal Electric Authority of Georgia; Murray Energy Corp.; National Mining Association; National Rural Electric Cooperative Association; Northern States Power Co. (a Minnesota corporation); Oak Grove Management Company LLC; Ohio Power Co.; Ohio Valley Coal Co.; Ohio American Energy, Inc.; Peabody Energy Corp.; Public Service Company of Oklahoma; Sandow Power Company LLC; South Mississippi Electric Power Ass'n; Southern Company Services, Inc.; Southern Power Co.; Southwestern Electric Power Co.; Southwestern Public Service Co.; Sunbury Generation LP; Sunflower Electric Power Corp.; Utility Air Regulatory Group; United Mine Workers of America; Utah American Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Cast Metals Association; Wisconsin Electric Power Co.; Wisconsin Paper Council, Inc.; Wisconsin Manufacturers and Commerce; Wisconsin Public Service Corp.

Respondents who were intervenors in support of the court of appeals petitioners are: San Miguel Electric Cooperative; City of New York (Nos. 11-1388 and 11-1395 only); State of New York (Nos. 11-1388 and 11-1395 only).

Respondents who were intervenors in support of the court of appeals respondents are: American Lung Association; Calpine Corporation; Clean Air Council; Envi-

ronmental Defense Fund; Exelon Corporation; Natural Resources Defense Council; Public Service Enterprise Group, Inc.; Sierra Club; City of Bridgeport, Connecticut; City of Chicago; City of New York (all but Nos. 11-1388 and 11-1395); City of Philadelphia; Mayor and City Council of Baltimore; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Maryland; Commonwealth of Massachusetts; State of New York (all but Nos. 11-1388 and 11-1395); State of North Carolina; State of Rhode Island; State of Vermont.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7. The final rule of the Environmental Protection Agency (Pet. App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (Pet. App. 1459a-1462a). The petitions for writs of certiorari were filed on March 29, 2013, and

granted (and consolidated) on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-35a.

STATEMENT

1. a. Air pollution emitted in one State but causing serious harm in others has long been an issue of national concern. The fundamental problem is that the emitting, or upwind, State secures all the benefits of the economic activity causing the pollution without having to absorb all the costs. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996). Conversely, many downwind States to which interstate pollution travels find it impossible to achieve clean air because of the influx of out-of-state pollution they cannot control. S. Rep. No. 228, 101st Cong., 1st Sess. 49 (1989) (1989 Senate Report) (noting that New York, New Jersey, and Connecticut would be unable to meet the federal standard for ozone even if they eliminated *all* in-state emission sources).

This Court first addressed the question of interstate air pollution more than a century ago when it concluded that an injunction should be issued against two copper smelters in Tennessee "discharging noxious gas" that had visited "wholesale destruction of forests, orchards and crops" in Georgia. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (Holmes, J.). The Court explained that "[i]t is a fair and reasonable demand on the part of a sovereign" in our federal system "that the air over its territory should not be polluted on a great scale * * * by the act of persons beyond its control" in another State. *Id.* at 238; see *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2535-2536 (2011) (dis-

cussing other decisions that "have approved federal common law suits brought by one State to abate pollution emanating from another State").

b. Beginning 50 years ago, Congress has also sought to mitigate interstate pollution by enacting a series of increasingly aggressive amendments to the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*

i. In 1963, Congress directed federal environmental officials to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution," 42 U.S.C. 1857a (1964); see Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392, and established a complex mechanism for the abatement of interstate air pollution, 42 U.S.C. 1857d(c)-(g) (1964).

ii. In 1970, Congress amended the Act to add generally applicable structural elements that remain today. Since 1970, the Act has required the Environmental Protection Agency (EPA) to establish national ambient air quality standards (NAAQS or air quality standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. The Act also directs States to submit to the EPA state implementation plans (SIPs or state plans) to meet those standards, and it requires federal implementation plans (FIPs or federal plans) if States submit inadequate plans or fail to submit altogether. 42 U.S.C. 7410(a) and (c)(1). These amendments reflected Congress's effort to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution." *Train* v. *NRDC*, 421 U.S. 60, 64 (1975).

Because the 1963 mechanism for abatement of interstate air pollution had "proved to be cumbersome, time consuming, and unwieldy," H.R. Rep. No. 294, 95th Cong., 1st Sess. 329 (1977) (1977 House Report), Con-

gress in 1970 used the new state-plan process to address the issue. In particular, Congress required state plans to include "adequate provisions for intergovernmental cooperation" on interstate air pollution. 42 U.S.C. 1857c-5(a)(2)(E) (1970). The EPA, however, interpreted this provision to require "mere exchange of information" between upwind and downwind States rather than "binding enforcement agreements." *NRDC* v. *EPA*, 483 F.2d 690, 692 (8th Cir. 1973). As a result, no enforcement actions took place under this provision, and "serious inequities among several States" persisted. S. Rep. No. 127, 95th Cong., 1st Sess. 41 (1977) (1977 Senate Report).

iii. Concluding that the 1970 provision was "an inadequate answer to the problem of interstate air pollution," Congress amended the Act in 1977 in another attempt "to establish an effective mechanism for prevention, control, and abatement of interstate air pollution." 1977 House Report 330. Congress's goal was to "mak[e] a source at least as responsible for polluting another State as it would be for polluting its own State." 1977 Senate Report 42. To accomplish that objective, Congress required that all state plans include "adequate" provisions "prohibiting any stationary source within the State from emitting any air pollutant in amounts which will * * * prevent attainment or maintenance [of air quality standards] for any other State." 42 U.S.C. 7410(a)(2)(E) (Supp. II 1977). This requirement has come to be known as the "good neighbor" provision.

The original good neighbor provision proved to be inadequate. In particular, it applied only to interstate emissions from a "single source," rendering it ineffective "in prohibiting emissions from * * * multiple sources, mobile sources, and area sources." 1989 Senate Report

21. In addition, emissions violated the Act only if they "*prevent[ed]* attainment" in a downwind State, yet it typically proved "impossible to say that any single source or group of sources is the one which actually prevents attainment." *Ibid.* (emphasis added).

iv. In 1990, Congress addressed the problem again, this time extending the good neighbor provision beyond a single stationary source and "eliminat[ing] the need to establish a causal relationship between a polluter and violation of an ambient standard." 1989 Senate Report 75; see Pet. App. 25a n.14. The good neighbor provision now requires state plans 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 interference with maintenance by, any other State with respect to any [air quality standard]." 42 U.S.C. 7410(a)(2)(D)(i)(I).

2. Following the 1990 amendments, the EPA began a series of rulemakings to address the revised good neighbor provision.

a. In each of these rulemakings, the EPA confronted a problem of considerable technical complexity. In particular, air quality modeling shows that ozone[1] and fine particles ($PM_{2.5}$)[2] pollution problems are caused by the

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[1] Short-term exposure to ozone at sufficient concentrations "can irritate the respiratory system" and aggravate asthma, and it has been associated with premature mortality. Pet. App. 166a-167a. "Longer-term ozone exposure can inflame and damage the lining of the lungs, which may lead to permanent changes in lung tissue and irreversible reductions in lung function." *Id.* at 167a; see *ibid.* (discussing impacts on environment and agriculture).

[2] Fine particles "are associated with a number of serious health effects including premature mortality, aggravation of respiratory and cardiovascular disease[,] * * * lung disease, * * * asthma attacks,

collective contribution of nitrogen oxide (NO_x) and sulfur dioxide (SO_2) emissions from numerous upwind States to particular downwind areas, combined with local emissions from the affected downwind areas themselves.[3]

Further complicating matters is the fact that many States that are upwind contributors to pollution problems in other States also receive upwind emissions that contribute to their own air pollution problems (*i.e.*, they are both upwind and downwind), and most upwind States contribute, in varying degrees, to pollution problems in many downwind areas. The interstate pollution problem is thus best understood as a dense, spaghetti-like matrix of overlapping upwind/downwind "linkages" among many States, rather than a neater and more limited set of linkages among just a few.

The EPA's modeling for this rule evaluated 2479 potential contribution linkages among 37 upwind States and 67 ozone and $PM_{2.5}$ downwind nonattainment and maintenance receptors, *i.e.*, locations where air quality

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and certain cardiovascular problems." Pet App. 165a; see *id.* at 165a-166a (discussing impacts on environment and agriculture).

[3] The underlying chemical mechanisms are complex but can be summarized in general terms as follows. In the case of ozone pollution, emissions of NO_x and volatile organic compounds (VOCs) mix in the atmosphere in the presence of sunlight to form ozone. Given the nature of VOCs emissions, the interstate component of ozone pollution is due primarily to NO_x emissions that can be transported in the atmosphere over hundreds of miles. Pet. App. 185a-187a. $PM_{2.5}$ can be emitted directly or formed secondarily in the atmosphere. The interstate component of $PM_{2.5}$ pollution is primarily attributable to the formation of sulfates from SO_2 emissions from power plants and industrial facilities and nitrates from NO_x emissions from power plants, automobiles, and other combustion sources. These precursors, as well as the fine particles themselves, can be transported long distances in the atmosphere. 69 Fed. Reg. 4566, 4575 (Jan. 30, 2004).

is measured and that are at risk of not attaining or maintaining air quality standards. Of those linkages, 565 were above the one-percent threshold used by the rule's screening analysis to subject them to further review. For each of the downwind nonattainment and maintenance receptors, between 17 and 36 upwind States contributed to the downwind problem, with between five and 12 (and a mean of eight) making contributions substantial enough to exceed the screening threshold. For ozone, four out of 25 contributing States were both upwind contributors and downwind receptors, while for $PM_{2.5}$, this figure was nine out of 23.[4]

The modeling EPA used in this case also starkly illustrates the challenge that interstate pollution transport poses to downwind States. For the receptors identified in this rule as having ozone problems, the out-of-state share of pollution contributions ranges from a low of 35% to a high of 93%. J.A. 177-178. For those receptors in areas with $PM_{2.5}$ problems, the range is 47% to 89%, with all but one area above 50%. J.A. 179-184.

New Haven, Connecticut, which has difficulty maintaining the ozone standard, provides one specific downwind example. Out-of-state contributions are responsible for 93% of ozone pollution in New Haven. J.A. 178. Twenty-eight of 36 States studied in the EPA's modeling contribute at least 0.1 parts-per-billion (ppb) to New Haven's ozone problem. C.A. App. 2704-2705. Ten of the upwind contributions exceed the rule's screening threshold. *Ibid.* Not only does the total out-of-state contribution (59.6 ppb) dwarf Connecticut's own contribution (4.4 ppb), J.A. 178, but four upwind States also

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[4] The figures discussed in this paragraph are derived from data in an EPA technical support document that accompanied the Transport Rule. See C.A. App. 2700-2727; J.A. 175-185.

contribute more *on their own* to ozone pollution in New Haven than Connecticut itself does, C.A. App. 2704-2705.

b. The EPA's first rule implementing the 1990 good neighbor provision was the "NO_x SIP Call," which in 1998 regulated NO_x emissions to address interstate contributions to nonattainment in downwind States of the air quality standard for ozone. 63 Fed. Reg. 57,356 (Oct. 27, 1998). The D.C. Circuit upheld the NO_x SIP Call in relevant respects. *Michigan* v. *EPA*, 213 F.3d 663, 682 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001).

c. In 2005, the EPA issued the Clean Air Interstate Rule (CAIR), which addressed emissions of NO_x and SO_2 contributing to nonattainment of the air quality standard for $PM_{2.5}$ and of a new, more stringent standard for ozone. 70 Fed. Reg. 25,171 (May 12, 2005). The D.C. Circuit remanded CAIR, in part on the ground that it was insufficiently protective of downwind States. *North Carolina* v. *EPA*, 531 F.3d 896, 908-912 (2008); see *North Carolina* v. *EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

3. This case involves the Cross-State Air Pollution Rule (commonly referred to as the Transport Rule). Pet. App. 117a-1458a. The Transport Rule responded to the remand in *North Carolina* and addressed the emission of pollutants in 27 upwind States that significantly contribute to downwind States' problems attaining or maintaining the air quality standards for ozone and $PM_{2.5}$.[5] In issuing the rule, the EPA cited a study show-

[5] The Transport Rule addressed three distinct air-quality standards: (1) the 1997 annual $PM_{2.5}$ standard; (2) the 2006 daily $PM_{2.5}$ standard; and (3) the 1997 8-hour ozone standard. Pet. App. 168a. Because the differences in the EPA's analysis for the two $PM_{2.5}$

ing that "1 in 20 deaths in the U.S. is attributable to $PM_{2.5}$ and ozone exposure" and that there are "almost 200,000 non-fatal heart attacks, 90,000 hospital admissions due to respiratory or cardiovascular illness, 2.5 million cases of aggravated asthma among children, and many other human health impacts to exposure to these two air pollutants." *Id.* at 602a.

a. As noted above (pp. 3, 5, *supra*), the Act provides for each State to adopt a state plan that, *inter alia*, assures that the State will not emit pollutants in amounts that "contribute significantly" to other States' nonattainment of the air quality standards or inability to maintain compliance with them. 42 U.S.C. 7410(a)(2)(D)(i)(I). If the EPA finds that a State has failed to submit a plan or determines that a state plan does not meet these or other requirements of the Act, the EPA "shall" issue a federal plan for that State within two years of that finding. 42 U.S.C. 7410(c)(1).

For each State subject to the Transport Rule, the EPA had previously conducted a separate administrative proceeding in which the agency either (1) had made a finding that the State had failed to submit a state plan addressing the good neighbor requirement, or (2) had disapproved the State's plan as inadequate. Those administrative determinations triggered the statutory requirement for the EPA to promulgate a federal plan

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standards are largely irrelevant to the issues addressed in this case, this brief refers simply to the $PM_{2.5}$ standard except as specifically noted. In 2008, the 8-hour ozone standard was revised to be somewhat more stringent, *id.* at 169a; see *Mississippi* v. *EPA*, No. 08-1200, 2013 WL 3799741 (D.C. Cir. July 23, 2013), and on January 15, 2013, the EPA revised its suite of particulate matter standards, making the annual $PM_{2.5}$ standard more stringent but retaining the same standard for daily $PM_{2.5}$, 78 Fed. Reg. 3086. The Transport Rule does not address these revised standards.

within two years. 42 U.S.C. 7410(c)(1); see Pet. App. 171a-172a; C.A. App. 3168-3178. In the Transport Rule, the EPA therefore promulgated federal plans for those States.

The EPA's analysis proceeded sequentially. The EPA initially used air quality modeling to identify downwind areas that will likely have difficulty attaining or maintaining compliance with the relevant air quality standards. Pet. App. 137a, 198a-254a. The EPA then conducted a two-step analysis to determine the amount of each upwind State's significant contribution to those downwind problems. In the first step (the screening analysis), the EPA "used air quality modeling to determine which upwind [S]tates are projected to contribute at or above threshold levels to the air quality problems" in the areas with attainment and maintenance problems. *Id.* at 137a-138a. Any State whose contributions to a specific receptor in a downwind area exceeded a specified threshold (one percent of the relevant air quality standard) was "considered linked to that receptor." *Id.* at 255a; see *id.* at 256a-258a.

In the second step (the control analysis), the EPA confirmed the inclusion of the States identified in the previous step,[6] and then "quantifie[d] the portion of each [S]tate's contribution that constitutes its 'significant contribution' or 'interference with maintenance.'" Pet. App. 316a. To make those judgments, the EPA used "an analysis that accounts for both cost and air quality improvement to identify the portion of a [S]tate's contribution that constitutes its significant contribution." *Ibid.*

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[6] Although the District of Columbia (because it was modeled together with Maryland) had contributions above the screening threshold, it was left out of the Transport Rule as a result of the control analysis. Pet. App. 380a-381a.

In particular, for each upwind State, the EPA developed "cost curves" to quantify emission reductions that could be achieved at ascending levels of cost per ton. Pet. App. 319a, see *id.* at 323a-337a. The EPA then used an air-quality assessment tool to estimate how emission reductions at each of those cost thresholds (if adopted by both linked upwind States and the downwind receptor States) would affect air quality in each downwind area. *Id.* at 321a, 338a-349a; see C.A. App. 2945-2962.

The EPA next examined this cost and air quality information to identify "significant cost thresholds," *i.e.*, "point[s] where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective." Pet. App. 322a, see *id.* at 349a-366a. For example, analysis of the data showed "a cost threshold with rapidly diminishing returns at $500/ton" for ozone-season NO_x. *Id.* at 351a. In particular, the "EPA observed that moving beyond the $500 cost threshold up to a $2,500 cost threshold would result in only minimal additional ozone season NO_x emission reductions." *Ibid.* Conversely, a lower cost-threshold would create perverse incentives for emitters to stop using low-cost emission controls already in place. *Id.* at 354a. For SO_2, the EPA determined that all downwind nonattainment and maintenance problems were solved at a $500/ton threshold for one group of upwind States, so it adopted that threshold for them. *Id.* at 356a-357a. For another group of States, however, significant downwind problems remained at that threshold, so the EPA adopted a $2300/ton threshold, the point at which most non-attainment and maintenance problems were solved and beyond which there were "notably smaller air quality improvements." *Id.* at 357a-365a.

At the final stage, the EPA used the assembled information to create a state "budget" of permitted emissions. Pet. App. 323a, 366a-392a. It did so by modeling the quantity of pollutants that sources in each upwind State would emit if all emission reductions achievable at the specified cost threshold were implemented. *Id.* at 366a-367a. The difference between that level of emissions and the level that would occur without adoption of controls was the amount of the State's significant contribution. *Ibid.*

Instead of imposing traditional command-and-control mechanisms to enforce state emission budgets, the EPA utilized cap-and-trade programs. Pet. App. 424a-431a; see 63 Fed. Reg. at 57,378, 57,457. Under that approach, sources of the relevant pollutant within the State receive allowances authorizing emissions of the pollutant at a given level, with all allowances in the aggregate authorizing emissions only up to the State's budget (subject to some accommodation for emissions variability). Allowances are traded much like other commodities. Sources that can reduce emissions less expensively than others therefore may sell their unneeded allowances. Conversely, sources that cannot reduce emissions as cost-effectively as others may purchase additional allowances on the market. Such a system gives sources the flexibility to secure required emission reductions in the most feasible and least expensive manner, while still assuring that the overall pollution-control targets are met. See generally *Michigan*, 213 F.3d at 676; Pet. App. 424a-428a; *Clean Air Markets* (2010), http://www.epa.gov/airmarkets/progsregs/index.html (last visited Sept. 3, 2013).

b. In *Michigan*, the D.C. Circuit reviewed the NO_x SIP Call and upheld the EPA's analytical approach,

which, like the one at issue here, defined significant contribution partly in light of cost considerations. 213 F.3d at 677-680. The court held that the term "significant" (as used in the good neighbor provision) is ambiguous, and that the EPA may permissibly determine the amount of a State's "significant" contribution by reference to the amount of emission reductions achievable through application of "highly cost-effective controls." *Id.* at 677-680. The court observed that "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, in the petitioners' view, health alone." *Id.* at 677.

The EPA used the same basic analytical approach for CAIR, and the D.C. Circuit in *North Carolina* expressly declined to disturb it. 531 F.3d at 916-917. The court of appeals ultimately remanded CAIR, however, principally because it determined that the rule provided insufficient assurance that each upwind State would, in fact, make the emission reductions necessary to address downwind nonattainment and maintenance problems. *Id.* at 907-908, 917-918; see *North Carolina*, 550 F.3d at 1178.

4. In the Transport Rule, the EPA again used the same basic approach that the D.C. Circuit had previously upheld, Pet. App. 136a-139a, but this time a divided panel of the court of appeals rejected it, *id.* at 1a-116a.[7]

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[7] To the extent that the EPA's two-step regulatory approach for the Transport Rule differed in any significant way from that used in the NO_x SIP Call and CAIR, it was to place *greater* emphasis on air-quality factors (and thus less emphasis on cost) in determining the required level of emission reductions. Pet. App. 421a. Most notable in this respect was the agency's decision to create two different cost thresholds for SO_2 controls to apply to different groups of States depending on the severity of the associated downwind $PM_{2.5}$ nonattainment problems. *Id.* at 314a, 316a-323a.

a. The panel majority discerned three statutory "red lines" in the good neighbor provision and concluded that the Transport Rule had transgressed them. Pet. App. 22a. First, the court found the rule violated the Act because it could theoretically require a State to reduce emissions below the threshold level the rule's screening analysis used to determine whether that State's emissions warranted further evaluation. *Id.* at 23a, 31a-38a. Second, the court believed that, where multiple upwind States contribute to a common downwind nonattainment problem, the rule did not guarantee that upwind States' emission-reduction obligations were proportional to their shares of modeled downwind contribution. *Id.* at 24a-27a, 38a-39a. Third, the court concluded that the rule did not assure that the collective obligations of upwind States would be no more than the minimum amount necessary to enable affected downwind areas to meet the air quality standards. *Id.* at 27a-29a, 39a-41a.[8]

b. The court of appeals also identified what it viewed as a "second, entirely independent problem with the Transport Rule." Pet. App. 42a. The court held that, once the EPA had "quantif[ied] each upwind State's good neighbor obligations," the agency was required to "giv[e] the States an initial opportunity to implement the obligations themselves through their State Implementation Plans." *Ibid.* The court held that the EPA had violated the Act by issuing federal plans as part of the Transport Rule itself, without "giv[ing] the States the first opportunity to implement" their good neighbor obligations. *Id.* at 42a-43a; see *id.* at 42a-61a.

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[8] The court of appeals stated that the EPA might have "discretion" to depart from these perceived statutory restrictions, but only to the extent it faced insurmountable technical obstacles in complying with them. Pet. App. 28a-29a.

Judge Rogers dissented. Pet. App. 65a-116a. She concluded that the court did not have jurisdiction to issue either of its alternative holdings. *Id.* at 65a-69a, 70a-82a, 95a-110a. On the merits, Judge Rogers would have held that the Transport Rule reflected a permissible construction of the Act. *Id.* at 83a-95a, 112a-114a.

SUMMARY OF ARGUMENT

The court of appeals erred both in determining that it had jurisdiction to consider the particular challenges that it ultimately found meritorious, and in rejecting the EPA's reasonable interpretations of the Act.

A. In holding that the EPA had issued federal implementation plans prematurely, the court of appeals exceeded its jurisdiction and misread the Act's requirements.

Before the EPA issued the Transport Rule, it took separate administrative actions in which it determined that (i) some States had breached their legal obligation to submit plans with good neighbor provisions for the relevant air quality standards, and (ii) other States had submitted inadequate plans. Those administrative actions logically and expressly depended upon the premise that States were required to timely submit plans containing good neighbor provisions whether or not the EPA had quantified particular States' good neighbor obligations. The large majority of those administrative actions went unchallenged, and the petitions for review challenging the remainder were not before the court in this case. The Act requires petitions for review challenging a particular EPA action to be filed within 60 days of *that* action, 42 U.S.C. 7607(b)(1), and the EPA is entitled to treat final actions for which the statutory review period has run as valid triggering events for subsequent, statutorily-mandated measures. The court

of appeals therefore exceeded its jurisdiction by holding, in direct contradiction to the EPA's prior determinations, that States have no duty to submit plans with good neighbor provisions until the EPA quantifies the relevant obligations.

On the merits, the court of appeals erred by effectively nullifying obligations the Act imposes on States, and by rejecting as premature the federal plans that the EPA was *required* to issue. Under the Act, States are required to submit state plans within three years of a new air quality standard, and such plans must include good neighbor provisions. 42 U.S.C. 7410(a)(1) and (2)(D)(i). The Act further requires the EPA to issue a federal plan if it finds that a State has not adequately complied with those requirements. 42 U.S.C. 7410(c) and (k). Nowhere did Congress make a State's duty to submit a plan contingent upon the EPA's prior quantification of the State's good neighbor obligations. In fact, the Act does not require the agency to conduct such quantification *at all*.

B. In invalidating the Transport Rule on statutory grounds that were not preserved during agency proceedings, the court of appeals exceeded its jurisdiction and misconstrued the Act's good neighbor provision.

The Act requires that objections be raised "with reasonable specificity" in the EPA proceedings before they can be adjudicated in court. 42 U.S.C. 7607(d)(7)(B). That provision helps ensure reasoned agency decisionmaking and adequately-informed judicial review, especially in an area (like this one) of technical complexity. The court of appeals violated this limit on its jurisdiction when it invalidated the Transport Rule for failure to comply with three statutory "red lines" on EPA authority. In concluding that those challenges to the Transport

Rule had been adequately preserved, the court relied on sources that were wholly inadequate to meet the Act's "reasonable specificity" requirement.

On the merits, the court of appeals erred by invalidating the EPA's approach to significant contribution. The Act requires States to prohibit emissions "in amounts which will * * * contribute significantly" to pollution problems in other States, 42 U.S.C. 7410(a)(2)(D)(i)(I), but does not define that phrase. As the D.C. Circuit itself had previously recognized, this provision does not dictate any particular methodological approach to defining the "significan[ce]" of a contribution. *Michigan* v. *EPA*, 213 F.3d 663, 677 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). The EPA has long interpreted the provision to permit the agency to take into account the availability of cost-effective emission-reduction measures when calculating the amount of a State's significant contribution, and that interpretation is reasonable. The court of appeals' contrary and mechanically proportional approach is not compelled by the Act; it would be both more expensive and less effective than the EPA's; and it was based in significant part on court-invented hypotheticals bearing little resemblance to the complex realities of interstate air pollution.

ARGUMENT

THE COURT OF APPEALS ERRED BOTH IN ADJUDICATING CHALLENGES THAT WERE NOT PROPERLY BEFORE IT AND IN REJECTING THE EPA'S REASONABLE INTERPRETATIONS OF THE ACT

A. In Holding That The EPA's Issuance Of Federal Implementation Plans Was Premature, The Court Of Appeals Both Exceeded Its Jurisdiction And Misconstrued The Act's Substantive Requirements

The court of appeals held that, once the EPA had "quantif[ied] each upwind State's good neighbor obligations," it was required to "giv[e] the States an initial opportunity to implement the obligations themselves through their State Implementation Plans." Pet. App. 42. The court concluded on that basis that the EPA had violated the Act by "preemptively issuing" federal plans as part of the Transport Rule. *Ibid.* In so holding, the court exceeded statutory limits on its jurisdiction and misread the Act's substantive requirements. Three aspects of the Act, taken together, make the court's errors clear.

First, the Act requires the EPA to establish air quality standards for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years (or such shorter period as [the EPA] may prescribe)" of the EPA's issuance of such a standard, "[e]ach State" is to submit to the EPA a plan that "provides for implementation, maintenance, and enforcement" of the standard. 42 U.S.C. 7410(a)(1). The Act further specifies the required content of state implementation plans. *Inter alia*, such plans "shall * * * contain adequate provisions" barring emissions of "any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interfere with

maintenance by, any other State with respect to any" air quality standard. 42 U.S.C. 7410(a)(2)(D).

Second, if a State does not submit an implementation plan during the mandatory time period, the EPA must make a finding of failure to submit. 42 U.S.C. 7410(c)(1)(A) and (k)(1)(B). If a State submits an inadequate plan, the EPA must disapprove it. 42 U.S.C. 7410(k)(3). Either of those EPA actions triggers another mandatory duty—issuance of a federal implementation plan by the EPA for the relevant State or States. Thus, the EPA "*shall* promulgate a Federal implementation plan at any time within 2 years after" it either "finds that a State has failed to make a required submission" or "disapproves a State implementation plan submission in whole or in part." 42 U.S.C. 7410(c)(1) (emphasis added); see *ibid.* (exception where "the State corrects the deficiency, and the [EPA] approves the plan or plan revision, before the [EPA] promulgates such Federal implementation plan").

Third, any petition for judicial review of an EPA action implementing the Act "shall be filed within sixty days from the date notice of such * * * action appears in the Federal Register." 42 U.S.C. 7607(b)(1); see *ibid.* (exception where "such petition is based solely on grounds arising after such sixtieth day"). "This filing period is jurisdictional in nature, and may not be enlarged or altered by the courts." *Motor & Equip. Mfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998) (quotation marks and citations omitted).

1. The court of appeals exceeded its jurisdiction by issuing a decision that effectively invalidated prior EPA determinations regarding the adequacy of various state implementation plans

For each State subject to the Transport Rule, the EPA had previously taken a final, judicially-reviewable action that either disapproved the relevant good neighbor provisions of the State's implementation plan, or found that the State had failed to submit such a plan altogether. An express and necessary premise of those administrative actions was that the States were legally required to promulgate good neighbor provisions for the relevant air quality standards, even though the EPA had not yet quantified the States' good neighbor obligations. The court of appeals in the current proceeding lacked authority to adjudicate a collateral attack on those separate administrative actions.

a. In April 2005, the EPA issued final rules finding that multiple States had failed to submit state implementation plans for the 1997 ozone and $PM_{2.5}$ air quality standards. C.A. App. 3168-3178. In June 2010 and July 2011, the EPA issued final rules finding that 29 States and territories had failed to submit such plans for the 2006 24-hour $PM_{2.5}$ standard. *Ibid.* No party sought judicial review of any of those actions. In July 2011, the EPA issued separate final rules disapproving as inadequate the good neighbor provisions of state implementation plans submitted by ten other States. *Ibid.* Only three of that last group of States sought judicial review, and those petitions (which remain pending) were not consolidated with the case below.

These disapprovals and findings of failure to submit triggered the EPA's statutory obligation to promulgate federal implementation plans within two years.

42 U.S.C. 7410(c)(1). The EPA satisfied that obligation by promulgating the Transport Rule, which included federal plans for the relevant States.[9] In holding that the agency's issuance of federal plans was premature, the court of appeals did not suggest (and could not plausibly have suggested) that the Act required the EPA to wait some greater length of time after issuing the various disapprovals and findings of failure to submit. Rather, the court held that the antecedent disapprovals and findings were themselves premature, and therefore invalid, because they were issued before the EPA had quantified the States' good neighbor obligations. Thus, the court stated that the "EPA's many [state implementation plan] disapprovals and findings of failure to submit share one problematic feature: [the] EPA made all of those findings *before* it told the States what emissions reductions their [state plans] were supposed to achieve under the good neighbor provision." Pet. App. 49a.

The only permissible way to challenge the validity of the prior EPA disapprovals and findings, however, was by filing petitions for review challenging *those actions* within 60 days of their publication in the Federal Register. 42 U.S.C. 7607(b)(1). As Judge Rogers explained, "[i]f a State wished to object that under [S]ection [7410(a)] it had no obligation to include 'good neighbor' provisions in its [state plan] until [the] EPA quantified

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[9] The EPA originally promulgated federal plans to implement CAIR in all affected States, 71 Fed. Reg. 25,328 (Apr. 28, 2006), and subsequently accepted state plans under CAIR for some of them. After CAIR was invalidated by the D.C. Circuit in *North Carolina* (thus rendering the CAIR federal and state plans inadequate), the EPA in the Transport Rule satisfied its continuing obligation to promulgate federal implementation plans for those States based on the 2005 findings of failure to submit. See pp. 32-33, *infra*.

its 'significant contribution' in emission reduction budgets, then the [Act] required it to do so at the time [the] EPA found it had not met its [state plan] 'good neighbor' obligation." Pet. App. 75a. Of course, petitioners were free to argue in the current proceeding that, even accepting the prior findings and disapprovals as valid, the federal implementation plans promulgated within the Transport Rule were arbitrary and capricious or legally infirm. But the validity of the prior EPA actions was not before the court below.

The requirement that challenges to agency rules be brought within time limits triggered by issuance of *those* rules, 42 U.S.C. 7607(b)(1), and the corresponding prohibition on untimely collateral attacks in later proceedings, serve critical purposes. They provide a bright-line rule under which the agency, regulated entities, and the public can determine which agency actions remain subject to potential judicial invalidation, and which ones can be viewed as part of the settled regulatory backdrop against which future decisions will be made. Those rules also properly limit the authority of the courts, which may review only discrete agency actions properly before them rather than attempting to superintend an entire chain of agency decision-making.

b. The court of appeals addressed the jurisdictional issue in only a spare footnote, Pet. App. 61a-62a n.34, and its analysis serves to highlight the fundamental flaws in its approach. According to the court, the Act requires the EPA to "issue a [federal implementation plan] within two years after a state fails to make a 'required submission' or submits a deficient" state plan. *Ibid.* The court found the federal implementation plans at issue here to be unlawful because "a State cannot be 'required' to implement its good neighbor obligation in a

[state implementation plan] 'submission'—nor be deemed to have submitted a deficient [state plan] for failure to implement the good neighbor obligation—until it knows the target set by [the] EPA." *Ibid.* The court concluded that respondents were challenging only the allegedly premature federal implementation plans, not the "EPA's prior disapproval of certain States'" plans. *Ibid.*

Contrary to the court of appeals' view, the trigger for the EPA's duty to issue a federal implementation plan is not the date on which a State "fails to make a 'required submission' or submits a deficient" state plan. Pet. App. 62a n.34. Instead, the EPA must act within two years after the agency "*finds* that a State has failed to make a required submission" or "*disapproves* a State implementation plan submission." 42 U.S.C. 7410(c)(1) (emphases added); see Pet. App. 80a-81a (Rogers, J., dissenting). The starting gun is fired by the EPA's administrative action, not by the States' submission or failure to submit. Indeed, the EPA made quite clear in its failure-to-submit and disapproval actions that those actions triggered the agency's obligation to promulgate federal plans within two years. *E.g.*, 75 Fed. Reg. 32,674 (June 9, 2010) ("[T]his finding establishes a 2-year deadline for promulgation by [the] EPA of a [federal implementation plan].").

To be sure, if an EPA finding or disapproval is subjected to a timely judicial challenge, and is ultimately vacated by a reviewing court, that (invalidated) EPA action cannot serve as a lawful predicate for a federal implementation plan. When no such challenge is brought, however, nothing in the Act suggests that a subsequent federal implementation plan can be declared invalid on the ground that the predicate finding or dis-

approval *should not have* been made. That approach would effectively eliminate the Act's jurisdictional 60-day deadline for petitions for review, 42 U.S.C. 7607(b)(1), of EPA decisions disapproving state plans or finding that a State had failed to submit one.

If a State thought that it was not "required" to submit a plan (*e.g.*, because the EPA had not yet quantified its good neighbor obligations), or if it thought the plan it did submit was not "deficient" for that reason (Pet. App. 62a n.34), the time to make that argument was when the EPA found to the contrary, *i.e.*, in the agency action specifically addressing the state implementation plan. Two States (respondents Indiana and Alabama) raised that argument in prior administrative proceedings before the EPA, but the agency rejected that contention, and neither State filed a petition for review. *Id.* at 76a-78a (Rogers, J., dissenting). Respondents' contention that the Transport Rule's federal implementation plans were issued prematurely is in substance an untimely (and thus jurisdictionally-barred) collateral attack on the EPA's antecedent findings and disapprovals. *Ibid.*

2. The court of appeals disregarded statutory requirements governing the necessary contents of state implementation plans, and it imposed extra-statutory requirements on the EPA

On the merits, the court of appeals erred in determining that state implementation plans need not include good neighbor provisions until the EPA has quantified a State's required level of emission reductions. Nothing in the statute requires the EPA to quantify upwind States' significant contribution obligations at all, much less makes the States' obligation to submit implementation plans with good neighbor provisions contingent upon any such EPA action. To the contrary, the States'

obligation to submit timely state plans with all required elements, including good neighbor provisions, is imposed directly by the Act itself.

a. The Act provides that each State "shall" submit a state implementation plan within three years of issuance of a new air quality standard, 42 U.S.C. 7410(a)(1), and that such plans "shall" include "adequate provisions" regulating emissions that "contribute significantly" to air quality problems in any other State, 42 U.S.C. 7410(a)(2)(D); see Pet. App. 84a-85a (Rogers, J., dissenting). The Act further requires the EPA to make a finding when a State fails to submit such a plan, and to disapprove an inadequate submission. 42 U.S.C. 7410(c)(1) and (k). Within two years of such a finding or disapproval, the EPA "shall" issue a federal implementation plan. 42 U.S.C. 7410(c).

For every State for which the EPA promulgated a federal implementation plan in the Transport Rule, the agency previously either had found that the State's submission was overdue or had disapproved a submitted state plan. Under the plain terms of the Act, the EPA therefore had not only the authority, but a mandatory duty, to promulgate federal plans for those States.

b. As explained above, the court of appeals found that the EPA lacked authority to promulgate federal implementation plans because, in the court's view, States had no obligation to submit state plans addressing the good neighbor provision until the EPA had defined their significant contribution. Pet. App. 42a-61a. The court did not cite any specific provision of the Act effecting such a carve-out from the States' statutory obligations. Rather, the court concluded that "contextual and structural factors" unambiguously prohibited the EPA from proceeding as it did. *Id.* at 54a-55a & n.32.

The court of appeals' analysis violated the basic rule that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (citation omitted). 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. 42 U.S.C. 7410(a)(2); see *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (Congress uses the word "'shall' to impose discretionless obligations"). Nothing in the Act makes the timing of the State's submission contingent on prior action by the EPA to define what portion of its contribution to downwind nonattainment is "significant."

Indeed, nothing in the Act requires the EPA to define the States' obligations regarding interstate pollution at all. And since Congress did not require the EPA to quantify States' good neighbor obligations, it established no deadline for the agency to do so. Thus, under the court of appeals' decision, no State is required to adopt a good neighbor provision until the EPA has completed regulatory action (the quantification of that State's good neighbor obligations) that the EPA has no obligation to take at all, much less by any particular date. And even if the EPA chooses to quantify the States' obligations (as it did in the Transport Rule), the CAA does not specify any time period within which States must thereafter adopt state implementation plans containing good neighbor provisions.

Congress adopted aggressive measures against interstate air pollution after prior efforts failed, see pp. 3-5, *supra*, and it enacted a series of tight deadlines for both state and federal implementation plans, see pp. 3, 18-19, *supra*. Making the States' good neighbor obligations contingent on legally gratuitous EPA action, without even specifying a particular deadline that such EPA action would trigger, would be quite out of keeping with the overall thrust of that regime. The "context[] and structur[e]" (Pet. App. 54a) of the relevant CAA provisions thus reinforce the natural reading of Section 7410(a)(2) itself.

By contrast, other CAA provisions expressly require action by the States only after specified EPA action. For example, the CAA makes States' submission of state implementation plans for a particular pollutant contingent upon the EPA's issuance of an air quality standard for that pollutant, and it provides States a three-year deadline measured from the EPA action. 42 U.S.C. 7410(a)(1). Likewise, "Congress's carefully crafted statutory scheme" for vehicle inspection and maintenance programs "provided the states a full year" after statutorily-mandated "EPA guidance to develop and submit" state implementation plans. *NRDC* v. *EPA*, 22 F.3d 1125, 1135 (D.C. Cir. 1994); see 42 U.S.C. 7511a(c)(3)(B). Here, by contrast, Congress did not require that the EPA quantify States' good neighbor obligations, nor did it specify any particular length of time within which the States must act if the EPA chooses to provide such quantification.

The open-ended, non-time-limited scheme contemplated by the court of appeals in this case would also be irreconcilable with the Act's emphasis on *downwind States'* timely attainment of air quality standards. See

Train v. *NRDC*, 421 U.S. 60, 86 (1975). The statute establishes specific deadlines by which those standards must be achieved, which can be as short as three years after an area is designated as nonattainment. 42 U.S.C. 7511(a)(1). And the fact that a State's inability to attain the standards is caused by pollutants coming from other States does not relieve it of the obligations associated with a nonattainment designation. *Southwestern Pa. Growth Alliance* v. *Browner*, 121 F.3d 106, 116-117 (3d Cir. 1997) (Alito, J.) (accepting the EPA's interpretation of the Act as providing "that the origin of the ozone that caused the [non-attainment] * * * is legally irrelevant"); see *id.* at 124 (Becker, J., concurring) (noting "the problem faced by communities such as the Pittsburgh-Beaver Valley area, whose herculean and largely successful efforts to combat air pollution may be derailed due to circumstances (upwind ozone) beyond its control").

Indeed, the D.C. Circuit in an earlier decision had determined that the EPA's previous rule (CAIR) did not sufficiently assure that upwind emission reductions would be in place in time for downwind nonattainment States to meet their statutory attainment deadlines. *North Carolina*, 531 F.3d at 908-912. The compliance dates in the Transport Rule were a direct response to that ruling. Pet. App. 449a-456a; see *id.* at 93a (Rogers, J., dissenting) (explaining that the EPA's actions are "well-explained by the time pressures imposed *by this court*"). In the decision below, by contrast, the court of appeals chided the EPA for acting prematurely. If allowed to stand, the court's decision would make downwind attainment within the statutory deadlines much more difficult, by allowing upwind States to ignore their obligation to address interstate pollution in a timely

fashion, and by preventing the EPA from itself addressing those obligations promptly through a timely federal implementation plan.

c. The court of appeals expressed the view that upwind States could not feasibly implement good neighbor provisions until the EPA had quantified their good neighbor obligations because those States "need[ed] more precise guidance to know how to conform their conduct to the law." Pet. App. 51a. Congress evidently did not share that view, since it made the States' obligation to adopt good neighbor provisions contingent on the EPA's promulgation of air quality standards, rather than on the EPA's quantification of various States' significant contributions to downwind nonattainment. In any event, the court of appeals was wrong as a factual matter.

To support its assumption that States cannot calculate their own significant contribution to downwind nonattainment, the court cited nothing except EPA statements to the effect that analyzing interstate contribution is complex. Pet. App. 51a-52a. In implementing the Act, however, States routinely undertake technically complex air quality determinations. *Id.* at 89a-90a (Rogers, J., dissenting). State implementation plans addressing in-state emissions, for example, are based on complex modeling to predict how emissions of numerous pollutants will interact with atmospheric conditions to create concentrations of ozone and $PM_{2.5}$, often in areas far from the sources. *E.g.*, 76 Fed. Reg. 57,856-57,857 (Sept. 16, 2011) (noting the EPA's endorsement of complex air-quality modeling completed by the California Air Resources Board). In addition, the necessary emissions information from all States is publicly available, Pet. App. 90a & n.12 (Rogers, J., dissenting), and States

not covered by CAIR or the Transport Rule have complied with the requirement to submit state implementation plans governing interstate transport. *E.g.*, 77 Fed. Reg. 1027 (Jan. 9, 2012) (EPA approval of Colorado's interstate transport SIP).

d. The court of appeals also viewed the EPA's approach in this case as inconsistent with "the States' first-implementer role under Section [7410]." Pet. App. 55a. That criticism gets the matter exactly backwards. The fact that Section 7410 "give[s] the States the first opportunity to implement the national standards EPA sets under Title I," *id.* at 54a, is precisely why the States have an initial obligation to promulgate state implementation plans that contain good neighbor provisions for particular pollutants once the EPA has promulgated air quality standards for those pollutants. To be sure, Congress *might* have decided (if it had viewed the practical concerns discussed by the court as compelling) to *except* the Act's good neighbor provisions from the general States-first approach, and to make each State's duty to implement the good neighbor provisions contingent upon prior EPA action quantifying that State's significant contribution. Congress's failure to enact such an exception, however, is fully consistent with the States-first approach reflected in Section 7410. In any event, even if there were any ambiguity on the question, the EPA's interpretation of the Act not to include such an exception (*id.* at 174a-175a) was at the least reasonable. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868-1873 (2013).

The court of appeals read Section 7410(a)(2)(D)(i)(I) as "preserv[ing] the basic principle that States, not the Federal Government, are the primary implementers *after EPA has set the upwind States' good neighbor*

obligations." Pet. App. 54a (emphasis added). Under the plain terms of the Act, however, the EPA action that triggers the States' duty to implement good neighbor provisions is the promulgation of national air quality standards, not the quantification of individual States' good neighbor obligations. See *id.* at 84a-85a (Rogers, J., dissenting). Since the purported antecedent requirement that the EPA quantify individual States' obligations was wholly of the court's invention, there is considerable irony in the court's invocation of States-first principles as a ground for treating the EPA's federal implementation plans as premature.[10]

Under the circumstances presented here, the EPA reasonably determined that issuance of federal plans was *required* by the Act. Pet. App. 170a-175a. And even putting aside the statutory mandate, the EPA reasonably determined that timely attainment of air quality standards, and compliance with the court of appeals' mandate in *North Carolina*, required it to issue federal implementation plans. *Id.* at 175a-176a, 449a-456a. The alternative preferred by the court of appeals—the EPA

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[10] The court of appeals expressed the view that "determining the level of reductions required under Section [7410(a)(2)(D)(i)(I)] is analogous to setting [an air quality standard]." Pet. App. 53a. That analogy is inapt. Air quality standards are "*national* health-based standard[s]," *id.* at 84a (Rogers, J., dissenting) (emphasis added), while "determining the level of reductions required under Section" 7410(a)(2)(D)(i)(I) (*id.* at 53a) is an inherently State-specific task. Because States lack authority to promulgate national standards, it is unsurprising that certain state obligations are not triggered until the EPA has performed that task. That aspect of the statutory scheme provides no support for the court of appeals' conclusion that the EPA must quantify a *particular State's* significant contribution before that State is required to devise and implement its own good neighbor provision.

(a) quantifies States' good neighbor obligations; (b) then allows States sufficient time to submit state plans implementing those obligations; (c) then evaluates those state plans for sufficiency; and (d) finally issues federal plans only upon a determination of inadequacy or failure to submit (with every one of those steps separately subject to judicial review)—would have taken many years to complete. During that period, downwind States would continue to suffer the unmitigated consequences of pollution from upwind States.

e. Finally, the EPA's previous approval of state plans for some States under (the legally defective) CAIR did not eliminate its authority to issue federal plans for those States. See Pet. App. 48a n.29 (declining to address this question); State-Local Br. in Opp. 17; see also note 9, *supra*.

For each State subject to CAIR, the EPA had previously made a (judicially reviewable) finding of failure to submit state plan provisions addressing interstate pollution for the 1997 ozone and 1997 $PM_{2.5}$ standards. C.A. App. 3168-3178. The EPA then promulgated a federal plan for each of those States as part of CAIR. 71 Fed. Reg. at 25,328. The agency later approved full or partial state plans implementing the CAIR requirements for most of those States. C.A. App. 3168-3178.

The Act provides that the EPA's obligation to promulgate a federal plan is terminated only if "the State corrects the deficiency, *and* the Administrator approves the plan or plan revision." 42 U.S.C. 7410(c)(1) (emphasis added). For this group of CAIR state plans, however, only one of those requirements was satisfied. Although the EPA approved some of these state plans under CAIR, the court of appeals' decision in *North Carolina* made clear that those state plans did not actu-

ally correct the deficiencies the EPA had found in making its previous findings of failure to submit. Pet. App. 173a.

Because the deficiency has not been corrected, the EPA's statutory authority to issue federal plans for those States remained. In the Transport Rule preamble, the EPA, pursuant to its authority under 42 U.S.C. 7410(k)(6), thus corrected those earlier state plan approvals to make clear that, in light of the decision in *North Carolina*, those States had not addressed the deficiencies identified in the EPA's findings of failure to submit. Pet. App. 173a-174a.[11]

B. The Court Of Appeals Erred In Adjudicating Unpreserved Challenges To The EPA's Significant-Contribution Analysis, And In Refusing To Defer To The Agency's Reasonable Interpretation Of Statutory Terms

The court of appeals also erred in invalidating the Transport Rule based on its conclusion that the EPA's significant-contribution analysis was unambiguously foreclosed by the Act. No such statutory objection was

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[11] Even if the CAIR state plans were found to have terminated the EPA's authority to issue federal plans regarding the 1997 air quality standards, the effect on the Transport Rule would be slight. First, for all States except South Carolina and Texas, the EPA's authority to promulgate the federal plan for the annual NO_x and SO_2 requirements flows from the EPA's finding of failure to submit or disapproval of a proposed state plan for the 2006 $PM_{2.5}$ standard, which CAIR did not address. Pet. App. 143a-144a, 172a. For Texas, EPA approved only a partial CAIR state plan. 72 Fed. Reg. 41,453 (July 30, 2007). South Carolina's CAIR plan was approved after the decision in *North Carolina* made clear that such approval could not satisfy the statutory requirements, and only "in order to temporarily preserve the environmental benefits achievable under the CAIR trading programs" while EPA crafted a legally adequate replacement. 74 Fed. Reg. 53,170 (Oct. 16, 2009).

made in the administrative proceedings, and the court of appeals therefore lacked jurisdiction to decide the challenges that it ultimately found meritorious. And even if respondents' statutory claims had been properly before the court of appeals, they should have been rejected. The EPA's interpretation of the good neighbor provision reflected a reasonable construction of the statute's broad and ambiguous terms.

1. The court of appeals exceeded its jurisdiction by invalidating the Transport Rule based on statutory objections that were not made to the EPA during the administrative proceedings

a. The Act specifies 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). If a party "has not satisfied" that "exhaustion requirement[] in raising its objections before [the] EPA, [reviewing courts] do not have jurisdiction to hear that objection on a petition for review." *National Ass'n of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20, 2013).

The Act's "reasonable specificity" standard "requires something more than a 'general [challenge] to [the] EPA's approach.'" *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004) (first pair of brackets in original). Objections must "be prominent and clear enough to place the agency 'on notice,' for [the] EPA is not required to cull through all the letters it receives and answer all of the possible implied arguments." *National Ass'n of Clean Air Agencies* v. *EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (internal quotation marks omitted). At bottom, the Act's exhaustion provision embodies the principle that "[s]imple fairness to

those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Statutory exhaustion requirements promote sound administrative and judicial decision-making. An agency might be persuaded by an objection asserted during administrative proceedings, giving the agency a fair opportunity to avoid mistakes. *L.A. Tucker Truck Lines*, 344 U.S. at 36-37. And even if an agency does not agree with an objection, it will typically explain its rationale for rejecting it, thus promoting both reasoned agency decision-making and better informed judicial review. *Unemployment Comp. Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946).

Enforcement of statutory exhaustion requirements is especially critical in cases like this one, where the agency's "decision calls for the application of technical knowledge and experience not usually possessed by judges." *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501 (1955). In addition, enforcement of exhaustion requirements is necessary to the proper conduct of judicial review when (as here) an agency's statutory authority is challenged. As this Court recently reemphasized, when Congress leaves an "ambiguity" in a statute administered by an expert agency, it understands "that the ambiguity would be resolved, first and foremost, by the agency, and desire[s] the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *City of Arlington*, 133 S. Ct. at 1868 (quoting *Smiley* v.

Citibank (South Dakota), N.A., 517 U.S. 735, 740-741 (1996)). Congressional intent is thus frustrated—and judicial review under *Chevron* distorted—when a court interprets an agency's organic statute before the agency has been given a fair opportunity to evaluate and choose among proposed alternative constructions. *NRDC* v. *EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994); Pet. App. 96a-98a (Rogers, J., dissenting); see *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984).

b. In invalidating the Transport Rule on statutory bases that had not been advanced in the administrative proceedings, the court of appeals in this case badly misapplied Section 7607(d)(7)(B) and disserved the important exhaustion principles underlying it.

The court of appeals held that the Transport Rule violated the Act because it crossed three "red lines that cabin [the] EPA's authority." Pet. App. 22a; see p. 14, *supra* (summarizing "red lines"). Neither the court nor respondents, however, have identified any comment in the Transport Rule record asserting, with anything approaching reasonable specificity, that the EPA's approach to significant contribution contravened any of those purported statutory limits. Respondents' failure to assert such objections is particularly glaring because the EPA's notice of proposed rulemaking explained the agency's tentative view that its proposed approach to significant contribution was consistent with the Act as construed by the court of appeals in *Michigan* and *North Carolina*. 75 Fed. Reg. 45,298-45,299 (Aug. 2, 2010). If any party disagreed with the agency's understanding of its statutory authority, and wished to preserve its challenge for judicial review, it was obligated to respond to that portion of the notice and articulate its statutory objections.

In the notice of proposed rulemaking, the EPA also explained that it had considered other approaches (some cost-based, some air quality-based, and some reflecting elements of both) but had found no compelling technical or policy reasons that supported choosing one of them over the EPA's existing approach. 75 Fed. Reg. at 45,299; C.A. App. 2306-2320. If respondents believed that the statute *required* the EPA to adopt one of those alternative regulatory approaches, they should have articulated that position "with reasonable specificity" during the administrative proceedings. 42 U.S.C. 7607(d)(7)(B); see generally *DOT* v. *Public Citizen*, 541 U.S. 752, 764-765 (2004) (a party "forfeit[s]" a claim that an agency erred by not considering alternatives to its adopted rulemaking approach if it does not propose such alternatives in the administrative proceedings).

This case amply illustrates the importance of enforcing statutory exhaustion requirements. The court of appeals ultimately held that the Transport Rule violated the CAA because, in the court's view, the EPA's two-step approach could lead an upwind State to lower its emissions below the threshold that the Transport Rule's screening step used to subject that State to further analysis. Pet. App. 34a-35a. But because respondents never presented that objection to the agency, the EPA had no incentive during the rulemaking to evaluate the practical likelihood of such an occurrence, see *id.* at 95a & n.15, or to consider whether some backstop mechanism should be adopted to prevent it from happening. When respondents first raised that argument in the court of appeals, the EPA's answering brief cited relevant data and asserted that "such a scenario is extremely *unlikely* to occur." Gov't C.A. Br. 33-34 & n.20. The court of appeals nevertheless vacated the Transport

Rule in its entirety, based on a theoretical possibility that objecting parties never gave the agency an opportunity to evaluate or address.

c. In arguing that objections based on the court of appeals' statutory "red-lines" were preserved during the administrative proceedings, the court of appeals and respondents have pointed to several statements made to or by the EPA. None of those sources comes close to satisfying the CAA's "reasonable specificity" requirement.

i. *The court of appeals' decision in* North Carolina. The court of appeals apparently thought that its 2008 decision in *North Carolina* was sufficient to place the EPA on notice of the statutory objections to the Transport Rule that the court in this case found to be meritorious. Pet. App. 32a n.18; see Industry-Labor Br. in Opp. 17-18. A court decision, especially one issued *before* a notice of proposed rulemaking, is plainly not "an objection to a rule or procedure" proposed in that notice. 42 U.S.C. 7607(d)(7)(B). An "objection" is made by a party in administrative proceedings, not by appellate judges reviewing them. Any party who believed that the EPA's proposed approach was inconsistent with the *North Carolina* court's construction of the Act was obligated to make that argument with reasonable specificity during the administrative process that produced the Transport Rule.[12]

ii. *CAIR comments.* The court of appeals also thought that respondents' statutory objections were preserved by a comment filed in the CAIR proceeding

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[12] Judge Rogers, the only panel member in this case who was also a panel member in *North Carolina*, viewed the Transport Rule as entirely consistent with the court of appeals' analysis in *North Carolina*. Pet. App. 68a, 69a, 102a-104a.

more than six years before the rule at issue here was promulgated. Pet. App. 32a n.18 (citing 70 Fed. Reg. 25,176-25,177 (May 12, 2005)). An objection may be asserted in court only if it was "raised with reasonable specificity *during the period for public comment*" on the particular agency action that is the subject of the petitioner's challenge, 42 U.S.C. 7607(d)(7)(B) (emphasis added), *i.e.*, after the notice of proposed rulemaking that preceded the final rule. The D.C. Circuit had previously enforced that rule, holding that comments filed before the relevant notice of proposed rulemaking are "inadequate to preserve [an] argument for consideration" in court. *Sierra Club* v. *EPA*, 353 F.3d 976, 991 (2004). The CAIR docket was not incorporated into the docket of this rulemaking, Pet. App. 106a (Rogers, J., dissenting), and an agency should be under no obligation to sift through old comments filed before a notice of proposed rulemaking and respond to every unrenewed objection they contain.

iii. *Notice of Proposed Rulemaking.* The court of appeals appears to have believed that it would have been pointless for parties to assert their statutory objections to the EPA's proposed approach because, in issuing its notice of proposed rulemaking, the agency stated that it had "evaluated a number of alternative approaches," including "air quality-only approaches," and was "not proposing any of the alternative approaches." Pet. App. 33a n.18 (quoting 75 Fed. Reg. at 45,299); see Industry-Labor Br. in Opp. 17, 18, 24 n.11; see also C.A. App. 2308-2312. Nothing in Section 7607(d)(7)(B), however, excuses non-compliance with the exhaustion requirement simply because the EPA has adopted a tentative approach in a notice of proposed rulemaking. Because notices of proposed rulemaking frequently express a

tentative preference for a particular course of action, the exhaustion requirement would be substantially undermined if objections to such preferences were viewed as "futile" and therefore unnecessary. And even if the notice of proposed rulemaking had expressed an unshakeable *policy* preference for a regulatory approach that treated cost as one relevant factor, objecting parties were required to argue with reasonable specificity that a different approach was *compelled by the Act* in order to preserve that statutory argument for judicial review. See p. 37, *supra*.

iv. *Wisconsin comments.* The court of appeals also cited as support for its jurisdictional holding one sentence from comments filed by Wisconsin. Pet. App. 34a n.18 (quoting C.A. App. 1293) (The "'EPA needs to primarily depend on air quality results instead of control costs in defining' significant contributions."); see Industry-Labor Br. in Opp. 19. Wisconsin was making a policy argument; the portion of the State's comments upon which the court of appeals relied did not even cite any provision of the Act, much less argue that the EPA's approach was foreclosed by it. C.A. App. 1293. Arguments that an alternative regulatory approach is preferable as a policy matter to the agency's proposed course of action are plainly insufficient to preserve the claim that the statute *compels* adoption of the alternative. *Cement Kiln Recycling Coal.* v. *EPA*, 255 F.3d 855, 860-861 (D.C. Cir. 2001); *NRDC*, 25 F.3d at 1074; Pet. App. 97a-98a (Rogers, J., dissenting). Moreover, Wisconsin argued that the EPA should have adopted *more* stringent controls based on air quality impacts (the opposite of the court of appeals' conclusion). C.A. App. 1293; see Pet. App. 98a-100a (Rogers, J., dissenting).

v. *Tennessee comments.* Comments filed by Tennessee (Pet. App. 34a n.18; Industry-Labor Br. in Opp. 19) likewise asserted no statutory objection to the EPA's approach. Pet. App. 98a (Rogers, J., dissenting). And, even as a policy matter, "Tennessee's comment does not even suggest a policy preference that the one percent of [air quality standard] threshold level be a floor." *Ibid.*; see C.A. App. 556.

vi. *Delaware comments.* Like the comments of Wisconsin and Tennessee, Delaware's comments (Pet. App. 34a n.18; Industry-Labor Br. in Opp. 19) expressed a policy "opinion," in Delaware's case that the EPA should put more emphasis on air quality in its significant-contribution analysis, but they did not contend that the Act required the agency to do so. Pet. App. 100a n.16 (quoting C.A. App. 1756). And, in any event, Delaware (primarily a downwind State, J.A. 233, appearing in this Court as respondent in support of *petitioners*) was arguing for greater upwind emission reductions—the opposite of what the court of appeals concluded was dictated by the Act. *E.g.*, J.A. 224, 233 ("The proposal does not offer necessary relief to downwind states.") (emphasis omitted).

vii. *West Virginia comments.* In their brief in opposition, respondents contended for the first time that a comment filed by West Virginia preserved their statutory arguments. Industry-Labor Br. in Opp. 23. This basis for claiming preservation was not asserted in the court of appeals and is therefore waived. In any event, West Virginia's comment (like all the others cited by respondents and the court of appeals) did not assert that the EPA's proposed approach was beyond the agency's statutory authority. Instead, West Virginia generally supported the EPA's approach (J.A. 235), but requested

additional data in tabular form and expressed a technical concern about "limited measurement precision" (J.A. 240-241).

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In sum, because no "objection" based on the court of appeals' "red lines" was "raised with reasonable specificity during the period for public comment" on the Transport Rule, the court of appeals erred by permitting such objections to be "raised during judicial review." 42 U.S.C. 7607(d)(7)(B).

2. On the merits, the court of appeals erred in invalidating the EPA's approach to significant contribution

a. The good neighbor provision requires state plans 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 interference with maintenance by, any other State with respect to any [air quality standard]." 42 U.S.C. 7410(a)(2)(D)(i)(I). The Act does not define the phrase at the heart of this provision—"amounts that will * * * contribute significantly" to air pollution in other States—or any of its constituent words.

Since the EPA first comprehensively addressed this provision in 1998, the agency has interpreted it to permit consideration of costs in assessing what portion of a State's contribution to pollution elsewhere should be considered "significant." In the NO_x SIP Call, the EPA "uniformly required that each [S]tate reduce [NO_x] * * * by the amount accomplishable by what [the] EPA dubbed 'highly cost-effective controls,' namely, those controls [the] EPA found capable of removing NO_x at a cost of $2000 or less per ton." *Michigan*, 213 F.3d at

669. The court of appeals in *Michigan* upheld that approach. *Id.* at 677-680; see *North Carolina*, 531 F.3d at 916-917 (declining to disturb CAIR's similar approach to significant contribution).

As the *Michigan* court explained, the "fundamental" question is whether the EPA must "simply pick some flat 'amount' of contribution, based exclusively on health concerns, such that any excess would put a [S]tate in the forbidden zone of 'significance'"; or whether it was instead "permissible for [the] EPA to 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.'" 213 F.3d at 677. Because the court of appeals in *Michigan* found no "clear congressional intent to preclude consideration of cost," it concluded that the second, cost-based approach was permissible. *Ibid.* (citation omitted). As the court explained, the "term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, * * * health alone." *Ibid.* The court noted that a contrary approach, under which costs are disregarded, would produce unreasonable results. "[I]f faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a ton," analysis without consideration of cost-effectiveness would "mandate the same cutback for each." *Id.* at 676.

The *Michigan* court's endorsement of the EPA's consideration of cost-effectiveness is consistent with this Court's approach in analogous circumstances. The Court has recognized, for example, that the EPA "may consider whether it is economically or technologically possible for [a] state plan" submitted under the Act "to

require more rapid progress than it does," and that the agency may reject a state plan when it concludes that more rapid progress is feasible. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 264 n.13 (1976). The Court more recently stressed that, except where consideration of costs is expressly precluded by statute, agencies should be allowed to consider costs in construing broad qualitative standards, so that they can identify the most efficient and least burdensome mechanisms to achieve a statutory goal. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (considering a Clean Water Act, 33 U.S.C. 1251 *et seq.*, "best technology available" standard and observing that, although the technology that achieves the maximum environmental benefit could be viewed as the "best," the term also could be used to describe the technology that is "*most efficient[]*" from a cost-benefit perspective). And, citing *Michigan*, this Court has specifically noted the D.C. Circuit's conclusion that the good neighbor provision, unlike the Act's air quality-standard-setting provisions, does *not* preclude the consideration of costs. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 469 n.1 (2001).

During the rulemaking that produced the Transport Rule, the EPA again considered cost-effectiveness in defining significant contribution, but it integrated air quality analysis into its selection of the relevant cost thresholds to a *greater* degree than it had in the NO_x SIP Call upheld in *Michigan*. Pet. App. 421a. In particular, the Transport Rule employed "an analysis that accounts for *both* cost and air quality improvement to identify the portion of a [S]tate's contribution that constitutes its significant contribution to nonattainment and interference with maintenance." *Id.* at 316a (emphasis added); see note 7, *supra*.

The EPA's approach to the good neighbor provision's ambiguous and undefined terms was reasonable here for the same reasons it was reasonable in *Michigan*. Nothing in the CAA precluded the EPA from considering the ability of cost-effective controls to mitigate interstate pollution as part of its significant-contribution analysis, and its decision to do so was a reasonable construction of the Act's ambiguous terms. *City of Arlington*, 133 S. Ct. at 1871-1873; *Chevron*, 467 U.S. at 842-845; *Michigan*, 213 F.3d at 677-680. Deference is especially appropriate where, as here, an expert agency construes ambiguous statutory terms addressing matters that are "technical, complex, and dynamic." *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002). Indeed, in *Chevron* itself the Court deferred to the EPA's interpretation of an ambiguous term ("stationary source") in the Clean Air Act. See 467 U.S. at 845-866.

b. Despite its previous endorsement of the EPA's consideration of costs as part of the significant-contribution analysis, the court of appeals in this case invalidated that approach on the ground that it transgressed three statutory "red lines" the court discerned in the good neighbor provision. Pet. App. 22a; see p. 14, *supra* (cataloguing the court's "red lines"). The court's analysis was misconceived. The term "red line" suggests an express and prominent statutory limit on an agency's authority. The court below, however, identified no language in the Act that expressly established any of the three limits the court discerned.

i. *Proportionality*. The court of appeals held that the Act unambiguously requires the EPA to allocate upwind States' emission-reduction obligations on a strictly proportional basis calculated only in reference to air quality factors, so that each upwind State would

shoulder only "its own fair share." Pet. App. 25a; see *id.* at 24a-27a, 38a-39a. The court viewed the Act as unambiguously precluding the agency from basing such reduction obligations in part on cost-effectiveness.[13]

Nothing in the key statutory phrase "amounts that will * * * contribute significantly," 42 U.S.C. 7410(a)(2)(D)(i)(I), or in any other provision of the Act, compels any such strict air quality-only methodological approach. *Michigan*, 213 F.3d at 677. Interstate air pollution is a complex phenomenon, characterized by numerous upwind/downwind linkages, differing amounts of contribution to and from different States, spatial and geographic differences among States, and the complexities of ozone and $PM_{2.5}$ formation. See pp. 5-8, *supra*. The problem is thus not amenable to the kind of simplistic proportionality approach the court of appeals thought unambiguously required, and the Act provides

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[13] The court of appeals acknowledged that its "decisions in *Michigan* and *North Carolina* establish that EPA may consider cost," but it viewed that principle as applicable only when cost considerations are used "to further lower an individual State's obligations." Pet. App. 27a. It is unclear, however, how the EPA's consideration of cost even for that purpose would be consistent with the court of appeals' overall statutory analysis. The Act requires States to submit implementation plans that "prohibit[]" emissions "in amounts which will * * * contribute significantly to nonattainment" with the air quality standards. 42 U.S.C. 7410(a)(2)(D)(i). If, as the court of appeals held, the "amounts" that will have that effect must be defined without reference to the cost of achieving reductions, no other provision of the Act allows States (or authorizes the EPA to allow States) to invoke costs as a reason not to prohibit the emissions after all. The only textually sound basis for considering costs in determining what emission reductions are legally required is the rationale consistently used by the EPA—*i.e.*, that costs are relevant to whether emissions from particular States "contribute *significantly* to" downwind nonattainment.

no indication that Congress intended to dictate that methodology.

To illustrate, first consider a downwind nonattainment area (Area A) that receives relatively equal amounts of pollution contributions from three upwind States, X, Y, and Z. A strict proportionality requirement would compel the EPA to identify the portion of the problem attributable at one specific point in time to each upwind State and then divide the upwind share among States X, Y, and Z "in proportion to the size of their contributions to the downwind State's nonattainment." Pet. App. 25a. The court of appeals built its proportionality interpretation of the good neighbor provision entirely on its application to such a scenario. *Id.* at 25a-26a & n.15.

In the real world, however, interstate pollution transport does not remotely resemble the court of appeals' simple model. To demonstrate this using a variation of the above scenario, imagine that States Y and Z also contribute relatively higher amounts to nonattainment in other areas (Areas B and C, respectively), while State X contributes a relatively small (but still "significant") amount to nonattainment in a fourth area (Area D). These facts may require States Y and Z to make relatively larger emission reductions to address their contributions to Areas B and C. With respect to Area A, however, where States Y and Z constitute two-thirds of the upwind contribution, the likely result of such larger reductions would be some degree of incidental "overcontrol," as well as a lack of "proportionality" among States X, Y, and Z. Similarly, because State X is a relatively small contributor to nonattainment in Area D, the relatively larger reductions it would have to make to satisfy its share of the upwind contribution to Area A

would likely cause some lack of proportionality and some overcontrol with respect to Area D.

Even that revised hypothetical does not match the realities of interstate air pollution. In a typical real-world case, a downwind area will have far more than the three upwind contributors; those upwind contributions will vary widely in their degree of transported emissions; and each upwind State will typically contribute in varying amounts to downwind nonattainment and maintenance problems in numerous areas, not just one or two. C.A. App. 2312; Pet. App. 256a-259a, 269a-309a; see pp. 5-8, *supra*. The court of appeals' notion of "proportionality" cannot be sensibly applied under these circumstances.

The court of appeals appeared to believe that its proportionality requirement was necessary to prevent upwind States from being required to excessively reduce emissions that contribute to air quality problems in downwind States whose own emissions, by themselves, put them out of attainment with air quality standards. Pet. App. 26a n.15, 39a. Once again, this hypothetical concern does not resemble any real-world scenario. For the three air quality standards addressed in the Transport Rule, the pollution contribution from the downwind State itself was in *all* cases below the level required by the standard. Compare J.A. 177-185 (in-state contributions) with Pet. App. 166a-167a (air quality standards).[14] The court of appeals also ignored the fact

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[14] There also is no basis for the court of appeals' concern that, under the EPA's approach, an upwind State could be required to "reduce more than the State's total emissions that go out of State." Pet. App. 38a n.23 (emphasis omitted); see *id.* at 23a. The pollution that travels beyond an upwind State's borders is not separate and distinct from the pollution with local impacts. The only way to reduce 100%

that downwind nonattainment areas are subject to stringent control obligations under separate provisions of the Act, 42 U.S.C. 7501-7515, and thus typically have already undertaken vastly greater pollution-control efforts than have contributing States that have attained air quality standards within their own borders.

The court of appeals' proportionality approach also does not take into account a separate but highly relevant consideration, namely that different States (both upwind and downwind) had made very different degrees of pollution-control progress (and corresponding pollution-control investments) at the time the Transport Rule was promulgated. To illustrate the effect that such cost differentials may have, again consider the simple hypothetical discussed above, where States X, Y, and Z contribute equal amounts to downwind nonattainment in Area A. Under the court of appeals' proportional approach, each of the three States must be required to make one-third of the total needed upwind emission reductions with respect to Area A. However, if States X and Y have previously made substantial pollution-control investments (thus *already* lowering their proportionate share of interstate pollution), but State Z's investments have been negligible, the next increment of emissions control in States X and Y might be substantially more expensive than those in State Z.

There is no reason to think—and certainly no clear indication in the statutory text—that Congress intended

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of a State's contribution to a downwind area therefore would be to eliminate 100% of its emissions. As explained in the text, however, the Transport Rule was specifically designed to avoid such draconian results, and instead required only those cost-effective emission reductions in each upwind State that would achieve appropriate downwind air-quality results.

to deny the EPA authority to take facts such as these into account in defining each State's obligations, even if the effect of that approach were to reduce State Z's relatively less controlled emissions by somewhat more than one-third of the total upwind contributions to Area A. That is especially true since, in the real world, State Z would likely contribute to nonattainment and maintenance problems in other downwind areas as well, and might even have nonattainment and maintenance problems of its own.

As noted previously (p. 37, *supra*), the EPA formally evaluated approaches such as that endorsed by the court of appeals, under which the agency would "utilize air quality contribution modeling, then determine reductions in emissions based solely on the results of this modeling." C.A. App. 2308. The agency rejected such alternatives because they could impose infeasibly large and expensive emission-reduction requirements on States whose sources were already well controlled, and because it was not mathematically possible to calculate an upwind State's proportional responsibility where, as is typically the case, that State "contribute[s] to multiple downwind monitors (in multiple states) and would have a different reduction percentage for each one." C.A. App. 2309-2310, 2312. The court of appeals noted that the EPA had considered such alternatives at the proposal stage (Pet. App. 40a n.24), but made no mention of the agency's reasons for rejecting them or the fact that no party in subsequent comments had advocated the court of appeals' preferred approach (much less argued that it was statutorily compelled).

ii. *Overcontrol.* The court of appeals also erred by basing its facial invalidation of the Transport Rule on a theoretical and misplaced concern that the rule failed to

"ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary overcontrol in the downwind States." Pet. App. 39a; see *id.* at 27a-29a, 39a-41a. Again, the court of appeals cited nothing from the administrative record to support this concern, *ibid.*, but instead relied on a hypothetical of its own creation, involving two upwind States that contribute to a common downwind nonattainment problem. *Id.* at 28a n.16. The court of appeals reasoned that "[i]f 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%." *Ibid.*

This hypothetical fails for the same reason as the others invented by the court of appeals. It ignores the hundreds of overlapping linkages among dozens of upwind states and downwind areas, and the fact that these relationships can only be fairly assessed in light of emissions information, meteorological data, and a host of other technical variables. Given the complexities of interstate pollution transport and the web of interconnecting upwind/downwind linkages, the mere fact that application of the Transport Rule may not result in every downwind area stopping "on a dime" at the precise level of an air quality standard cannot be said to demonstrate impermissible "overcontrol" in any particular upwind State.

For example, in addressing upwind States' contributions to a highly polluted area in the Northeast, the EPA may incidentally bring some monitors in the Southeast below the level needed for attainment, because some of the same upwind States that contribute to the area in the Northeast also contribute to the (rela-

tively less polluted) area in the Southeast. There is, however, no way to channel the reductions aimed at reducing contribution to a particular area to ensure that they benefit that area exclusively. Nor would it make sense to reduce the upwind controls to avoid overcontrol in the Southeastern area, because such action would automatically result in undercontrol with respect to the Northeastern area.

There are, however, more refined and appropriate ways to tailor upwind control requirements to actual downwind air quality problems, and the EPA pursued such approaches here. Through extensive study of emissions data, cost data, and air quality modeling, the EPA determined the amounts of emission reductions that were available in each State at ascending levels of cost, and the resulting air quality impacts that would result from controls set at each of those possible cost levels. Pet. App. 316a-349a; C.A. App. 2945-2968. The EPA ultimately established state emission budgets at levels that were both feasible from the upwind States' perspective and appropriate in terms of the air-quality needs of the downwind areas to which they were linked.

Contrary to the court of appeals' unsupported assumption (Pet. App. 31a), in making these determinations, the EPA *did* tailor its approach to take account of the extent of the downwind nonattainment and maintenance problem to be addressed. With regard to $PM_{2.5}$ nonattainment and maintenance problems, for example, the EPA split the States subject to the rule into two groups, depending on the severity of the downwind nonattainment or maintenance problem to which they were linked. *Id.* at 356a-379a, 385a-387a. For States linked only to less severe downwind $PM_{2.5}$ nonattainment or maintenance problems, the EPA based its SO_2

emission control requirements on a relatively less stringent $500 per ton cost threshold, while States linked to more severe downwind problems were assigned emission budgets based on a higher ($2300 per ton), although still cost-effective, cost threshold starting in 2014. *Ibid.*

Although the EPA believed that the overall control regime produced beneficial and appropriate downwind results, it hardly can be said to have imposed any significant amount of avoidable over-control. Indeed, in the EPA's final air-quality modeling, several populous locations were projected to continue experiencing nonattainment or maintenance problems despite the emission reductions required by the Transport Rule. For example, four areas (including Chicago and Detroit) are projected to have 24-hour $PM_{2.5}$ nonattainment or maintenance problems, while two areas (Houston and Baton Rouge) will have ozone problems. Pet. App. 131a, 313a.

In any event, to the extent respondents believed that the EPA's approach was too stringent with regard to any particular State, they were free to raise such State-specific concerns in rulemaking comments, and to seek judicial review under the arbitrary-and-capricious standard if they viewed the agency's response as inadequate. 42 U.S.C. 7607(d)(9)(A). Instead of requiring that conventional approach, however, the court of appeals facially invalidated the rule as inconsistent with the unambiguous terms of the Act, based on the mere hypothetical possibility of such a challenge. Neither the Act itself nor any established principle of administrative law warranted that disproportionate holding.

iii. *Screening "floor."* In developing the Transport Rule, the EPA "used air quality modeling to determine which upwind states [were] projected to contribute at or above threshold levels to the air quality problems in"

downwind nonattainment and maintenance areas. Pet. App. 137a-138a. "States whose contributions [were] below the thresholds [were] not included in the Transport Rule for that [air quality standard]." *Id.* at 255a. The court of appeals expressed concern that the Transport Rule could have the ultimate practical effect of requiring some upwind States to reduce their emissions to levels below the threshold amounts that the EPA had used in its initial screening analysis. *Id.* at 35a; see *id.* at 31a-38a. In the court's view, that possibility meant that the EPA had exceeded its authority to regulate pollutants in "'amounts which will . . . contribute significantly' to downwind attainment problems." *Id.* at 36a-37a (quoting 42 U.S.C. 7410(a)(2)(D)(i)).

The court of appeals' analysis is misguided. The court did not suggest that the EPA had set out to regulate emissions that will contribute *in*significantly to downwind nonattainment, or even that the Transport Rule is likely to have that effect—only that the Rule does not eliminate that possibility. Given the uncertainties associated with amelioration of interstate pollution, a particular regulatory regime may be a reasonable and lawful means of preventing emissions in "amounts which will * * * contribute significantly" to downwind nonattainment, even if it incidentally sweeps in some emissions that would not have that effect.

In any event, the court of appeals' concern was entirely hypothetical. The court cited nothing in the record showing that the scenario it hypothesized was a realistic possibility. Pet. App. 95a n.15 (Rogers, J., dissenting). And because no party advanced that argument in the administrative proceedings, the EPA did not address it in the rulemaking. As noted above, when the EPA did analyze the question during the preparation of

its court of appeals brief, it found that such a scenario was highly unlikely to occur. See p. 37, *supra*. If the course of events that the court of appeals described unexpectedly materialized, and if a party believed it led to an arbitrary result with respect to the relevant State, the party would have, at most, the basis for a focused arbitrary-and-capricious challenge, not support for wholesale invalidation of the Transport Rule.

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In sum, the court of appeals should have deferred to the EPA's reasonable interpretations of the Act's broad and ambiguous terms, rather than finding the agency's methodology to be unambiguously foreclosed by statutory "red lines" of the court's own creation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 7410 provides:

State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, 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 ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such sec-

ondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emis-

sions 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, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State

has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it imple-

ments or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or

other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)[1] of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)[1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include

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[1] See References in Text note below.

any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or

assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any

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[1] See References in Text note below.

plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(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 finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, 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.

(2)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent

the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such

area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101-549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement

under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Admin-

istrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10[2] of this title, as in effect before August 7, 1977, or section 7413(d)[2] of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

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[2] See References in Text note below.

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10[2] of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the

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[2] See References in Text note below.

conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)[2] of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

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[2] See References in Text note below.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required

to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the

Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of

such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect

immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(*o*) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem neces-

sary to assess the development[3] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

2. 42 U.S.C. 7607(b) and (d) (2006 & Supp. V 2011) provides:

Administrative proceedings and judicial review

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(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the

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[3] So in original.

[3] So in original.

[1] See References in Text note below.

Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial

review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

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(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsec-

tion applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review

Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments,

criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a

determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.