ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,
v.

United States Environmental Protection Agency, *et al.*,
Respondents.

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

JOINT OPPOSITION OF STATE AND LOCAL PETITIONERS TO MOTIONS TO LIFT THE STAY

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The State of Kansas and other undersigned State and Local Petitioners (collectively, the "State and Local Petitioners") file this separate joint opposition to the motions of EPA and certain Respondent-Intervenors (Doc. Nos. 1499505 and 1502200) to highlight the very real consequences to the States if the stay of the Transport Rule is lifted during the limited period of time necessary for this Court to decide the issues that remain unresolved following *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). Lifting the stay before this litigation is complete as proposed by EPA and Respondent-Intervenors (collectively, "ALA") would upset the status quo, causing substantial regulatory burden and confusion. That disruption, standing alone, counsels against lifting the stay of the Transport Rule. It is only compounded by the fact that Petitioners are likely to succeed on the merits of the unresolved issues. The net result of lifting the stay is likely to be not one, but three periods of regulatory disruption and administrative burden for the States. And for no good reason. The Clean Air Interstate Rule (CAIR) is in effect and is working. It can continue to remain in place during the limited period of time necessary for this Court to resolve the issues remaining in this case.

BACKGROUND

EPA and ALA's description of the relevant procedural and substantive events is inaccurate. Industry and Labor Petitioners, in their opposition filed today, catalogue several ways in which EPA and ALA have mischaracterized the Supreme Court's holding as it relates to the overcontrol and one-percent threshold issues. But

that is not all. EPA and ALA both downplay the important federalism issues that remain—including State and Local Petitioners' challenge to EPA's use of Clean Air Act (CAA) section 110(k)(6) to disapprove retroactively state implementation plans (SIPs) previously approved under CAIR, and the challenges by Kansas and Georgia to the disapprovals of their good-neighbor submissions and the federal implementation plans (FIPs) promulgated for those States.

ARGUMENT

I. State and Local Petitioners Are No Less Likely to Prevail on the Merits Than They Were When the Stay Was Originally Entered.

EPA's motion to lift the stay is based on the flawed premise that the Supreme Court's decision fully resolved the petitions to review the Transport Rule. It did not. Substantial issues remain, and Petitioners are likely to prevail on those issues.

A. EPA Invocation of CAA Section 110(k)(6) Was Unlawful and Fatally Undermines the Transport Rule in Its Entirety.

State and Local Petitioners are likely to prevail on their argument that it was unlawful for EPA to use section 110(k)(6) of the CAA, 42 U.S.C. § 7410(k)(6), to impose FIPs on the many States with EPA-approved CAIR SIPs. This argument was briefed in this Court earlier and in the Supreme Court.[1] This Court did not resolve

[1] *See* State & Local Pet'rs' Opening Br. at 24-31 (Doc. No. 1364206); Br. for the State & Local Resp'ts at 25-39, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182). The parties' Supreme Court briefs are available at http://www.scotusblog.com/case-files/cases/environmental-protection-agency-v-eme-homer-city-generation/.

the issue, and the Supreme Court declined to address the argument in the first instance.[2]

By the time it issued the Transport Rule, EPA had approved good-neighbor CAIR SIPs submitted by 22 of the 27 Transport Rule States. *See* 76 Fed. Reg. 48,208, 48,220–21 (Aug. 8, 2011). As this Court has already noted, EPA was rightly concerned that these approvals would preclude EPA from imposing Transport Rule FIPs on those States with respect to the 1997 national ambient air quality standards (NAAQS). *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 31 n.29 (D.C. Cir. 2012). To overcome this concern, EPA resorted to CAA section 110(k)(6), 42 U.S.C. § 7410(k)(6), a "Corrections" provision intended merely to "enable EPA to deal promptly with clerical errors or technical errors," rather than offer EPA a route "to reevaluate its policy judgements." Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 ENVTL. L. 1843, 1924–25 (1991); *see EME Homer*, 696 F.3d at 31 n.29. As was addressed in earlier briefs here and at length in Supreme Court merits briefing, EPA's invocation of section 110(k)(6) was a bridge too far. Br. for the State & Local Resp'ts at 25–34, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182); *EME Homer*, 134 S. Ct. at 1599 n.12 (2014).

[2] *See EME Homer*, 134 S. Ct. at 1599 n.12.

Section 110(k)(6) allows "corrections" only when a past EPA action "was in error," 42 U.S.C. § 7410(k)(6), meaning that the past action was erroneous based on the law in existence at the time the action was finalized. *See Texas v. EPA*, 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("Section 110(k)(6) can be used to retroactively disapprove a SIP only if the SIP was out of compliance with the Act or EPA regulations when the SIP was originally approved.").[3] Because the law in existence when EPA approved these 22 States' SIPs compelled their approval, section 110(k)(6) could not be invoked to retroactively disapprove CAIR SIPs. CAIR—a binding legislative rule—required States to submit SIPs meeting the good-neighbor SIP obligations imposed in CAIR for the 1997 NAAQS for ozone and $PM_{2.5}$. EPA's approval of those proposed SIPs was not in "error"; it was mandated under section 110(k)(3). *See* 42 U.S.C. § 7410(k)(3) ("Administrator shall approve [a] submittal … if it meets … applicable requirements of [the Act]").

This Court's decision in *North Carolina*[4] could not, as EPA has argued, provide support of an argument that approvals of CAIR SIPs were erroneous. *See* Br. for Fed. Pet'rs 32-33, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182). To the contrary, EPA, supported by a host of States (including States on both sides of this litigation (*e.g.*, Ohio and New York)) asked this Court to keep CAIR and the previously

[3] State and Local Petitioners are aware of no contrary authority on this provision.

[4] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam).

approved CAIR SIPs in effect and enforceable. *See* Br. of Amicus Curiae State of Ohio in Support of EPA for Reh'g or Reh'g En Banc at 5-8, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (No. 05-1244) (Doc. No. 1147973); Br. of Amici States of New York, et al. in Support of Staying Vacatur of CAIR at 2-6, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (No. 05-1244) (Doc. No. 1148253). This Court agreed, and, as a result, CAIR and all CAIR SIPs continued in effect while EPA developed a new program that would supersede CAIR. *See North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam). Accordingly, as this Court previously noted, EPA continued to approve CAIR SIPs following *North Carolina*. *See EME Homer*, 696 F.3d at 31 n.29; 76 Fed. Reg. at 48,221. These approvals were not errors—they were integral parts of the interim plan that EPA requested and this Court approved.

This interpretation of the word "error," which would allow EPA to revisit old regulatory decisions every time EPA refines its understanding as to what is necessary to attain or maintain relevant NAAQS, would render section 110(k)(5) superfluous. Under EPA's reading, section 110(k)(6) would be applicable in every circumstance described in section 110(k)(5). Any time EPA concludes that an EPA-approved SIP is "inadequate" based on EPA's current understanding of the Act, EPA could simply declare its earlier approval an "error" and impose a FIP without complying with any of the requirements of section 110(k)(5). The statute cannot be interpreted that way. *See Davis Cnty. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1404 (D.C. Cir. 1996) ("[I]t is

of course a well-established maxim of statutory construction that courts should avoid interpretations that render a statutory provision superfluous.").

Finally, as this Court has already observed, "EPA made [its section-110(k)(6)] 'corrections' without using notice and comment rulemaking, despite the statutory requirement that EPA make any corrections 'in the same manner as the approval.'" *EME Homer*, 696 F.3d at 31 n.29 (quoting 42 U.S.C. § 7410(k)(6)); *see* 76 Fed. Reg. at 48,221. Specifically, EPA did not engage in the same notice-and-comment rulemaking process it followed in approving the 22 CAIR SIPs. In the Supreme Court, EPA tried to excuse its failure to follow section 110(k)(6)'s "in the same manner" command by invoking the "good cause" exception of 5 U.S.C. § 553(b)(B). Reply Br. for the Fed. Pet'rs at 10 n.5, *EME Homer*, 134 S. Ct. 1584 (2014) (No. 12-1182). But a showing of good cause would only excuse EPA from the notice-and-comment requirement imposed by the APA. Section 110(k)(6) independently imposes the "in the same manner" requirement, which here would mandate notice-and-comment rulemaking, and there is no "good cause" exception to section 110(k)(6).

For each of these reasons, the State and Local Petitioners are likely to prevail in their section 7410(k)(6) argument. *See EME Homer*, 696 F.3d at 31 n.29. Should Petitioners prevail on this argument, a substantial portion of the Transport Rule's FIPs would be unlawful. The Transport Rule regional trading programs for the 1997

NAAQS could not function with 22 of the 25 covered States excluded from the program.

B. Kansas and Georgia Are Likely to Prevail in Their Challenges to EPA's Disapproval of Their SIPs and Thus Are Likely to Prevail on Challenges to Their Transport Rule FIPs.

The States of Kansas and Georgia are likely to prevail in their challenges to EPA's disapprovals of their submissions under the 2006 $PM_{2.5}$ NAAQS and to their Transport Rule FIPs. EPA judged these good-neighbor submissions for the 2006 $PM_{2.5}$ NAAQS using a single, unlawful criterion—whether EPA's final Transport Rule modeling resulted in the State being included in, or excluded from, the Rule.

A comparison of good-neighbor SIPs submitted by Kansas (included in the Transport Rule) and by Delaware (not included in the Transport Rule) illustrates EPA's approach. Each of these submittals consisted of demonstrations that the State did not contribute significantly to nonattainment or interfere with maintenance. EPA disapproved Kansas's submittal based on Kansas's projected inclusion in the final Transport Rule, 76 Fed. Reg. 43,143, 43,145 (July 20, 2011), and EPA approved Delaware's submittal because Delaware was projected to be excluded from the Transport Rule, 76 Fed. Reg. 53,638 (Aug. 29, 2011). In the Delaware approval, EPA made clear that, if Delaware had been subject to the final Transport Rule, its SIP would have been disapproved. See *id.* at 53,638-39.

The Kansas and Delaware examples illustrate that EPA judged the adequacy of the good-neighbor SIP submittal by any potential Transport Rule State not on the

basis of EPA rules or guidance applied by the States in developing their SIPs, but instead solely on the basis of EPA's projection of whether the State might be included in the final Transport Rule.[5] EPA's use of a legislative rule to establish a retroactive standard for determining SIP adequacy was unlawful. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

For these reasons, Kansas and Georgia are likely to prevail on the merits of their challenge to the disapprovals of their 2006 $PM_{2.5}$ good neighbor submissions. And, without a valid disapproval, EPA lacked statutory authority to impose Transport Rule FIPs on these States.

[5] Similarly, the regulatory consequence of failing to submit a good-neighbor SIP revision following promulgation of the 2006 $PM_{2.5}$ NAAQS depended entirely on the outcome of EPA's Transport Rule rulemaking. On June 9, 2010, EPA found that 29 States and territories had failed to submit good-neighbor SIP revisions for the 2006 $PM_{2.5}$ NAAQS. 75 Fed. Reg. 32,673 (June 9, 2010). Seventeen of those States and territories were not identified in the Transport Rule as "significantly contributing" to nonattainment of the 2006 $PM_{2.5}$ NAAQS in States within the Transport Rule region. Tellingly, EPA has not imposed a FIP on any of those 17 States. Indeed, EPA in 2013 determined that, in light of its Transport Rule findings, one of those States—North Dakota—need not modify its SIP at all to address the good neighbor provision for the 2006 $PM_{2.5}$ NAAQS. 78 Fed. Reg. 45,457, 45,458 (July 29, 2013).

C. EPA Did Not Give Independent Meaning to the Interfere-With-Maintenance Prong of the Good Neighbor Provision.

State and Local Petitioners are also likely to succeed on their challenge to EPA's approach to the interfere-with-maintenance prong of the good neighbor provision. As explained more fully in the original merits briefing, EPA ignored its long standing distinction between "nonattainment" SIP requirements and "maintenance" SIP requirements and failed to satisfy this Court's mandate in *North Carolina* to give independent meaning to the interfere-with-maintenance requirement. *See* State & Local Pet'rs' Opening Br. at 37-42 (Doc. No. 1364206) (citing *North Carolina v. EPA*, 531 F.3d 896, 909-10, 930 (D.C. Cir. 2008) (per curiam)). This Court did not need to reach that argument, but it nonetheless observed:

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

EME Homer, 696 F.3d at 27 n.25. By using the same approach for both the "contribute significantly" and "interfere with maintenance" prongs, and ignoring what was happening to air quality in linked maintenance areas, EPA failed to establish

criteria grounded in this "interfere with maintenance" standard and violated the *North Carolina* mandate.

D. State Petitioners Are Likely to Succeed on Individual As-Applied Challenges.

Finally, State and Local Petitioners are likely to succeed on individual as-applied challenges to the Transport Rule. For example, Texas has demonstrated that the Transport Rule's treatment of Texas was in excess of EPA's statutory authority in multiple respects, and EPA has consistently declined to provide a substantive response on this point. *See* Texas's Combined Resp. in Opp'n to EPA's Mot. to Govern Future Proceedings & Mot. for Summ. Vacatur (Doc. No. 1503258). *See also* Pet'r Wisconsin's Mot. for Stay at 7, 9-13 (Doc. No. 1337415); Wisconsin Mot. to Govern Further Proceedings (Doc. No. 1500945); Louisiana's Motion For Stay, or, In the Alternative, For Expedited Review (Doc. No. 1334498) at 6-9.

Finally, Texas and other States have valid arguments that EPA violated notice-and-comment requirements. *See* State & Local Pet'rs' Opening Br. at 42-55 (Doc. No. 1364206).

II. The Balance of Harms Strongly Favors Leaving the Stay in Place.

A. Rulemaking Is Necessary Before the Transport Rule Can Be Implemented.

Unlike the *Michigan* case, where the Court lifted its stay of the NOx SIP Call after the litigation was complete, Order, *Michigan v. EPA*, No. 98-1497 (D.C. Cir. June 22, 2000), litigation of these petitions is not complete. And, contrary to EPA's claim

(Resp'ts' Mot. to Lift the Stay at 15-16 (Doc. No. 1499505)), this Court cannot here restore the status quo by revising one or two compliance deadlines. Several provisions of the Transport Rule are premised on a compliance schedule for controls that superseded reductions that otherwise would have been required under CAIR. Under that schedule, Phase 1 was to take effect on January 1, 2012, and Phase 2 two years later. To restore Transport Rule compliance deadlines, this litigation must be completed and new rulemaking undertaken to consider the effect of CAIR reductions over the past three years on various provisions of the Transport Rule that were explicitly premised on the original compliance schedule. The following are but a few examples of the regulatory provisions that would be implicated and the policy questions that would have to be resolved before the Rule could be re-imposed:

- Will EPA reevaluate "planned units" in setting new-unit allowance set-asides? In the Transport Rule, EPA indicated it would set aside two percent of each state's budget for new units and (depending on the state) up to an additional six percent for new units that were "planned" to be built. 76 Fed. Reg. at 48,284. Will, or should, EPA determine that the basis for its calculation of the planned-unit percentage for individual states needs to be reassessed—and, in at least some cases, revised—given current circumstances that may differ significantly from those that existed in 2011?

- When will States be allowed to submit SIPs (or "abbreviated" SIPs) to replace the Transport Rule FIPs? According to the Transport Rule, States would have been permitted to submit (a) abbreviated SIPs (covering unit-level allowance allocations only) for 2013 and (b) full SIPs for 2014 and later years. *Id.* at 48,328-29.

- Will, or should, EPA change its approach to allocating allowances to existing units? Under the Transport Rule, existing units' allowance allocations reflect their pro rata shares of State budgets, using each unit's historic heat input (the average of the unit's three highest non-zero annual

heat input values within a 2006-2010 baseline period), subject to a maximum allocation equal to the unit's maximum annual emissions during 2003-2010. *Id.* at 48,289-90. Will, or should, these emission baseline periods change due to the passage of time?

- Will the retired-unit provision change? The Transport Rule states that allowances that would otherwise have been allocated to a unit that does not operate for two consecutive years will be allocated instead to the State's new-unit set-aside "in the fifth year after the first . . . year [of non-operation]." *Id.* at 48,389. Would not this provision have to be reexamined and, presumably, revised to account for the passage of three years in which the Transport Rule has not been in effect?[6]

If questions such as these, which are basic to the Transport Rule's implementation, are not resolved in advance of implementation of the Transport Rule, the result will be, at best, confusion and uncertainty among states and regulated utilities.

In its motion, EPA acknowledges that "[t]he Rule contains additional deadlines [in addition to the 2012 Phase 1 and 2014 Phase 2 compliance deadlines] applicable to EPA, the states, and utilities for reporting and other generally ministerial actions." Resp'ts' Mot. to Lift the Stay at 14 n.5 (Doc. No. 1499505). EPA asserts, however, that it "would . . . tak[e] any necessary administrative action to amend the existing regulatory text in the Code of Federal Regulations to be consistent with this Court's action." *Id.* This vague and general statement raises a host of issues regarding how, when, and with respect to which provisions of the Rule EPA would make such "amend[ments]." It is unclear what sort of administrative action EPA anticipates taking, but anything short of public notice-and-comment rulemaking would be

[6] *See also* Ex. 1, Decl. of Robert Hodanbosi at ¶¶ 6-8.

insufficient and unlawful. The many complex issues that would necessarily be raised affect many entities—some of which are participating in these cases but many of which are not before the Court. All affected entities are entitled to participate fully and meaningfully in the development of any revisions to the Rule.

ALA goes even further than EPA in its motion by asking this Court to effect, by judicial order, a restructuring of the Rule to eliminate the first of the two phases of Transport Rule implementation. That this would be a major judicial rewriting of the Rule is plain. EPA designed the Transport Rule to take effect in two phases, with the first, and less stringent, phase being in effect for the first two years of the program, followed thereafter by the more stringent second phase; this was an integral part of the Rule. *See* 76 Fed. Reg. at 48,277-84. Moreover, EPA made clear the "assurance levels," or "variability limits," which set further individual-state caps on emissions and use of emission allowances, would not take effect before the second phase. Although the Rule initially would have imposed assurance levels at the beginning of Phase 1, *id.* at 48,294, EPA revised those provisions to make them effective only in the second phase, 77 Fed. Reg. 10,324, 10,330-32 (Feb. 21, 2012). This important revision reflected a carefully considered determination by EPA that deferring these limits by two years would "promote the development of allowance market liquidity, thereby smoothing the transition from the [CAIR] programs." *Id.* at 10,326.

Not only does ALA ask this Court to make this fundamental change to the Transport Rule in the face of the exercise of expert agency judgment to the contrary,

and without benefit of notice-and-comment rulemaking, it also attempts to circumvent the time limits in the CAA's judicial-review provisions. Neither ALA nor anyone else challenged in this Court, within the 60-day period allowed by law, 42 U.S.C. § 7607(b)(1), EPA's February 2012 decision that the variability limits should not apply until the program had been operating for two years. ALA's untimely request to restructure the Transport Rule should not be entertained.

B. There Is No Valid Public Health Reason to Lift the Stay.

There is no valid public health reason to lift the stay during this Court's remand proceedings. Independent of the Transport Rule, there have been—and there will continue to be—dramatic and lasting reductions in SO_2 and NOx emissions from electric generating units (EGUs) and air quality improvement that results in widespread attainment of the NAAQS that are addressed by the Transport Rule.

For example, according to EPA's most recent air status and trends report, national annual and 24-hour $PM_{2.5}$ concentrations declined by 24 percent and 28 percent, respectively, between 2001 and 2010, and national 8-hour-average ozone concentrations declined by 13 percent in the same period.[7]

Moreover, most of the downwind (or "receptor") air quality monitors that EPA believed would fail to attain and maintain compliance with ambient air quality standards in the absence of Transport Rule-mandated emission reductions are, in fact,

[7] *See* EPA, EPA-454/R-12-001, Our Nation's Air: Status and Trends Through 2010, at 1 (Feb. 2012), *available at* http://www.epa.gov/airtrends/2011/.

attaining and maintaining compliance with applicable air quality standards. For example, at the time it promulgated the Transport Rule, EPA projected that 16 downwind monitors would, without implementation of the Transport Rule, fail to attain or maintain compliance with the 1997 annual $PM_{2.5}$ NAAQS. *See* 76 Fed. Reg. at 48,233-34 (Tables V.C-1 and V.C-2). But in fact, EPA has re-designated 13 of the 16 sites as attaining that NAAQS,[8] and EPA has published a final determination of attainment of air quality for the other three.[9] Thus, *all* of these sites are in areas that attained the NAAQS without the Transport Rule. In addition, when it promulgated the Transport Rule, EPA projected that 41 downwind sites would be unable to attain or maintain compliance with the 2006 24-hour $PM_{2.5}$ NAAQS. *Id.* at 48,235 (Tables V.C-3 and V.C-4). Since then, however, 17 of those sites are in areas that have been redesignated attainment,[10] and EPA has published a final determination of attainment

[8] 78 Fed. Reg. 4341 (Jan. 22, 2013) (Jefferson County, Alabama, receptors 10730023 and 10732003); 78 Fed. Reg. 41,698 (July 11, 2013) (Marion County, Indiana, receptors 180970081 and 180970083); 78 Fed. Reg. 53,272 (Aug. 29, 2013) (Wayne County, Michigan, receptor 261630033); 78 Fed. Reg. 57,270 (Sept. 18, 2013) (Cuyahoga County, Ohio, receptors 390350038, 390350045, 390350060, and 390350065); 76 Fed. Reg. 80,253 (Dec. 23, 2011) (Hamilton County, Ohio, receptors 390610014, 390610042, 390617001, and 390618001).

[9] 76 Fed. Reg. 76,620 (Dec. 8, 2011) (Fulton County, Georgia, receptor 131210039); 77 Fed. Reg. 38,183 (June 27, 2012) (Madison County, Illinois, receptor 171191007); 78 Fed. Reg. 63,881 (Oct. 25, 2013) (Allegheny County, Pennsylvania, receptor 420030064).

[10] 78 Fed. Reg. 5306 (Jan. 25, 2013) (Jefferson County, Alabama, receptors 10730023 and 10732003); 78 Fed. Reg. 53,272 (Aug. 29, 2013) (St. Clair County, Michigan, receptor 261470005, Washtenaw County, Michigan, receptor 261610008,

(Continued . . . .)

air quality for an additional six sites.[11] Fifteen of the receptor sites EPA previously projected to be nonattainment or maintenance sites were *never* designated nonattainment, and the most recent available data show they in fact have air quality that attains the NAAQS.[12] The remaining three receptor sites are in the Liberty-Clairton nonattainment area in Allegheny County, Pennsylvania.[13] In the Transport

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and Wayne County, Michigan, receptors 261630015, 261630016, 261630019, and 261630033); 78 Fed. Reg. 57,270 (Sept. 18, 2013) (Cuyahoga County, Ohio, receptors 390350038, 390350045, 390350060, and 390350065); 78 Fed. Reg. 57,273 (Sept. 18, 2013) (Jefferson County, Ohio, receptor 390811001); 79 Fed. Reg. 15,019 (Mar. 18, 2014) (Brooke County, West Virginia, receptor 540090011); 79 Fed. Reg. 22,415 (Apr. 22, 2014) (Milwaukee County, Wisconsin, receptors 550790010, 550790026, and 550790043).

[11] 79 Fed. Reg. 25,014 (May 2, 2014) (Allegheny County, Pennsylvania receptors 420030093, 420031008, and 420031301 and Beaver County, Pennsylvania receptor 420070014); 77 Fed. Reg. 18,922 (Mar. 29, 2012) (Lancaster County, Pennsylvania receptor 420710007 and York County, Pennsylvania receptor 421330008).

[12] According to monitor value data available on EPA's Air Data website (http://www.epa.gov/airdata/), air quality at all receptor sites for which data were available for 2011, 2012, and 2013—the three most recent years for which final data exist—attains the NAAQS. There are no monitor values for 2011, 2012, or 2013 available on EPA's AirData website for three of the receptor sites projected in the Transport Rule to be nonattainment or maintenance sites in 2012 for the 2006 24-hour $PM_{2.5}$ NAAQS: receptor 171190023 in Madison County, Illinois; receptor 180970066 in Marion County, Indiana; and receptor 390618001 in Hamilton County, Ohio. However, data from EPA's Air Quality Statistics Report, which provides the highest reported values during the year by all monitoring sites county-wide, indicate that air quality in these counties attains the NAAQS. *See* http://www.epa.gov/airdata/ (98^{th} percentile value, averaged over 3 years, is 28.67 $\mu g/m^3$ for Madison, 32.33 $\mu g/m^3$ for Marion, and 27 $\mu g/m^3$ for Hamilton – all below the 35 $\mu g/m^3$ level of the NAAQS).

[13] Allegheny County contains two separate areas for purposes of area designations—the Pittsburgh-Beaver Valley and Liberty-Clairton Area. *See*

(Continued . . . .)

Rule, EPA projected that Liberty-Clairton would remain nonattainment for the 24-hour $PM_{2.5}$ NAAQS *even after implementation of the Transport Rule* due to contributions from local emission sources that are not addressed by CAIR and the Transport Rule—not due to the impact of interstate transport of EGU emissions that are the subject of those rules. *See Id.* at 48,210, 48,247 n.40 ("[T]he Liberty-Clairton receptor in Allegheny county [is] significantly impacted by local emissions from a sizeable coke production facility and other nearby sources.").

These air quality improvements are the result, in significant part, of EGUs' expenditure of billions of dollars to install pollution-control equipment, to switch to lower-emitting fuels, and to take other measures to meet enforceable emission reduction requirements. *See, e.g.,* Ex. 1, Decl. of Robert Hodanbosi ¶¶ 6-11 (describing reductions by EGUs in Ohio). Further reductions of EGUs' SO_2 and NOx emissions will be achieved soon, due to implementation of the next phase of CAIR in January 2015 and implementation of other CAA programs (*e.g.*, EPA's Mercury and Air Toxics Standards (MATS) for EGUs, with compliance dates in 2015 and 2016). 77 Fed. Reg. 9304, 9465, 9407 (Feb. 16, 2012) (promulgating MATS and

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http://www.epa.gov/oar/oaqps/greenbk/rncs.html#PENNSYLVANIA. EPA published a final rule on May 2, 2014 determining that the Pittsburgh-Beaver Valley Area attains the 2006 24-hour $PM_{2.5}$ NAAQS "based upon quality-assured and certified ambient air monitoring data for 2010-2012." 79 Fed. Reg. at 25,015; *see also* note 11 *supra* (citing the May 2, 2014 rule redesignating the Pittsburgh-Beaver Valley Area to attainment with respect to the Allegheny County receptors located in that area).

setting 2015 compliance date and authority to request, on a facility-by-facility basis, a one-year extension of that date).

Under these circumstances, no basis exists for EPA's or ALA's conjecture that retaining the current stay of the Transport Rule for the limited period of the remand proceedings will reverse already-accomplished emission reductions and NAAQS attainment. To the contrary, the air-quality improvements described above will continue during (and beyond) the remand proceedings in this Court.[14]

C. State and Local Petitioners Will Suffer Irreparable Harm and Considerable Administrative Expense If The Stay Is Lifted.

As explained above, by exceeding its authority in issuing Transport Rule FIPs, EPA invaded State sovereign prerogatives that are preserved by the plain text of the CAA. An intrusion on State sovereignty is an irreparable injury. *See Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). By unlawfully disapproving SIPs, States were prevented from determining measures that could implement the rule in the way that makes the most sense for each specific State. For example, States might sensibly have concluded that NOx reductions should be effected through non-EGU reductions, given that EGUs account for a relatively small percentage of NOx emissions. States might also have opted for an allowance allocation method more

[14] The parties recently proposed expedited remand briefing schedules: 115 days under Petitioners' proposals (Industry/Labor Pet'rs' Mot. at 8 (Doc. No. 1500963); State & Local Pet'rs' Mot. at 6 (Doc. No. 1500966)); 125 days under EPA's proposal (Doc. No. 1500830 at 2-3, 11).

precisely tailored for local conditions, rather than EPA's one-size-fits-all method that in some instances resulted in retired, nonfunctioning units receiving allowances. EPA's actions prevented the exercise of these state prerogatives and lifting the stay will frustrate efficient implementation of ongoing good neighbor reductions by States.

The practical consequences of lifting the stay favor preserving the status quo. Today, the status quo for regulation of interstate transport of the pollutants at issue here is CAIR. Nearly all of the States governed by the Transport Rule are subject to restrictions on interstate transport under CAIR and have approved CAIR implementation plans already in place. Replacement of CAIR will require States to expend considerable administrative resources to meet the requirements of any new regime and will require EPA to recognize the intertwined relationship between CAIR and any successor rule in fashioning that transition. *See* Ex. 1, Decl. of Robert Hodanbosi (Ohio); Ex. 2, Aff. of Keith Baugues (Indiana); Ex. 3, Aff. of Ronald Gore (Alabama); Ex. 4 Aff. of Bart Sponseller (Wisconsin). If the stay remains in place, these States will incur this expense and administrative burden only once—either by transitioning to the Transport Rule, if it is upheld; or by transitioning to whatever new rule EPA promulgates if the Transport Rule is vacated. But under the proposal advanced by EPA and ALA, the States will experience this administrative burden as many as three times—(1) to comply with the Transport Rule by January 1, 2015; (2) to shift back to CAIR if the Transport Rule is vacated; and then (3) to shift from CAIR to whatever new rule is promulgated by EPA.

So in addition to the irreparable intrusion on State sovereignty, lifting the stay would impose regulatory uncertainty and administrative burden on the States.

CONCLUSION

For the foregoing reasons, the motions by EPA and Respondent-Intervenors to lift the stay should be denied.

Dated: July 31, 2014

Respectfully submitted,

/s/ Jeffrey A. Chanay

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, I caused the foregoing Joint Opposition of State and Local Petitioners to Motions to Lift the Stay to be served by the Court's CM/ECF system on all registered counsel through the Court's CM/ECF system.

/s/ Jeffrey A. Chanay
Counsel for Petitioner State of Kansas

ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,

v.

United States Environmental Protection Agency, *et al.*,

Respondents.

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

EXHIBIT 1

DECLARATION OF ROBERT HODANBOSI

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

EME HOMER CITY GENERATION, L.P.,	:	
	:	
Petitioner,	:	
	:	
v.	:	**No. 11-1302**
	:	**(and consolidated cases)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	:	
	:	
Respondents.	:	

DECLARATION OF ROBERT HODANBOSI

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

2. I am Chief of Ohio EPA's Division of Air Pollution Control ("DAPC"). The DAPC ensures Ohio's compliance with the federal Clean Air Act; reviews, issues and enforces permits for installation and operation of sources of air pollution; and operates an extensive outdoor air monitoring network. These activities are part of the DAPC's mission to attain and maintain air quality for the protection of human health and the environment.

3. As Chief of the DAPC, I supervise all the activities of the division, including permitting, enforcement, and development of our State Implementation Plan ("SIP') and support information. For SIP development specifically, I oversee the administration of state rule-making for air pollution control as well as air dispersion modeling and modeling review. This has also included management of Ohio's implementation of the Clean Air Interstate Rule (CAIR).

4. I have been employed by the Ohio EPA for 41 years, and have been Chief of the DAPC for 22 years. Prior to becoming Chief, I worked in the development of State Implementation Plans and permit reviews. My education includes a Bachelor of Chemical Engineering Degree and a Master of Science Engineering Degree from Cleveland State University.

5. I oversaw the development of Ohio's SIP submittals for interstate transport, as well the Ohio EPA's response to the proposed Cross State Air Pollution Rule, also known as the Transport Rule. I have been involved in Ohio's management of interstate transport of air pollution for over 10 years and am very familiar with the issues involved.

6. During the stay of the final Transport Rule, Ohio has continued to comply with the emissions budgets and allowances set forth in CAIR. Thus the state further reduced emissions of

both nitrogen oxides ("NOx") and sulfur dioxide ("SO_2"), among other pollutants. In order to achieve these reductions, utilities within the state have shut down uncontrolled electric generating units ("EGUs"), installed controls, or switched fuel sources in other units.

7. After the Transport Rule was finalized, nine EGUs within the state have shutdown, with six more planned before U.S. EPA's proposed compliance deadline for Phase 1 (2015), fourteen more planned during Phase 1, and eleven[1] more planned six months before the beginning of Phase 2 (2017). These shutdowns were unaccounted for in U.S. EPA's budget allocation in the original Transport Rule. A unit's allowances can no longer be sold or traded two years after the unit is shut down, so Ohio's budget in the Transport Rule includes allowances that actually no longer exist, or will not exist by Phase 2 of the Transport Rule's deadlines.

8. The retirements that have already occurred since the final Transport Rule and that are planned for the next two years have significantly decreased the generating capacity of Ohio's electrical grid. Of the 22,700 megawatts of generating capacity that existed at the time the Transport Rule was finalized for these EGUs, only 15-16,000 megawatts of generating capacity will exist after all of the planned shut downs. This is a loss of 27-34% of available generation in Ohio and Ohio is already a net-importer of electricity.

9. After all the planned shut downs occur, all of Ohio's remaining coal burning fleet will have state-of-the-art controls in place for NOx and SO2, except for one small municipal EGU representing 0.3 % of the megawatts remaining.

10. After all the planned shut downs occur, some of Ohio's remaining well-controlled coal burning fleet may be required to operate more than historically in order to ensure reliability and meet electricity demand. This level of operation could be above those levels used to determine unit allocations under the Transport Rule.

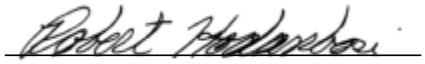
11. While the Transport Rule does provide assurance provisions allowing a State to exceed its Phase 2 emissions budget by up to 10%, the use of assurance provisions does come with significant penalties and costs, such as purchasing and using two allowances for each allowance needed.

12. The emissions budgets for Ohio will be difficult to meet. Even with all major uncontrolled units retired, and with planned conversions to natural gas complete, after the two-year period of availability of shutdown allowances the State will have an estimated allowance shortfall of 17% for SO_2, 10% for annual NOx, and 9% for ozone season NOx. This means the State will be out of compliance with the Transport Rule. Although the Transport Rule does allow assurance provisions that give an additional 10% leeway in the budget, these provisions come with penalties and will still not be adequate to cover the allowances needed for SO_2, and if some of these EGUs increase operations, will not be adequate to cover allowances needed for NOx. Some EGUs in Ohio will be forced into non-compliance for violation of the Clean Air Act or will be forced to reduce operations and potentially cause reliability issues.

[1] Four units may convert to natural gas or reactive power.

13. The stringent requirements of the Transport Rule as it currently exists would require utilities in Ohio to makes significant operational decisions that would have lasting implications, including possible further decommissioning of plants. It will be difficult, if not impossible for utilities to plan effectively for these significant decisions if the stay of the Transport Rule is lifted while significant portions of the Transport Rule are still being litigated and could be subject to change.

SO DECLARED:



ROBERT HODANBOSI, Chief
Ohio EPA, Division of Air Pollution Control

DATED: July 31, 2014

ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,

v.

United States Environmental Protection Agency, *et al.*,

Respondents.

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

EXHIBIT 2

AFFIDAVIT OF KEITH BAUGUES

STATE OF INDIANA)
)
COUNTY OF MARION)

Affidavit of Keith Baugues

My name is Keith Baugues and I make this affidavit as part of the submissions in the matter currently before the United States Court of Appeals for the District of Columbia entitled EME Homer City Generation, L.P., *et al.* v. United States Environmental Protection Agency, *et al.*, No. 11-1302 and consolidated cases (COMPLEX).

1. My name is Keith Baugues and I reside in Fishers, Hamilton County, Indiana.

2. I am the Assistant Commissioner for the Office of Air Quality of the Indiana Department of Environmental Management (IDEM) and I have reviewed "EPA's Motion to Govern Proceedings" that proposes to lift the Court's stay of the Environmental Protection Agency's (EPA) implementation of the Cross State Air Pollution Rule (CSAPR).

3. If the stay is lifted, EPA would impose the requirements of CSAPR on January 1, 2015, and would at the same time void the Clean Air Interstate Rule (CAIR) that is currently in effect.

4. If the stay is lifted, IDEM would expeditiously initiate rulemaking to adopt CSAPR into Indiana's rules in order for Indiana to maintain primacy for the implementation of EPA rules. However, should the Court overturn all or parts of CSAPR after lifting the stay, IDEM will be faced with having to initiate rulemaking again to reflect the Court's ruling or change its rules to reinstitute CAIR.

5. The resources expended in a potential second or third change to IDEM's rule are substantial and the impact on IDEM's resources would be greatly reduced if IDEM's adoption of federal rules for the purpose of maintaining primacy is limited to one round of rulemaking. If the stay is not lifted then IDEM would only have to initiate rulemaking one time after the Court has issued a decision in the case.

The foregoing statements are true and correct and based on my personal knowledge.

Executed this 28th day of July, 2014.

Keith Baugues

Keith Baugues

State of Indiana)
)
County of Marion)

Before me, the undersigned, A Notary Public, in and for said County and State, this 28th day of July, 2014, personally appeared Keith Baugues, said person being over the age of 18 years and acknowledged the execution of the foregoing instrument attached hereto, entitled "Affidavit of Keith Baugues".

Carolyn M. Koontz
Notary Public

Print name: Carolyn M. Koontz

My commission expires:

5-14-16

ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

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Respondents.

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

EXHIBIT 3

AFFIDAVIT OF RONALD W. GORE

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

AFFIDAVIT OF RONALD W. GORE

My name is Ronald W. Gore and I make this affidavit as part of the submissions in the matter currently before the United States Court of Appeals for the District of Columbia styled: EME Homer City Generation, L.P., *et. al.* v. United States Environmental Protection Agency, *et al.*, No. 11-1302 and consolidated cases (COMPLEX).

1. My name is Ronald W. Gore and I reside in Montgomery County, Alabama.

2. I am the Chief of the Air Division of the Alabama Department of Environmental Management (ADEM). In preparation for making this affidavit, I have reviewed "EPA's Motion to Govern Proceedings" that proposes to lift the Court's Stay of the Environmental Protection Agency's (EPA) Implementation of the Cross State Air Pollution Rule (CSAPR).

3. If the Stay were lifted, EPA would impose the requirements of CSAPR on January 1, 2015 and would at the same time void another similar rule currently in effect, the Clean Air Interstate Rule (CAIR).

4. If the Stay were lifted, ADEM would expeditiously initiate efforts to adopt CSAPR into Alabama's Air Rules. Alabama, almost without exception, adopts federal pollution rules into State Rules as quickly as possible in order for the State to maintain primacy for federally-required regulations. However,

should the Court subsequently overturn all or parts of CSAPR after lifting the Stay, ADEM will be faced with having to initiate rulemaking again to change its rules to reflect the Court's ruling or possibly change its rules to implement CAIR again.

5. The resources expended in a potential second or third change to ADEM's rules are substantial. Ideally, ADEM's adoption of federal rules for the purpose of maintaining primacy should occur in only one round of rulemaking.

The foregoing statements are true and correct and are based on my personal knowledge. Executed this the 31st day of July, 2014.

Ronald W. Gore

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

I, Freida K. Thomas, a Notary Public in and for the State of Alabama At-Large, hereby certify that Ronald W. Gore, whose name is signed to the foregoing Affidavit, and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and seal this 31st day of July, 2014.

Freida K. Thomas
Freida K. Thomas, Notary Public

My Commission Expires: 12/27/16

ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

EME Homer City Generation, L.P., *et al.*,
Petitioners,

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United States Environmental Protection Agency, *et al.*,

Respondents.

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

EXHIBIT 4

AFFIDAVIT OF BART SPONSELLER

ORAL ARGUMENT HELD APRIL 13, 2012
No. 11-1302 and consolidated cases (COMPLEX)

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

EME Homer City Generation, L.P., et al.
Petitioners,
v.

United States Environmental Protection Agency, et al.,
Respondents,

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

AFFIDAVIT OF BART SPONSELLER

My name is Bart Sponseller and I make this affidavit as part of the submissions in the matter currently before the United States Court of Appeals for the District of Columbia styled: *EME Homer City Generation, L.P., et. al. v. United States Environmental Protection Agency, et. al.*, No. 11-1302 and consolidated cases (COMPLEX).

1. My name is Bart A. Sponseller. I reside in Dane County, Wisconsin.

2. I am the Director of the Air Management Program for the Wisconsin Department of Natural Resources.

3. In preparing this affidavit I understand "EPA's Motion to Govern Proceedings" proposes to lift the Court's Stay of the Cross State Air Pollution Rule

(CSAPR) and implement emission requirements beginning January 1, 2015, and at the same time void the Clean Air Interstate Rule (CAIR).

4. Lifting the Stay would preclude the State of Wisconsin from adopting a state implementation plan (SIP) before requirements of CSAPR go into effect.

5. The State of Wisconsin would not be able to complete a SIP before CSPAR goes into effect due to the time necessary to meet Wisconsin statutory procedural requirements for administrative rules. Under Wis. Stat. § 285.14 and federal SIP requirements, the implementation of a SIP requires public input, implementation through an enforceable mechanism such as a state rule, review by the State Legislature, and finally approval by EPA. Rule-making by itself will effectively take Wisconsin 27½ months, or more, to complete all steps in promulgating administrative rules required under Wis. Stat. ch. 227, Subchapter II. The 27½ month timeframe is anticipated for a rule with little or no controversy and which moves through the process in a timely manner. Attachment 1 to this affidavit provides a flow chart of Wisconsin's rule process.

6. Completing all steps necessary to implement the CSAPR through a SIP could not be accomplished before the first phase of emission budgets would apply in 2015, as proposed by EPA's motion. Further, it is unlikely that Wisconsin could complete all steps necessary to implement the CSAPR through a SIP even before the second phase of emission requirements begin on January 1, 2017. Therefore, based on the 27½ month rule making schedule, it is unlikely that Wisconsin will be able to

implement a SIP which addresses conditions specific to Wisconsin before the second phase of emission requirements begin.

7. In addition to creating regulatory uncertainty, lifting the Stay will force the Department to expend resources to implement the rule before all outstanding legal issues have been resolved. This expenditure of time and resources would potentially have to be repeated if the CSAPR is altered in a significant manner by this Court's ultimate resolution of this litigation.

8. The foregoing statements are true and correct and are based on my personal knowledge.

Dated: July 30, 2014

Bart A. Sponseller
Bureau of Air Management Director

State of Wisconsin
County of Dane

Subscribed and sworn to before me
this 30th day of July, 2014.

LACEY COCHART NOTARY PUBLIC STATE OF WISCONSIN

Notary Public, State of Wisconsin
My commission expires permanent

Attachment 1: Wisconsin Rule Making Process Chart

Attachment A to Affidavit of Bart Sponseller, Wisconsin Department of Natural Resources

Flow Chart of Wisconsin's Rule Process

DNR PERMANENT ADMINISTRATIVE RULE PROMULGATION PROCEDURE

[WHEN GOVERNOR APPROVAL OF THE STATEMENT OF SCOPE RECEIVED AFTER APRIL, 2013]

Phase I. INITIATION

1. Statement Of Scope (Scope) completed and approved by the Secretary. — 2
2. Scope submitted to and approved by the Governor. — 3
3. Scope submitted to the Legislative Reference Bureau (LRB) and published in the Wisconsin administrative register. — 3½
4. Yellow sheet approved by the Secretary to request NRB approval of the Scope and conditional approval of the notice of public hearing and the notice of submittal of the proposed rule to the Legislative Council (Notices). — 3½
5. Green sheet package approved by the Secretary to request NRB approval of the Scope and conditional approval of the Notices. *A* — 4½
6. NRB meeting to request approval of the Scope and conditional approval of the Notices. *B* — 5½

Phase II. RULE DEVELOPMENT AND HEARINGS

7. Proposed rule prepared in Board order format. — 10
8. Solicitation notice prepared to request information and advice on the economic impacts of the proposed Board order. — 11
9. Board order and solicitation notice from steps 7 and 8 approved by the Secretary and sent to the NRB and affected businesses, et. al, and posted on web sites. — 11½
10. Fiscal estimate and economic impact analysis (FE/EIA) prepared using DOA form 2049 based on information received in step 9. — 13½
11. The Notices conditionally approved by the Board in step 6 prepared and with the Board order and the FE/EIA approved by the Secretary and sent to the NRB for 15-day passive review. *C* — 14
12. Report to Legislative Council prepared and submitted with the proposed Board order and FE/EIA to the Legislative Council, et.al. — 15
13. The Notices submitted to LRB and published in the Wisconsin administrative register. The notice of public hearing sent to the Wisconsin State Journal or other newspaper for publication if necessary. — 15½
14. Report from the Legislative Council received. — 16
15. Public hearings held, and comment period expired. — 16½

Phase III. RULE ADOPTION

16. Board order modified as necessary based on comments received. *D* — 17½
17. Yellow sheet approved by the Secretary to request NRB adoption of the Board order. — 18
18. Green sheet package approved by the Secretary to request NRB adoption of the Board order. *A* — 19
19. NRB meeting to request adoption of the Board order. — 20

Phase IV. GOVERNOR AND LEGISLATIVE REVIEW

20. Adopted Board order submitted to and approved by the Governor. — 21
21. Report to legislature and the notice to chief clerk of the senate and assembly prepared and submitted to the chiefs clerks. Notice submitted to LRB. *E,F* — 21½
22. Report and notice from step 21 referred by the chief clerks to standing committees as directed by the presiding officer in each house of the legislature. — 22
23. Standing committees' review completed. *G* — 24
24. Board order referred to the Joint Committee for Review of Administrative Rules (JCRAR). — 24½
25. JCRAR review completed. *H* — 25½

Phase V. PROMULGATION

26. Board Order signed by the Secretary and filed with LRB. — 26
27. Rule published and becomes effective. — 27½

Numbers to right of boxes indicate approximate cumulative month. Time required may differ significantly for complex or controversial proposals or to a lesser degree for limited minor changes.

A: Green sheet packages may not be distributed outside the agency until the NRB has received the green sheet package from the Board Liaison.
B: NRB meeting must be no sooner than the 11th day after publication of the scope in the Wisconsin administrative register.
C: If not contacted by the NRB within the 15-day period, proceed to next step. If contacted, follow instructions received before proceeding.
D: If modifications to the Board order are made that significantly change the economic impact the FE/EIA should be amended appropriately.
E: If FE/EIA implementation and compliance costs exceed $20,000,000, DOA Secretary approval and report must be received prior to submittal to chief clerks.
F: Receipt by the chief clerks after the last day of the final general business floor period (typically in March of even numbered years) will be considered received on the 1st day of the next general session, unless the presiding officers of each house direct referral to committees.
G: Time shown assumes a hearing is held or a briefing is requested by one of the committees. Subtract 1 month if neither happens. Additional time will be required if modifications are requested or other committee actions are taken.
H: Time shown assumes no hearing is held and no briefing is requested by the committee. Add 1 month if either happens. Additional time could be required if the committee takes action other than approval.

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