

**ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012**

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

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

RESPONDENTS' MOTION TO LIFT THE STAY
ENTERED ON DECEMBER 30, 2011

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TABLE OF CONTENTS

BACKGROUND 2

ARGUMENT 5

I. THE SUPREME COURT’S DECISION UPHELD EPA’S APPROACH TO IMPLEMENTING THE CLEAN AIR ACT’S INTERSTATE TRANSPORT PROVISIONS AND REJECTED THE PRINCIPAL BASES PETITIONERS ARGUED IN SUPPORT OF A STAY 6

II. LIFTING OF THE STAY IS NEEDED TO PREVENT FURTHER DELAY IN IMPLEMENTING A RULE WITH ENORMOUS HEALTH BENEFITS..... 9

III. LIFTING THE STAY AND RESTORING THE STATUS QUO PRESERVED BY THE STAY WOULD NOT CAUSE PETITIONERS IRREPARABLE HARM 13

 A. EPA Requests That the Court Restore the Status Quo by Tolling the Compliance Deadlines by Three Years 14

 B. Lifting the Stay Now Would Not Cause Petitioners Any Irreparable Harm 17

CONCLUSION 20

Respondent United States Environmental Protection Agency (“EPA”) hereby moves the Court for an Order (1) lifting the stay of the Transport Rule¹ entered by the Court on December 30, 2011; and (2) tolling the Transport Rule compliance deadlines by three years, so that the Phase 1 emissions budgets apply in 2015 and 2016 (instead of 2012 and 2013), and the Phase 2 emissions budgets apply in 2017 and beyond (instead of 2014 and beyond). As explained below, the Supreme Court’s April 29, 2014 decision in *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), approved EPA’s approach in the Transport Rule to implementing the interstate transport provisions of the Clean Air Act and rejected the principal arguments Petitioners advanced in this Court in support of a stay pending judicial review. Lifting the stay of the Rule now will ensure that the important health benefits of the Rule are not delayed, provide assistance, as Congress required, to downwind states in achieving and maintaining national ambient air quality standards, and allow EPA to implement the replacement to the Clean Air Interstate Rule (“CAIR”), which this Court invalidated and ordered EPA to replace “expeditiously” in *North Carolina v. EPA*. Petitioners will not suffer any irreparable harm if the stay is lifted and any impact

¹ “Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals,” 76 Fed. Reg. 48,208 (Aug. 8, 2011).

flowing from implementation of the Transport Rule is outweighed by the benefits of putting the Transport Rule in place.

BACKGROUND

EPA promulgated the Transport Rule to address the complex and enduring problem of interstate transport of pollutants, which the Clean Air Act directs states and EPA (to the extent states fail to do so) to address. *See* 42 U.S.C.

§ 7410(a)(2)(D), (c)(1). The Transport Rule replaces an earlier rule, known as CAIR. The Transport Rule requires utilities in states that “contribute significantly” to downwind states’ failure to attain and maintain national ambient air quality standards (“NAAQS” or “standards”) to reduce emissions of nitrogen oxides (“NO_x”) and sulfur dioxide (“SO₂”). NO_x and SO₂ contribute to fine particulate matter or “PM_{2.5}” pollution; NO_x also contributes to ozone pollution. These pollutants are responsible for a variety of serious health effects, including asthma, bronchitis, heart attacks, and death. EPA determined that the Transport Rule is needed to help downwind states attain and maintain ozone and PM_{2.5} NAAQS and will result in dramatic health benefits for over 240 million people in the eastern half of the United States.

In addition to carrying out the directives in 42 U.S.C. § 7410(a)(2)(D) and (c)(1), the Transport Rule was designed to remedy flaws in CAIR that this Court ordered EPA to address “expeditiously” in *North Carolina v. EPA*, 531 F.3d 896,

907-908, 911-12, *modified on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). In brief, the Transport Rule identifies those states with emissions that significantly contribute to nonattainment or interfere with maintenance of certain ozone and PM_{2.5} standards in downwind states;² establishes several trading programs with emissions budgets for covered electric generating units in each state; and promulgates Federal Implementation Plans (“FIPs”) that allocate emissions allowances to sources and impose other requirements to achieve the necessary reductions in each state. To address *North Carolina*, 531 F.3d at 906-08, the Transport Rule contains state-specific limits (called “assurance levels”) to ensure that necessary emission reductions occur within each covered state. 76 Fed. Reg. 48,271. The assurance levels are firm caps that limit state-level emissions from electric generating units in each covered state while allowing for limited fluctuation above the state budgets. Also as directed by *North Carolina*, 531 F.3d at 911-12, EPA aligned the Rule’s original compliance deadlines with the downwind states’ Clean Air Act attainment deadlines for whose attainment and maintenance problems the Rule was designed to address. 76 Fed. Reg. 48,277-78. The Transport Rule also replaces the CAIR emission allowance allocation system found to be illegal in *North Carolina*, 531 F.3d at 918-21. 76 Fed. Reg. 48,285-87.

² Specifically, the Transport Rule addresses upwind state emissions that interfere with downwind states’ attainment and maintenance of the 1997 ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS.

Several states and utilities, whose upwind emissions of NO_x and SO₂ have been documented by EPA to contribute to downwind ozone and PM_{2.5} pollution problems in other states, petitioned this Court for review of the Rule and moved for a stay pending judicial review. Petitioners claimed, among other things, that they would be irreparably harmed if the Rule were not stayed because they could not possibly comply with the initial compliance deadlines in the Rule and continue to provide electricity in a reliable manner. On December 30, 2011, the Court ordered a stay of the Rule pending its resolution of the petitions for review and expeditious briefing on the merits. Dkt. No. 1350421. The Court further ordered EPA to continue administering CAIR pending the Court's resolution of the petitions. *Id.*

On August 21, 2012, the Court rendered a decision on the merits vacating and remanding the Transport Rule and ordering EPA to continue administering CAIR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). Judge Rogers dissented. *Id.* at 38. The Court invalidated the Transport Rule on two grounds. First, the Court held that the Rule exceeded EPA's authority under the Clean Air Act's good neighbor provision, 42 U.S.C. § 7410(a)(2)(D), essentially finding that EPA's regulatory approach placed too much emphasis on cost rather than air quality factors in allocating responsibility among multiple "upwind" state contributors to "downwind" nonattainment and maintenance problems. *EME Homer City*, 696 F.3d at 19-28. Second, the Court held that EPA

lacked statutory authority to promulgate FIPs without first identifying each state's significant contribution to downwind nonattainment and maintenance problems and, then, giving states an initial opportunity to implement the required reductions through State Implementation Plans ("SIPs"). *Id.* at 28-37.

The Supreme Court subsequently granted EPA's petition for a writ of certiorari, and, on April 29, 2014, reversed this Court's August 21, 2012 merits decision. The Supreme Court held that the Clean Air Act does not require that EPA give states that missed the deadline for submitting "good neighbor" SIPs a second opportunity to submit SIPs after EPA has quantified those states' good neighbor obligations. *EME Homer City*, 134 S. Ct. at 1609-10. Further, the Supreme Court held that EPA's use of cost-effectiveness in determining states' obligations under the good neighbor provision "is a permissible, workable, and equitable interpretation of the Good Neighbor Provision." *Id.* at 1610.

In light of the Supreme Court's decision upholding EPA's approach to implementing the good neighbor provision in the Transport Rule and the reasons explained below, EPA now moves to lift the stay entered on December 30, 2011.

ARGUMENT

Circumstances no longer justify the stay entered on December 30, 2011, and therefore it should be lifted immediately. The Supreme Court's decision affirming EPA's approach to satisfying the Clean Air Act's good neighbor provision decided

the merits issues upon which the stay motions relied against Petitioners. Given the Supreme Court's endorsement of the Transport Rule and this Court's decision holding CAIR to be inconsistent with the Clean Air Act, the equities have now tipped in favor of allowing EPA to implement the Transport Rule. Moreover, recent emissions data show that Petitioners' claims of irreparable harm were exaggerated and that implementing the Transport Rule under the schedule proposed by EPA will not cause Petitioners irreparable harm. Any efforts that Petitioners might have to undertake to comply with the Transport Rule prior to the Court's resolution of the remaining issues in this case would not cause the type of harm that would warrant a stay and any such harm would be outweighed by the important benefits of allowing EPA to begin to implement the Rule.

I. THE SUPREME COURT'S DECISION UPHELD EPA'S APPROACH TO IMPLEMENTING THE CLEAN AIR ACT'S INTERSTATE TRANSPORT PROVISIONS AND REJECTED THE PRINCIPAL BASES PETITIONERS ARGUED IN SUPPORT OF A STAY

In the motions to stay the Transport Rule filed at the outset of this litigation, many Petitioners argued a likelihood of success on the merits by attacking the central legal underpinnings of the Rule: EPA's approach to determining states' obligations under the Clean Air Act's good neighbor provision, 42 U.S.C.

§ 7410(a)(2)(D); and EPA's conclusion that the Clean Air Act, 42 U.S.C.

§ 7410(c)(1), authorized EPA to issue FIPs without first permitting states to submit

SIPs to address the good neighbor obligations that EPA had identified in the Rule.³

In its merits decision vacating the Transport Rule, this Court agreed with Petitioners that EPA had exceeded its authority under the good neighbor and FIP provisions of the Act. *EME Homer City*, 696 F.3d at 19-37.

The Supreme Court, in a decision supported by six justices, with only two justices dissenting, affirmed EPA's approach to the good neighbor provision and rejected arguments that EPA lacked authority to issue FIPs for states in noncompliance with their "good neighbor" SIP obligations without first providing states an opportunity to submit SIPs after EPA has quantified those states' "good neighbor" obligations. *EME Homer City*, 134 S. Ct. at 1600, 1606-07. As such, the Supreme Court's decision does away with the primary merits arguments Petitioners advanced in support of a stay.

Although Petitioners advanced other merits arguments in their stay motions, some of which remain for this Court to decide, none of the issues that this Court's August 21, 2012 merits decision left undecided warrants continuation of the stay.

³ See, e.g., *Luminant Mot. for Stay* (Dkt. No. 1329866) (filed Sept. 15, 2011), at 10-13; *Wisconsin Stay Mot.* (Dkt. No. 1337415) (filed Oct. 24, 2011), at 5-7, 8-9; *Dairyland Power Coop. Mot. for Stay* (Dkt. No. 1337439) (filed Oct. 24, 2011) at 12-13, 14-15; *Florida Utilities Mot. for Stay* (Dkt. No. 1335573) (filed Oct. 14, 2011), at 14, 15; *Municipal Electric Authority of Georgia Mot. for Stay* (Dkt. No. 1335586) (filed Oct. 14, 2011), at 11-14; *Mot. by Alabama, Mississippi, et al. for Stay* (Dkt. No. 1339054) (filed Oct. 31, 2011) at 1-9; *Indiana Mot. for Stay* (Dkt. No. 1341729) (filed Nov. 14, 2011), at 4-6.

The remaining issues, by and large, assail technical and scientific judgments made by EPA, an area where the Court's review is at its most deferential. EPA's brief on the merits (Dkt. No. 1364178) establishes that Petitioners' record-based challenges to the emissions budgets and other aspects of the Transport Rule lack merit. Even if Petitioners could overcome their high burden and demonstrate that EPA acted arbitrarily or capriciously with respect to some issues, a narrow remand of a discrete issue is not likely to require vacatur of the entire rule. *See, e.g., EME Homer City*, 134 S. Ct. at 1608 (noting that the possibility of "over-control" does not justify "wholesale invalidation" of the Rule).

Moreover, lifting the stay now would allow EPA to replace CAIR, a rule that this Court found to be invalid. In issuing the stay and ordering EPA to continue implementing CAIR—the rule the Transport Rule was intended to replace—the Court implicitly acknowledged the necessity of having a rule in place to address the statutory requirement that upwind states eliminate their significant contribution to downwind states' air quality problems. Indeed, in *North Carolina*, 550 F.3d at 1178, this Court expressly recognized that "allowing CAIR to remain in effect until it is replaced by a rule consistent with our opinion would at least temporarily preserve the environmental values covered by CAIR." Because the Transport Rule remedies the defects this Court found in CAIR and the Supreme Court has upheld the Transport Rule in significant respects, the Court should lift the stay and allow

EPA to transition from CAIR to the Transport Rule. As explained further below, lifting the stay would not cause Petitioners any irreparable harm, and whatever impacts the Rule would have on Petitioners would be outweighed by the significant benefits that would result from lifting the stay.

II. LIFTING OF THE STAY IS NEEDED TO PREVENT FURTHER DELAY IN IMPLEMENTING A RULE WITH ENORMOUS HEALTH BENEFITS

Lifting the stay now is necessary to prevent further delay in implementation of the Transport Rule and to ensure that upwind states continue to meet the Clean Air Act's interstate transport requirements. The Rule addresses emissions that cause ozone and PM_{2.5}, air pollutants which are responsible for wide-ranging and serious health effects such as bronchitis, asthma, heart attacks, and death.⁴ EPA estimated that the emissions reductions required by the Rule would “annually reduce between 13,000 and 34,000 PM_{2.5}-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma,” while the Rule's “annual ozone related health benefits” would include “160,000 fewer days with restricted

⁴ According to EPA analyses, “1 in 20 deaths in the U.S. is attributable to PM_{2.5} and ozone exposure.” 76 Fed. Reg. at 48,309-11. “This same analysis attributed 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.*

activity levels, and 51,000 fewer days where children are absent from school due to illnesses.” 76 Fed. Reg. at 48,309-11.

Maintaining the stay would further delay achieving some of these benefits and put at risk benefits already achieved. The rulemaking record before the Court establishes that the emission levels set by the rule are necessary for downwind states to attain *and* maintain the NAAQS. 76 Fed. Reg. 48,211-12, 48,227-28. Although the emissions data for 2012 and 2013, discussed below, show that emissions levels are currently below the Rule’s aggregated Phase 1 emissions budgets, CAIR – the rule the Transport Rule is intended to replace – was not designed to push emissions down to the same levels, nor did it address maintenance of the NAAQS. Thus, CAIR is not sufficient to ensure the emissions levels associated with full implementation of the Transport Rule and the related benefits are maintained. While CAIR led to very significant decreases in emission levels, the additional reductions that occurred since the Court issued the stay in this case are also in part attributable to a number of non-regulatory factors (e.g., low natural gas prices and relatively low electricity demand growth) that could change. In fact, emission data for the first quarter of 2014 show an increase in emissions of pollutants controlled under Transport Rule programs from the first quarter 2013 levels. Declaration of Reid Harvey, dated June 26, 2014, at ¶ 49 (attached hereto).

In the future, sources will need to achieve additional emissions reductions to achieve the Rule's Phase 2 requirements and fully realize the Rule's benefits.

Moreover, recent air quality data confirms that, even with the lower 2012 emission levels, multiple areas in the Transport Rule region, including major metropolitan areas such as New York City and Houston, have ozone levels that exceed the relevant standards. Harvey Decl. ¶ 51. High ozone levels not only adversely affect public health, but increasingly stringent requirements may apply in areas that fail to meet the standards on time. 42 U.S.C. § 7511(b)(2). Two areas—Baltimore, MD and Dallas, TX—could face reclassification and thus more stringent requirements if EPA determines they failed to attain by their June 2013 attainment dates. Harvey Decl. ¶ 51. Putting the Rule in place will help bring these areas into, or at least closer to, attainment and help ensure that other areas maintain the NAAQS.

It also bears emphasizing that lifting the stay would allow EPA to replace CAIR, which this Court found to be invalid. In *North Carolina*, this Court concluded that CAIR did not satisfy the goals of the Clean Air Act's good neighbor provision because it did not ensure that states contributing emissions that were adversely affecting downwind air quality would actually be required to reduce those emissions to levels needed to help downwind states achieve and maintain the NAAQS. The Transport Rule remedies these defects by, among other

things, requiring state-specific emissions reductions. It also addresses transport with regard to the newer 2006 PM_{2.5} NAAQS, a standard unaddressed by CAIR.

Furthermore, replacing CAIR with the Transport Rule would have benefits that go beyond the confines of the Rule and this litigation. The effects of interstate transport and the resulting benefits from its regulation affect other regulatory programs that EPA administers under the Clean Air Act, such as regional haze, attainment demonstrations, and area redesignations. *See, e.g., Sierra Club v. EPA*, No. 13-1014, slip op. at 2-6 (D.C. Cir. June 13, 2014) (discussing the relationship between CAIR and the Transport Rule and decisions EPA must make with regard to state SIP submissions). While EPA agrees that administering CAIR pending implementation of its replacement is an appropriate stop-gap, the Transport Rule is CAIR's replacement. Given that this Court found CAIR to be invalid and that the Supreme Court has given its imprimatur to the Transport Rule's approach to implementing the Clean Air Act interstate transport requirements, the balance of interests weighs heavily in favor of lifting the stay and allowing the Transport Rule to go into effect.

In sum, allowing EPA to finally replace CAIR with the Transport Rule best serves the interests of downwind states and their residents, for whom healthy air is dependent on upwind states fulfilling their transport obligations. Further, getting

on with the replacement of CAIR also serves the interests of upwind states and the regulated community by providing long-overdue regulatory certainty.

III. LIFTING THE STAY AND RESTORING THE STATUS QUO PRESERVED BY THE STAY WOULD NOT CAUSE PETITIONERS IRREPARABLE HARM

In this motion, EPA asks the Court to lift the stay of the Transport Rule immediately and toll for three years all deadlines that had not already passed as of the date the stay was issued, December 30, 2011. As explained below, this would mean that the Transport Rule's Phase 1 requirements would apply to sources in 2015 and 2016, instead of in 2012 and 2013, and the Rule's Phase 2 requirements would apply in 2017 and beyond, instead of in 2014 and beyond. Petitioners cannot show that granting the relief requested by EPA would cause irreparable harm. Recent emissions inventory data show that sufficient emissions control capacity exists to allow sources to meet the Phase 1 emissions budgets that would be applicable in 2015 and 2016, and there is ample time for the Court to resolve the remaining issues before the more stringent Phase 2 requirements begin to apply in 2017. Whatever steps sources might need to take to prepare for Phase 2 reflect ordinary compliance costs and do not amount to irreparable harm justifying continued stay of the Rule.

A. EPA Requests That the Court Restore the Status Quo by Tolling the Compliance Deadlines by Three Years.

If the Court lifts the stay, the Court should also toll for three years all Transport Rule compliance deadlines that had not passed as of the date of the stay. Under EPA's request, the key compliance deadlines would be as follows:⁵

Transport Rule Compliance Schedule, as Promulgated	Revised Transport Rule Compliance Schedule, if Stay Is Lifted	Applicable Requirements
January 1, 2012	January 1, 2015	Phase 1 (2015 and 2016) begins for annual trading programs. Existing units must begin monitoring and reporting SO ₂ and NO _x emissions.
May 1, 2012	May 1, 2015	Phase 1 begins for ozone-season NO _x trading program. Existing units must begin monitoring and reporting NO _x emissions.
December 1, 2012	December 1, 2015 (and each Dec. 1 thereafter)	Date by which sources must demonstrate compliance with ozone-season NO _x trading program (i.e., allowance transfer deadline).
March 1, 2013	March 1, 2016 (and each March 1 thereafter)	Date by which sources must demonstrate compliance with annual trading programs (i.e., allowance transfer deadline).
January 1, 2014	January 1, 2017	Phase 2 (2017 and beyond) begins for annual trading programs. Assurance provisions in effect.
May 1, 2014	May 1, 2017	Phase 2 (2017 and beyond) begins for ozone-season NO _x trading program. Assurance provisions are in effect.

⁵ The Rule contains additional deadlines applicable to EPA, the states, and utilities for reporting and other generally ministerial actions that also would be tolled if EPA's request is granted. EPA would anticipate taking any necessary administrative action to amend the existing regulatory text in the Code of Federal Regulations to be consistent with this Court's action.

EPA believes that this approach is equitable and consistent with this Court's precedent and would allow for the most orderly implementation of the Rule, while allowing ample lead time for parties subject to the Rule to come into compliance.

EPA's request to toll the Transport Rule's compliance deadlines is supported by this Court's decision in *Michigan v. EPA*, No. 98-1497, Order dated June 22, 2000 (attached hereto), relating to the NOx SIP Call. The NOx SIP Call is a prior interstate transport rule structured similarly in many ways to the Transport Rule. In *Michigan*, the Court had granted a stay pending judicial review, which it then lifted, after ruling mostly in EPA's favor on the merits. In so doing, the Court addressed a situation similar to the one presented here, *i.e.*, how to lift the stay in a manner that returned the Rule as much as possible to the status quo that would have existed, but for the stay.

In its order lifting the stay in the *Michigan* case, this Court extended the compliance deadlines for SIP submissions required by the NOx SIP Call by the same number of days that stay was in effect. In this motion, EPA is proposing that the Court follow roughly the same approach as it did in *Michigan*, *i.e.*, restore the status quo preserved by the stay, except that here EPA is requesting that the Court extend the compliance deadlines a few months longer than the stay to maintain the calendar-year compliance schedule set forth in the Rule.

As explained in the attached declaration, EPA does not believe it would be reasonable to toll the compliance deadlines by the exact number of days that the stay was in place. The stay of the Transport Rule was issued just two days before the trading programs were to begin and two years and two days before the Phase 2 budgets and the assurance provisions were to go into effect. Therefore, such an approach would provide regulated parties and the agency with an unreasonably short time—two days—to prepare for implementation. *See Harvey Decl.* ¶¶ 29-30. Further, the annual Transport Rule trading programs were designed as calendar-year programs that run from January 1 through December 31, to allow for consistency and coordination with the requirements of other annual emissions trading programs administered by EPA and applicable to many of the same utilities as would be subject to the Transport Rule. *See Harvey Decl.* ¶¶ 31-32. Revising the administrative requirements for the Transport Rule, as would be required if the Court extended the compliance deadlines the same number of days the stay was in place, would create multiple overlapping compliance schedules and increase the burden on EPA and regulated parties. *Harvey Decl.* ¶ 31. Thus, to truly preserve the status quo, EPA believes it would be equitable for the Court here to extend all compliance deadlines remaining at the time of the stay by three years.

EPA also notes that it intends to implement the Rule as amended by three subsequent rules known as the Supplemental Rule, the First Revisions Rule, and

the Second Revisions Rule.⁶ In brief, these three rules added five states to the Transport Rule ozone-season NO_x program, revised certain state emissions budgets, and made other adjustments to allowance allocations for a handful of states. *See* Harvey Decl. at ¶¶ 20-26. The First Revisions Rule also delayed the effective date of the Transport Rule assurance provisions until Phase 2 of the Rule. Harvey Decl. at ¶ 24. Petitions for review of these three rules were filed in this Court, but those petitions have not been consolidated with this action.⁷ None of these rules has been stayed by the Court, and thus the Rule that would go into effect if the stay is lifted is the Rule as revised by these revisions and amendments.

B. Lifting the Stay Now Would Not Cause Petitioners Any Irreparable Harm.

In their stay motions, Petitioners argued that they would be irreparably harmed absent a stay pending judicial review because compliance with the Rule's expeditious Phase 1 emissions budgets would be prohibitively expensive and

⁶ *See* “Final Rule, Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone,” 76 Fed. Reg. 80,760 (Dec. 27, 2011). (“Supplemental Transport Rule”); “Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone,” 77 Fed. Reg. 10,324 (Feb. 21, 2012) (“First Revisions Rule”); “Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone,” 77 Fed. Reg. 34,830 (June 12, 2012) (“Second Revisions Rule”).

⁷ *Public Serv. Co. of Oklahoma v. EPA*, No. 12-1023 (D.C. Cir.); *Wisconsin Public Serv. Corp. v. EPA*, No. 12-1163 (D.C. Cir.); *Utility Air Regulatory Group v. EPA*, No. 12-1346 (D.C. Cir.). These cases are being held in abeyance.

would threaten electrical system reliability, leading to blackouts.⁸ Recent emissions data show that Petitioners' earlier claims were exaggerated, and, more importantly, that Petitioners cannot show that lifting the stay now would cause them irreparable harm.

As discussed above, if the stay is lifted, EPA expects that all compliance deadlines that postdate issuance of the stay would be tolled by three years, such that the Phase 1 requirements would apply in 2015 and 2016, and the Phase 2 requirements would apply in 2017 and beyond. As explained in the declaration of Reid Harvey, attached to this motion, EPA compared the 2012 and 2013 emissions levels in states covered by the Transport Rule to the emissions budgets for the same years for each of the four emissions trading programs in the Rule. Harvey Decl. ¶¶ 35-48. In both 2012 and 2013, the aggregated emissions for all states, in each of the trading programs, were well below the respective total Phase 1 program budgets. Harvey Decl. ¶ 38. The data thus demonstrate that compliance with the Transport Rule would have been feasible in 2012 and 2013 in all states covered by the Rule, contrary to many of Petitioners' arguments in support of the stay. *Id.*

⁸ See, e.g., Luminant Mot. for Stay (Dkt. No. 1329866) (filed Sept. 15, 2011), at 16-20; Kansas Util.'s Mot. for Stay (Dkt. No. 1337158) (filed Oct. 21, 2011), at 6-14; Wisc. Electric Power Co.'s Mot. for Stay (Dkt. No. 1339347) (filed Nov. 1, 2011), at 10; Entergy Corp. Stay Mot. (Dkt. No. 1338085) (filed Oct. 26, 2011), at 12-19; Ohio Mot. for Stay (Dkt. No. 1342027) (filed Nov. 15, 2011), at 18-19.

That aggregate emissions levels are currently below the Transport Rule's emissions budgets indicates that there is sufficient control capacity to meet the Phase 1 requirements and, thus, if the stay is lifted, sources could comply with the Phase 1 requirements by doing what they are already doing or buying allowances from other sources with surpluses. In other words, lifting the stay would cause no irreparable harm in the near term. While sources would not need to construct or install control equipment to meet the Phase 1 requirements, as explained above, implementation of these requirements would provide much needed regulatory certainty and ensure that a valid framework is in place to ensure that upwind states maintain emissions levels that meet their "good neighbor" obligations.

Second, the emissions data reviewed by EPA also show that for each of the four programs, additional emission reductions from 2013 levels would not be necessary until the Phase 2 requirements go into effect. Harvey Decl. ¶ 38. Under the compliance schedule EPA anticipates if the Court lifts the stay, the Phase 2 requirements would not go into effect until January 2017, and sources would not need to show compliance until December 1, 2017 for the ozone-season NO_x program and March 1, 2018 for the annual programs. To the extent sources would need to achieve additional emissions reductions to comply with the Phase 2 requirements, any associated actions are not imminent and do not rise to the level of irreparable harm. Indeed, the vast majority of reductions needed by 2017 can be

achieved by resuming operation of idled controls or through actions that have already been announced. Harvey Decl. ¶¶ 40, 42, 45, 48. Moreover, it is likely that the remainder of the merits issues in this case will be decided long before 2017. The Phase 2 obligations thus are unlikely to have any significant impact on regulated parties until well after this case is resolved. While sources may be required to undertake some planning activities or make some expenditure in furtherance of complying with the Phase 2 requirements, such routine and preliminary compliance burdens do not constitute irreparable harm, and any such burdens are outweighed by the corresponding harm to the public interest that would occur by further delay of the Transport Rule. In the absence of any immediate, irreparable harm pending judicial resolution of the remaining issues in this litigation, there is no justification for continuing the stay.

CONCLUSION

For the foregoing reasons, EPA requests that the Court lift the stay of the Transport Rule, entered on December 30, 2011, and toll for three years all of the compliance deadlines that had not passed as of the date of the stay.

DATED: June 26, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion to lift the stay entered on December 30, 2011, were served this 26th day of June, 2014, on all registered counsel, through the Court's CM/ECF system.

/s/ Jessica O'Donnell
Jessica O'Donnell
United States Department of Justice
Counsel for Respondents

ATTACHMENTS

ATTACHMENT A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EME HOMER CITY GENERATION, L.P.,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, et al.,)
)
 Respondents.)

No. 11-1302 (and
(consolidated cases)

DECLARATION OF REID HARVEY

1. I, Reid Harvey, 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 United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

2. I am the Director of the Clean Air Markets Division in the Office of Atmospheric Programs within the Office of Air and Radiation at EPA. Since the early 1990s, the Clean Air Markets Division has operated several market-based clean air programs for large stationary sources of pollution, including EPA's Acid Rain Program, NO_x Budget Trading Program, and Clean Air Interstate Rule (CAIR). The Clean Air Markets Division designs and operates emissions cap-and-trade programs to reduce emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x), creates public access to emissions data, facilitates emissions monitoring and reporting, assesses emissions control technology options, conducts atmospheric deposition monitoring and analysis, develops information systems for market-based programs, assesses environmental and human health effects, assesses benefits and costs of programs, and educates the public about acid rain, other regional air pollution problems, and market-based programs.

3. In my capacity as Director of the Clean Air Markets Division, I oversee EPA's implementation of major portions of the Clean Air Act (CAA) including Title IV (acid deposition control) and parts of Title I (air quality standards and associated emission limitations). In coordination with other EPA offices, I manage the promulgation of regulations pursuant to the CAA such as CAIR and the Cross State Air Pollution Rule (Transport Rule) as well as regulations relating to the Acid Rain Program. I also manage and evaluate the implementation of such regulations from EPA headquarters. I manage all of the Clean Air Markets Division's activities as listed in paragraph 2, including overseeing EPA's collection of emissions data from the power sector (and some other stationary emissions sources) under the Acid Rain Program and CAIR. I have held several management positions in the Office of Atmospheric Protection over the last eighteen years, and have been the Director of the Clean Air Markets Division for the past two years.

4. Prior to becoming Director of the Clean Air Markets Division, I held several management positions in the Division and EPA's Office of Atmospheric Programs. Prior to joining EPA in 1994, I was a project manager at ICF Inc., engaged in energy and environmental policy analyses. I hold a master's degree in public policy from the University of California Berkeley's Goldman School of Public Policy and a bachelor's degree from Duke University.

5. My Division worked closely with the Office of Air Quality Planning and Standards in the development of the Transport Rule. As such, I am very familiar with the Transport Rule and the requirements of that rule.

6. Most fossil fuel-fired electric generating units report hourly emissions and operations data to EPA on a quarterly basis. My staff track this emissions data – and allowance allocations and transfers used for compliance determinations each year – in the Clean Air Markets Division database.

7. I have over 28 years of experience working on energy and environmental policy, including managing work related to the electric power sector, emissions data collection and analysis, and emissions control strategies.

8. This declaration is filed in support of EPA's motion to lift the stay of EPA's final Transport Rule, entered in the above-captioned case on December 30, 2011.

I. Summary of Key Elements of the Transport Rule

9. The EPA promulgated the Transport Rule¹ in 2011 as a replacement for CAIR, which the U.S. Court of Appeals for the D.C. Circuit remanded to EPA in 2008. Like CAIR, the Transport Rule established multiple emissions trading programs to achieve emission reductions required by the good neighbor provision of the Clean Air Act. These emissions trading programs are implemented through Federal Implementation Plans (FIPs) for each state subject to the Transport Rule. FIPs are plans promulgated by the federal government that define compliance obligations for sources in a given state. States may elect to replace the Transport Rule FIPs with State Implementation Plans (SIPs) after a defined period of time. SIPs are state plans that define specific compliance obligations and have been approved by EPA, thus becoming federally enforceable.

10. The emission trading programs established by the Transport Rule are cap-and-trade programs. Each source covered by a trading program is required to hold sufficient allowances (issued in the respective trading program) to cover the emissions from all covered units at the source during the control period (i.e., during a calendar year for the annual SO₂ and annual NO_x trading programs or during the May-September ozone season for the ozone-season NO_x trading program). Sources receive an initial allocation of allowances and may purchase additional allowances directly from others holding allowances or sell excess allowances to any other party.

11. The Transport Rule established four separate emissions trading programs. It established three trading programs to address fine particulate pollution (sometimes referred to as PM_{2.5}) issues – an annual NO_x trading program and two annual SO₂ trading programs – and an ozone-season NO_x trading program to address ozone pollution.

12. As promulgated, the Transport Rule trading programs contained two phases. Phase 1 of the programs was to begin in 2012 and Phase 2 in 2014. The annual trading programs were to begin on January 1, 2012, with sources required to demonstrate that they held sufficient allowances to cover their emissions during the

¹“Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals,” 76 Fed. Reg. 48,208 (Aug. 8, 2011).

2012 calendar year by March 1, 2013. Phase 1 of the ozone-season NO_x trading program was to begin on May 1, 2012, with sources required to demonstrate that they held sufficient allowances to cover their emissions during the 2012 ozone season by December 1, 2012. Phase 2 of the annual and ozone-season programs was to begin on January 1, 2014 and May 1, 2014 respectively, with sources being required to show they had sufficient allowances by March 1, 2015 and December 1, 2014 respectively.

13. The EPA designed the Transport Rule annual trading programs as calendar-year programs in part to align the emission reporting and compliance requirements in the Transport Rule with the relevant emission reporting and compliance requirements under other programs. Such coordination avoids duplicative reporting requirements and reduces the potential for confusion, making compliance with all the programs easier and less burdensome.

A. State Budgets

14. The EPA established an emissions budget for each state covered by each Transport Rule trading program. A state covered by multiple programs has a budget for each program. The specific methodology used to develop each state's budget is described in significant detail in section VI of the preamble to the final Transport Rule. 76 Fed. Reg. 48,246-71.

15. The state budget determines the total number of allowances to be allocated to covered sources in the state. Each individual state budget, however, is not a limit on total state emissions. Under the Transport Rule trading programs, it is permissible for total state emissions from covered sources in any particular state to exceed the state budget up to a certain level, called the assurance level.

B. State Assurance Levels

16. The Transport Rule establishes assurance levels for each state covered by each Transport Rule trading program. Emissions from covered sources in each state are not to exceed that state's assurance level for each trading program. States covered by the rule for PM_{2.5} have assurance levels for annual NO_x and annual SO₂, while states covered by the rule for ozone have assurance levels for ozone-season NO_x. These assurance levels were included in the Transport Rule to ensure that

reductions needed for each state to meet its obligations under the CAA good neighbor provision would occur and thus address concerns raised by the U.S. Court of Appeals for the D.C. Circuit in its decision striking down CAIR. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

17. The assurance levels for each state take into account the inherent variability in emissions from year to year. Each assurance level is calculated by adding to each state budget a variability limit, which is a percentage of the state budget. For annual NO_x, a state's assurance level is the state budget plus 18%, for annual SO₂, a state's assurance level is the budget plus 18%, and for ozone-season NO_x, a state's assurance level is the budget plus 21%.

18. As originally promulgated, the Transport Rule required compliance with the assurance levels starting in 2012. The EPA subsequently modified the rule to defer the effective date of the assurance provisions by two years, making compliance with the assurance levels mandatory in Phase 2 of the program, which was to begin in 2014. 77 Fed. Reg. 10,324 (Feb. 21, 2012).

C. Allowance Allocations

19. The EPA distributes a number of SO₂, annual NO_x and ozone-season NO_x emission allowances to covered units in each state equal to the respective budgets for those states. However, the Transport Rule trading programs do not limit a source's emissions to its initial allocation of allowances. A source choosing to emit more may purchase allowances directly from other sources or through any party that holds allowances. Similarly, sources with excess allowances can sell those allowances to any party. Although EPA, through the FIPs, distributes the allowance allocations initially, states may choose how to allocate allowances from their budgets to covered sources after the first year of the program and may subsequently elect to fully replace the FIPs.

D. Post-Promulgation Revisions to the Transport Rule

20. After the Transport Rule was finalized, EPA promulgated three additional rules that modified the Transport Rule as originally promulgated. These rules are commonly referred to as the Supplemental Rule, the First Revisions Rule, and the Second Revisions Rule.

21. In the Supplemental Rule, EPA promulgated FIPs to add five additional states -- Iowa, Michigan, Missouri, Oklahoma, and Wisconsin -- to the Transport Rule ozone-season NO_x program. 76 Fed. Reg. 80,760 (December 27, 2011). For one additional state, Kansas, EPA determined that the state had emissions that significantly contributed to nonattainment or interfered with maintenance in another state, but because of the state's unique procedural posture EPA did not promulgate a FIP. Instead, EPA proposed to issue a SIP Call. 76 Fed. Reg. 763 (Jan. 6, 2011).

22. Several petitions for review of the Supplemental Rule were filed in the U.S. Court of Appeals for the D.C. Circuit. Following the December 30, 2011 stay of the Transport Rule, EPA issued a notice explaining that because the underlying programs of the Transport Rule were stayed and there was no practical way for covered sources under the Supplemental Rule to comply with those programs, EPA would treat the Supplemental Rule in the same manner as the Transport Rule, which had been stayed. 77 Fed. Reg. 5710 (Feb. 6, 2012).

23. The First Revisions Rule adjusted state budgets for Florida, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New York, Texas, and Wisconsin and made other adjustments to allowance allocations for a handful of states. 77 Fed. Reg. 10,324 (Feb. 21, 2012).

24. The First Revisions Rule also delayed the effective date of the assurance provisions by two years, from 2012 to 2014, "in order to neutralize a key uncertainty facing successful and potentially rapid program implementation following the current stay, such that sources can rely on immediate activation of a Transport Rule allowance market that offers the cost-effective emission reduction flexibilities on which the rule relies . . ." 77 Fed. Reg. at 10,331.

25. Several petitions for review of the First Revisions Rule were filed in the U.S. Court of Appeals for the D.C. Circuit. No judicial or administrative action was taken to stay the First Revisions Rule and it went into effect on April 23, 2012.

26. The Second Revisions Rule adjusted state budgets for Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, South Carolina, and Texas and made other adjustments to allowance allocations for a handful of states. 77 Fed. Reg. 34,830 (June 12, 2012). Several

petitions for review of the Second Revisions Rule were filed in the U.S. Court of Appeals for the D.C. Circuit. No judicial or administrative action was taken to stay the Second Revisions Rule and it went into effect on August 13, 2012.

II. Implementation of the Transport Rule if the Stay is Lifted

27. The EPA anticipates that if the stay of the Transport Rule is dissolved by the Court, as requested in EPA's motion to lift the stay, the Transport Rule would go into effect in its current form – that is, as revised by the Supplemental Rule, the First Revisions Rule and the Second Revisions Rule.

28. As explained above, the Transport Rule established Phase 1 budgets that were to apply in 2012 and 2013 and Phase 2 budgets that were to apply in 2014 and beyond. As explained in EPA's motion to lift the stay, EPA is requesting that the stay be lifted immediately. However, because the rule was intended to operate on a calendar-year basis, EPA is asking the court to toll by three years all deadlines in the rule that had not already passed prior to the December 30, 2011 stay, so that the Phase 1 budgets would apply in 2015 and 2016 and the Phase 2 budgets would apply in 2017 and beyond.

29. The EPA believes tolling the deadlines by three years would balance several competing interests – the equitable interest in restoring the parties to the same position each would have been in prior to the December 30, 2011 stay, restoring the rule to the position it was in prior to the stay, and providing for the most orderly, least disruptive implementation of the rule going forward.

30. The EPA does not believe it would be reasonable to toll the compliance deadlines by exactly the number of days the stay was in effect. The stay of the Transport Rule was issued just two days before the trading programs were to begin and two years and two days before the Phase 2 budgets and the assurance provisions were to go into effect. Therefore, such an approach would provide regulated parties and the agency with an unreasonably short time -- two days -- to prepare for implementation.

31. The EPA designed the Transport Rule trading programs for implementation as calendar-year programs. Coordination of emission reporting requirements and compliance obligations is an important design consideration for each of the trading

programs operated by the Clean Air Markets Division. Such coordination is necessary to ensure that final emissions data for a control period is available before the deadline for sources to transfer allowances to cover emissions during that control period. The Transport Rule's calendar-year annual trading programs are consistent with the existing calendar-year Acid Rain trading program (whose calendar-year compliance schedule is mandated by statute) and CAIR (whose annual trading programs' schedules were designed to align with the Acid Rain program's schedules). Any change from calendar-year compliance for the Transport Rule's annual trading programs could therefore create a need for additional rulemaking to revise the Transport Rule's reporting schedules in order to provide final emissions information when needed for the revised compliance schedule. Given EPA's lack of authority to change the Acid Rain trading program's calendar-year compliance schedule, such revised reporting requirements could create multiple overlapping reporting schedules with an increased regulatory burden on sources.

32. Thus, retaining a calendar-year basis for the Transport Rule's annual programs -- by tolling the deadlines by a specific number of calendar years -- would avoid the potential for increased regulatory burden, reduce the potential for confusion that would accompany any approach that required reporting for parallel annual programs on different schedules, and maintain a compliance schedule with which affected sources are familiar due to nearly 20 years of compliance with Acid Rain Program and CAIR requirements.

33. If the compliance deadlines are tolled by three years, the EPA would anticipate taking any administrative action necessary to convert previously allocated 2012 allowances to 2015 allowances and previously allocated 2013 allowances to 2016 allowances.

34. In addition, EPA anticipates that the assurance provisions would, consistent with the change to the program made in the First Revisions Rule, not go into effect until January 1, 2017. The EPA would anticipate taking any necessary administrative action to amend the existing regulatory text in the Code of Federal Regulations to clarify the effective date of these provisions.

III. Comparison of Transport Rule Budgets, Assurance Levels, and Recent Emissions

A. Emissions Data

35. Under 40 CFR 75 (Part 75), most fossil fuel-fired electric generators report hourly emissions (e.g., SO₂, NO_x) and operations data to EPA on a quarterly basis. The Clean Air Markets Division collects and maintains this data.

36. Part 75 is a comprehensive monitoring, reporting, and verification program. The EPA and state environmental regulators use Part 75 emissions data to assess compliance with a variety of emission control programs. To ensure EPA and state environmental regulators have complete, accurate, reliable, precise, and timely data, EPA designed Part 75 with prescriptive measurement and quality assurance (QA) requirements accompanied by rigorous auditing and verification procedures. These measures ensure that the Part 75 emissions data is accurate and reliable.

B. Comparison of Transport Rule Budgets, Assurance Levels, and Recent Emissions

37. The following tables present Transport Rule emissions budgets for Phases 1 and 2, assurance levels for Phase 2, and recent emissions in states covered by each of the four Transport Rule programs. The data below reflect the assumptions identified in paragraphs 28 through 35 of this declaration. Specifically, they reflect the assumption that if the stay of the Transport Rule were dissolved, the Transport Rule would go into effect as revised by the Supplemental Rule and the First and Second Revisions Rules. The Phase 1 and Phase 2 budgets reflect the revisions to those budgets made in the Revisions rules, and assurance levels for Phase 1 are not shown as those regulatory provisions would not go into effect until Phase 2. The state-level emissions data for 2012 and 2013 were obtained by adding together the annual or ozone-season unit-level emissions data for all sources within a state that EPA believes meet the applicability criteria for the Transport Rule.²

² All EPA emissions data are final and were downloaded from EPA's Air Markets Program Data website on May 28, 2014 (<http://ampd.epa.gov/ampd>). For a few sources not covered by the Acid Rain Program or CAIR data reported by sources to the Energy Information Administration were used.

38. Several common points regarding the four tables should be noted. First, the data in the tables show that, for each of the four trading programs, the aggregated emissions of sources covered by the program in both 2012 and 2013 were less than the respective total Phase 1 program budgets. The data thus demonstrate that compliance with the Transport Rule would have been feasible in 2012 and 2013 and that, if the stay is lifted, there would likely be a surplus of allowances in the trading system during Phase 1 and thus compliance with the allowance holding requirements could be achieved without additional emission reductions from 2013 levels. Second, the data also show that, for each of the four programs, additional emission reductions from 2013 levels would be necessary in one or more states to bring those states into compliance with the respective states' Phase 2 assurance levels. As explained above, the assurance levels provide a firm cap on the amount of emissions that may be emitted from electric generating units in each covered state. The Transport Rule includes assurance levels to ensure that necessary reductions occur in each covered state while allowing for limited fluctuation above the state budgets. The Clean Air Interstate Rule (CAIR) does not contain a comparable state-specific requirement.

Table 1: Transport Rule Annual SO₂ Budgets (Group 1 States), Assurance Levels and Recent Emissions (Tons)

State	2012 Emissions	2013 Emissions	Phase 1 Budget	Phase 1 Assurance Level	Phase 2 Budget	Phase 2 Assurance Level
Illinois	152,172	135,866	234,889	N/A	124,123	146,465
Indiana	273,628	268,217	290,762	N/A	166,449	196,410
Iowa	81,368	76,844	107,085	N/A	75,184	88,717
Kentucky	186,180	188,115	232,662	N/A	106,284	125,415
Maryland	22,884	25,117	30,120	N/A	28,203	33,280
Michigan	194,699	194,390	229,303	N/A	143,995	169,914
Missouri	138,833	141,430	207,466	N/A	165,941	195,810
New Jersey	2,990	2,432	7,670	N/A	5,574	6,577
New York	17,636	17,797	36,296	N/A	27,556	32,516
North Carolina	58,295	48,154	136,881	N/A	57,620	67,992
Ohio	323,962	281,986	315,393	N/A	142,240	167,843
Pennsylvania	249,716	252,078	278,651	N/A	112,021	132,185
Tennessee	66,258	56,405	148,150	N/A	58,833	69,423
Virginia	31,488	38,778	70,820	N/A	35,057	41,367
West Virginia	83,265	86,201	146,174	N/A	75,668	89,288
Wisconsin	61,565	62,434	79,480	N/A	47,883	56,502
Total	1,944,936	1,876,246	2,551,802		1,372,631	

39. The data in Table 1 show that in 2013 the annual SO₂ emissions from covered sources in every individual SO₂ Group 1 state were below the state's Transport Rule Phase 1 budget, and 2012 emissions were below Phase 1 budgets in all states except Ohio. Additionally, these data show that aggregate 2013 emissions were well below the aggregate emissions level in the Phase 1 budgets that would apply in 2015 and 2016, if the stay is lifted.

40. These data also show that several states' 2013 emissions were above their Phase 2 budgets and assurance levels and that the Group 1 states' collective 2013 SO₂ emissions exceeded the sum of the Group 1 states' Phase 2 SO₂ budgets. Implementation of the Transport Rule under the schedule proposed by EPA in its motion would therefore require emission reductions both from individual states and from all the Group 1 states collectively. I believe, based on a review my staff conducted of information regarding planned retirements and new emission control installations, that the necessary reductions can be feasibly achieved by 2017 without the construction of additional control equipment. Our analysis shows that all of the needed reductions will be achieved by carrying out actions that have already been announced.

Table 2: Transport Rule Annual SO₂ Budgets (Group 2 States), Assurance Levels and Recent Emissions (Tons)

State	2012 Emissions	2013 Emissions	Phase 1 Budget	Phase 1 Assurance Level	Phase 2 Budget	Phase 2 Assurance Level
Alabama	128,828	106,155	216,033	N/A	213,258	251,644
Georgia	101,072	80,949	158,527	N/A	135,565	159,967
Kansas	32,945	30,026	41,980	N/A	41,980	49,536
Minnesota	25,286	24,366	41,981	N/A	41,981	49,538
Nebraska	62,399	65,834	68,162	N/A	68,162	80,431
South Carolina	44,973	26,779	96,633	N/A	96,633	114,027
Texas	339,309	365,657	294,471	N/A	294,471	347,476
Total	734,813	699,767	917,787		892,050	

41. As the data in Table 2 show, in 2012 and 2013, annual SO₂ emissions from covered sources in every individual SO₂ Group 2 state except Texas were below the state's Transport Rule Phase 1 and Phase 2 budgets for annual SO₂. In addition, aggregate 2012 and 2013 emissions of all covered states were well below

the aggregate emissions levels in both the Phase 1 budgets that would apply in 2015 and 2016 and the Phase 2 budgets that would apply in 2017 and beyond.

42. Texas sources' collective 2013 emissions were slightly above the state's Phase 2 assurance level. Implementation of the Transport Rule under the schedule proposed by EPA in its motion would ensure that in 2017 and beyond Texas emissions did not exceed this assurance level. I believe, based on a review my staff conducted of information regarding past Texas emissions and planned retirements and new emission control installations in Texas, that the necessary reductions can be feasibly achieved by 2017 without the construction of additional control equipment. Our analysis shows that the vast majority of the needed reductions will be achieved by carrying out actions that have already been announced. In fact, merely returning to 2012 emission levels would bring Texas into compliance with its Phase 2 assurance level.

Table 3: Transport Rule Annual NO_x Budgets, Assurance Levels and Recent Emissions (Tons)

State	2012 Emissions	2013 Emissions	Phase 1 Budget	Phase 1 Assurance Level	Phase 2 Budget	Phase 2 Assurance Level
Alabama	45,793	45,552	72,691	N/A	71,962	84,915
Georgia	34,892	35,599	62,010	N/A	53,738	63,411
Illinois	52,874	50,102	47,872	N/A	47,872	56,489
Indiana	103,933	101,270	109,726	N/A	108,424	127,940
Iowa	34,827	33,666	38,335	N/A	37,498	44,248
Kansas	33,408	28,685	31,354	N/A	31,354	36,998
Kentucky	80,214	84,894	85,086	N/A	77,238	91,141
Maryland	15,559	11,971	16,633	N/A	16,574	19,557
Michigan	66,449	65,433	65,421	N/A	63,040	74,387
Minnesota	24,353	24,855	29,572	N/A	29,572	34,895
Missouri	69,814	75,943	52,400	N/A	48,743	57,517
Nebraska	26,993	27,644	30,039	N/A	30,039	35,446
New Jersey	5,446	5,214	8,218	N/A	7,945	9,375
New York	16,908	17,439	21,722	N/A	21,722	25,632
North Carolina	48,261	46,067	50,587	N/A	41,553	49,033
Ohio	81,274	83,735	95,468	N/A	90,258	106,504
Pennsylvania	129,462	133,817	119,986	N/A	119,194	140,649
South Carolina	17,552	12,904	32,498	N/A	32,498	38,348
Tennessee	22,607	18,102	35,703	N/A	19,337	22,818
Texas	132,875	138,872	137,701	N/A	137,701	162,487
Virginia	22,642	25,019	33,242	N/A	33,242	39,226
West Virginia	50,488	58,101	59,472	N/A	54,582	64,407
Wisconsin	24,841	25,604	34,101	N/A	32,871	38,788
Total	1,141,464	1,150,487	1,269,837		1,206,957	

43. As the data in Table 3 show, aggregate 2012 and 2013 annual NO_x emissions from covered sources in Transport Rule states were well below the aggregate emissions levels in the Phase 1 budgets that would apply in 2015 and 2016, and were also below the Phase 2 budgets that would apply in 2017 and beyond.

44. Several covered states had 2012 or 2013 annual NO_x emissions above their Phase 2 state budgets, but for all covered states except Missouri, both 2012 and 2013 emissions were below the respective states' Phase 2 assurance levels. Implementation of the Transport Rule under the schedule proposed by EPA in its motion would ensure that in 2017 and beyond Missouri emissions did not exceed this assurance level.

45. Based on my staff's analysis of reported emissions data, I believe that the emission reductions required from Missouri sources collectively to enable the state to meet its Phase 1 budget and its Phase 2 budget (the assurance level that state emissions cannot exceed is 18% higher than the budget) could be achieved by recommencing operation of idled control equipment (e.g., restarting existing selective catalytic reduction control equipment to reduce NO_x emissions). Additional reductions in the Transport Rule region could also be achieved by recommencing operation of idled control equipment in many other states. Operation of such controls would bring emissions in both Illinois and Pennsylvania below their Phase 2 budgets.

Table 4: Transport Rule Ozone-Season NO_x Budgets, Assurance Levels and Recent Emissions (Tons)

State	2012 Emissions	2013 Emissions	Phase 1 Budget	Phase 1 Assurance Level	Phase 2 Budget	Phase 2 Assurance Level
Alabama	23,382	20,771	31,746	N/A	31,499	38,114
Arkansas	16,407	17,339	15,110	N/A	15,110	18,283
Florida	30,764	27,081	28,644	N/A	27,825	33,668
Georgia	14,957	14,801	27,944	N/A	24,041	29,090
Illinois	21,264	18,671	21,208	N/A	21,208	25,662
Indiana	44,054	42,172	46,876	N/A	46,175	55,872
Iowa	15,550	15,254	16,532	N/A	16,207	19,610
Kentucky	35,898	34,363	36,167	N/A	32,674	39,536
Louisiana	22,084	17,789	18,115	N/A	18,115	21,919
Maryland	7,494	5,303	7,179	N/A	7,179	8,687
Michigan	29,801	28,365	28,041	N/A	27,016	32,689
Mississippi	10,713	11,321	12,429	N/A	12,429	15,039
Missouri	34,275	31,482	22,788	N/A	21,099	25,530
New Jersey	3,281	2,680	4,128	N/A	3,731	4,515
New York	8,518	7,717	10,369	N/A	10,369	12,546
North Carolina	23,069	20,593	22,168	N/A	18,455	22,331
Ohio	38,323	35,626	41,284	N/A	39,013	47,206
Oklahoma ³	33,029	25,504	36,567	N/A	22,694	27,460
Pennsylvania	61,476	57,246	52,201	N/A	51,912	62,814
South Carolina	8,251	5,962	13,909	N/A	13,909	16,830
Tennessee	11,082	8,040	14,908	N/A	8,016	9,699
Texas	62,791	63,977	65,560	N/A	65,560	79,328
Virginia	11,362	11,283	14,452	N/A	14,452	17,487
West Virginia	23,284	24,461	25,283	N/A	23,291	28,182
Wisconsin	11,844	10,864	14,784	N/A	14,296	17,298
Total	602,952	558,666	628,392		586,275	

46. As the data in Table 4 show, aggregate 2012 and 2013 ozone-season NO_x emissions from covered sources in Transport Rule states were below the sum of the state budgets that would apply in 2015 if the stay were lifted and aggregate 2013 emissions were below those that would apply in 2017 and beyond.

³ The Phase 1 budget shown for Oklahoma is its 2012 budget. Oklahoma's 2013 budget is 22,694 tons, equal to its Phase 2 budget. These budgets would become Oklahoma's 2015 and 2016 budgets, respectively, if the stay were to be lifted and the deadlines were to be tolled for three years as EPA is requesting. For all other states, the 2015 and 2016 budgets would be identical.

47. Several covered states had 2012 or 2013 ozone-season NO_x emissions above their Phase 2 state budgets, but for all covered states except Missouri, 2013 emissions were below the respective states' Phase 2 assurance levels.

Implementation of the Transport Rule under the schedule proposed by EPA would ensure that in 2017 and beyond Missouri emissions do not exceed this assurance level.

48. Based on my staff's analysis of reported emissions data, I believe that the emission reductions required from Missouri sources collectively to enable the state to meet its Phase 1 budget and its Phase 2 budget (the assurance level that state emissions cannot exceed is 21% higher than the budget) could be achieved by recommencing operation of idled control equipment. Additional reductions in the Transport Rule region could also be achieved by recommencing operation of idled control equipment in many other states. Operation of such controls would bring emissions in Pennsylvania below its Phase 2 budget.

C. Current Emission Levels

49. Current emission levels are below the levels that CAIR was designed to achieve and thus implementation of CAIR does not guarantee these current levels will be maintained. In 2011, when the Transport Rule was promulgated, sources covered by the rule, in aggregate, would have needed to make additional reductions (beyond those already made to comply with CAIR) to comply with the Transport Rule. Since that time, and even though the Transport Rule was stayed on December 30, 2011, sources reduced their aggregate emissions such that all of the Transport Rule Phase 1 budgets were being met in the aggregate. These additional reductions are not directly attributable to CAIR. In fact, emissions data for the first quarter of 2014 show an increase in emissions of pollutants controlled under Transport Rule programs from the first quarter 2013 levels. Moreover, CAIR addressed transport with respect to only the 1997 ozone and 1997 PM_{2.5} NAAQS while the Transport Rule addresses transport with respect to those NAAQS and also the 2006 PM_{2.5} NAAQS.

IV. Ozone Nonattainment

50. Despite decreases in emissions, several areas in the portion of the country covered by the Transport Rule continue to face ozone nonattainment problems.

EPA tracks air quality data and makes available on its website data regarding air quality in areas designated nonattainment for various NAAQS. The address for this website is: www.epa.gov/airtrends/values.html. Table 1b of the detailed ozone information on the website provides information regarding the designation status of and the air quality in areas originally designated nonattainment for the 1997 ozone NAAQS.

51. The most recent final air quality data available on the aforementioned website are the design values for 2010-2012. Design values are the values used to determine whether air quality in an area is meeting the NAAQS. For the 1997 8-hour ozone NAAQS, the design value is the 3-year average of the annual 4th highest daily maximum 8-hour ozone concentration. The design value period, in turn, is the 3-year period used for calculating the design value. The air quality data show that several areas in the Transport Rule region had air quality for the 2010-2012 design value period that did not meet the 1997 ozone NAAQS. These areas include major metropolitan areas such as: Baltimore, Maryland; Dallas, Texas; Houston, Texas; and New York, New York. Two of these areas, Baltimore, Maryland and Dallas, Texas are classified as "Serious" nonattainment areas and thus had June 2013 attainment deadlines. They could face reclassification and more stringent requirements if EPA determines that they failed to attain by their attainment deadlines.

SO DECLARED:



Reid P. Harvey, Director
Clean Air Market Division

DATED: June 26, 2014

ATTACHMENT B

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1497

September Term, 1999

Filed On: June 22, 2000 [524995]

State of Michigan, Michigan
Department of Environmental Quality
and State of West Virginia,
Division of Environmental Protection,
Petitioners

v.

Environmental Protection Agency,
Respondent

New England Council, Inc., et al.,
Intervenors

Consolidated with 98-1499, 98-1500, 98-1501,
98-1502, 98-1504, 98-1518, 98-1556, 98-1567,
98-1573, 98-1585, 98-1588, 98-1590, 98-1596,
98-1598, 98-1601, 98-1602, 98-1608, 98-1609,
98-1611, 98-1615, 98-1616, 98-1617, 98-1618,
98-1619, 98-1621, 99-1070, 99-1093

Before: Williams, Sentelle and Rogers, Circuit Judges

ORDER

Upon consideration of respondent EPA's motion to lift partial stay, petitioning States' (Michigan, et al.) response, Industry/Labor petitioners' opposition, opposition and cross-motion to extend stay of Interstate Natural Gas Association of America and Council of Industrial Boiler Owners, EPA's opposition to the cross-motion, response of intervenor-respondent States, response of the Electric Generator intervenor-respondents, opposition of NRDC, EPA's reply, Interstate Natural Gas Association of America and Council of Industrial Boiler Owners' reply, and EPA's motion for leave to file corrected exhibit, it is

ORDERED that EPA's motions be granted in part; the cross-motion of Interstate Natural Gas Association of America and Council of Industrial Boiler Owners be denied.

The original deadline for covered states to submit revised state implementation plans (SIPs) was September 30, 1999. On May 25, 1999 we stayed that deadline pending further order of this court. The purpose of a stay is "to maintain the status quo pending a final determination of the merits of the suit." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). At the time of the stay, covered states had 128 days left to submit their SIPs. Having made a final determination of the merits of the suit and denied the petitions for rehearing, and the full court having denied the petitions for rehearing en banc, we lift the stay but hereby order that covered states be given the 128 days, running from the date of issuance of this order, that they had remaining when the stay was imposed. While this grants somewhat more time than EPA's current schedule of September 1, 2000, it does no more than restore the status quo preserved by the stay.

FOR THE COURT:

Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk