

ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1037 (and consolidated cases)

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

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTIONS OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**BRIEF FOR PETITIONERS STATE OF WYOMING, STATE OF TEXAS,
RICK PERRY, GREG ABBOTT, TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY, TEXAS DEPARTMENT OF
AGRICULTURE, TEXAS RAILROAD COMMISSION, TEXAS GENERAL
LAND OFFICE, BARRY SMITHERMAN, DONNA NELSON, AND
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**CERTIFICATE AS TO PARTIES, RULINGS
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), Petitioners State of Texas; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Railroad Commission; Texas General Land Office; Barry Smitherman, Texas Public Utility Commissioner; Donna Nelson, Texas Public Utility Commissioner; Kenneth Anderson, Texas Public Utility Commissioner; and State of Wyoming state as follows:

A. Parties, Intervenors, and Amici:

Petitioners:

State of Texas

Rick Perry, Governor of Texas

Greg Abbott, Attorney General of Texas

Texas Commission on Environmental Quality

Texas Department of Agriculture

Texas Railroad Commission

Texas General Land Office

Barry Smitherman, Texas Public Utility Commissioner

Donna Nelson, Texas Public Utility Commissioner

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State of Wyoming

Utility Air Regulatory Group

National Mining Association

Peabody Energy Company

SIP/FIP Advocacy Group

Coalition for Responsible Regulation, Inc.

Industrial Minerals Association – North America

National Cattlemen’s Beef Association

Great Northern Project Development L.P.

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Intervenor for Petitioners:

Wyoming Mining Association

Respondent:

United States Environmental Protection Agency (“EPA”)

Intervenors for Respondent:

State of Connecticut

The Sierra Club

Natural Resources Defense Council

Environmental Defense Fund

Conservation Law Foundation

Movant-Intervenors for Respondent:

The Sierra Club

Natural Resources Defense Council

Environmental Defense Fund

Conservation Law Foundation

Amici Curiae: None at this time.

Each of these consolidated cases is a petition for review of agency action; there were no proceedings before the District Court, and therefore the requirement to furnish a list of all parties and amici who appeared before the District Court is inapplicable.

B. Rulings Under Review

The rulings under review are final actions promulgated by the EPA entitled the *Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77,698 (Dec. 13, 2010); the *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed Reg. 81,874 (Dec. 29, 2010); and the *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82,246 (Dec. 30, 2010).

C. Related Cases

To the knowledge of undersigned counsel, there are no other cases related to this case other than the following consolidated cases: *State of Texas, et al v. EPA*, No. 11-1038; *National Mining Association v. EPA*, No. 11-1039; *Peabody Energy Company v. EPA*, No. 11-1040; *SIP/FIP Advocacy Group v. EPA*, No. 11-1041; *Utility Air Regulatory Group v. EPA*, No. 11-1059; *Utility Air Regulatory Group v. EPA*, No. 11-1060, *State of Texas, et al v. EPA*, No. 11-1063; *Coalition for Responsible Regulation, Inc. et al v. EPA*, No. 11-1075; *Utility Air Regulatory Group v. EPA*, No. 11-1076; *SIP/FIP Advocacy Group v. EPA*, No. 11-1077; *National Mining Association v. EPA*, No. 11-1078; *State of Wyoming v. EPA*, No. 11-1287; *State of Wyoming v. EPA*, No. 11-1288; *State of Wyoming v. EPA*, No. 11-1289; *National Mining Association v. EPA*, No. 11-1290; *Utility Air Regulatory Group v. EPA*, No. 11-1291; *Utility Air Regulatory Group v. EPA*, No. 11-1292; and *Utility Air Regulatory Group*, No. 11-1293.

None of these cases have previously been before this Court. *State of Texas, et al v. EPA*, No. 11-1063; *Coalition for Responsible Regulation, Inc. et al v. EPA*, No. 11-1075; *Utility Air Regulatory Group v. EPA*, No. 11-1076; *SIP/FIP Advocacy Group v. EPA*, No. 11-1077; and *National Mining Association v. EPA*, No. 11-1078 were filed in the United States Court of Appeals for the Fifth Circuit but were transferred to this Court. *State of Wyoming v. EPA*, No. 11-1287; *State of Wyoming v. EPA*, No. 11-1288; *State of Wyoming v. EPA*, No. 11-1289; *National Mining Association v. EPA*, No. 11-1290; *Utility Air Regulatory Group v. EPA*, No. 11-1291; *Utility Air Regulatory Group v. EPA*, No. 11-

1292; and *Utility Air Regulatory Group*, No. 11-1293 were filed in the United States Court of Appeals for the Tenth Circuit but were transferred to this Court.

Dated: February 8, 2012

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TABLE OF ABBREVIATIONS

EPA	United States Environmental Protection Agency
APA	Administrative Procedure Act
SIP	State Implementation Plan
PSD	Prevention of Significant Deterioration
GHG	Greenhouse Gases

JURISDICTIONAL STATEMENT

Pursuant to 42 U.S.C. § 7607(b)(1), this Court has jurisdiction over the *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (“SIP Call”), the *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81,874 (Dec. 29, 2010) (“Failure Finding”), and the *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82,246 (Dec. 30, 2010) (“Federal Implementation Plan”), because the State Petitioners filed timely petitions for review of each rule, which were transferred to this Court because they were incorrectly held to be nationally-applicable regulations subject to exclusive venue in this Court.

STATEMENT OF ISSUES

1. Clean Air Act § 110(i) allows EPA to revise state implementation plan requirements applicable to stationary sources, only through a plan revision under Clean Air Act § 110(a) or a federal implementation plan under Clean Air Act § 110(c) if a state failed to submit a required plan revision. EPA required Wyoming and Texas to revise their state implementation plans without allowing prospective revisions

under Clean Air Act § 110(a), and imposed a federal implementation plan on Wyoming. Are EPA's calls for plan revisions in Texas and Wyoming and imposing a federal implementation plan in Wyoming unlawful?

2. EPA's regulations at 40 C.F.R. § 51.166(a)(6) provide three years for States to revise state implementation plans in response to changes in EPA's minimum standards for plan approvals. The SIP Call implements the Tailoring Rule, which revises EPA's minimum standards for approvable state implementation plans, in certain States, and requires those states to revise plans in less than three months. Is EPA's decision to depart from 40 C.F.R. § 51.166(a)(6) and require plan revisions in less than three months arbitrary and capricious or contrary to law?

3. Clean Air Act § 110(k)(5) allows EPA to call for state implementation plan revisions only with respect to requirements "to which the State was subject when it developed and submitted the plan for which such finding was made." Wyoming and Texas were not subject to greenhouse gas regulation requirements when they developed and submitted their plans more than thirty years ago and more than a decade ago, respectively. Is EPA's decision to require immediate revisions to meet standards that were not in place when the States developed and submitted their plans arbitrary and capricious?

4. The Administrative Procedure Act requires that a final rule promulgated pursuant to 5 U.S.C. § 553 be the logical outgrowth of the Agency's proposal. In the

proposed SIP Call, EPA did not provide notice to interested parties that it was considering calling for revisions to Wyoming's state implementation plan. Is EPA's final SIP Call, which requires revisions to Wyoming's plan, a logical outgrowth of the proposed SIP Call?

5. The Tenth Amendment to the United States Constitution prohibits the federal government from coercing sovereign states to participate in a federal program. The SIP Call requires that Texas and Wyoming implement federal policy or face an unlawful construction ban. Does the SIP Call constitute unlawful coercion and commandeering of State government functions in violation of the Tenth Amendment's protection of Texas' and Wyoming's residual state sovereignty?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum attached to this Brief.

STATEMENT OF THE CASE

A. The Importance of State Implementation Plans in Clean Air Act Administration

The Clean Air Act “establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals.” *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). Under this partnership, “air pollution prevention . . . at its source is the primary responsibility of States and local governments[.]” 42 U.S.C. § 7401(a)(3). Accordingly, “the states retain wide latitude

in choosing how best to achieve national standards, given local needs and conditions.”

United States v. Gen. Motors Corp., 876 F.2d 1060, 1062 (1st Cir. 1989).

States implement the Clean Air Act primarily through state implementation plans. A state implementation plan compiles the state’s laws, regulations, and enforcement standards for complying with the Act’s national ambient air quality standards and other supporting scientific and technical evidence. *See* 42 U.S.C. § 7410(a). “The [state implementation plan] basically embodies a set of choices regarding such matters as transportation, zoning and industrial development that the state makes for itself in attempting to reach the [national ambient air quality standards] with minimum dislocation.” *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 780-81 (3d Cir. 1987).

Among the programs that States are required to implement through their state implementation plans is the prevention of significant deterioration program, which is a preconstruction review and permitting program. As its name suggests, the program seeks to prevent air quality from significantly deteriorating in areas meeting federal ambient air quality standards. *Ala. Power Co. v. Costle*, 636 F.2d 323, 349-50 (D.C. Cir. 1979) (per curiam).

B. The Clean Air Act Gives States the Primary Role in Adopting and Revising Their State Implementation Plans

Because decisions about how States allocate their air quality resources among different sources implicate quintessentially local concerns, Congress “carefully

balanced State and national interests by providing for a fair and open process in which State and local governments and the people they represent will be free to carry out the reasoned weighing of environmental and economic goals and needs.” H.R. Rep. No. 95-294, at 146 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1225. The prevention of significant deterioration program is no different and is therefore not self-executing. Instead, Congress, through the Clean Air Act, expressly requires EPA to publish regulations to guide state implementation of the program through state implementation plans. *See* 42 U.S.C. § 7471. The general framework for state implementation plan development, submission, and revision is found in Clean Air Act § 110(a). EPA has promulgated regulations at 40 C.F.R. Part 51 that implement § 110(a) and that set forth the Agency’s minimum standards for approvable state implementation plans. State implementation plans and plan revisions promulgated under the Act are legislative rules that are adopted through notice and comment procedures and have the force and effect of law. 42 U.S.C. §§ 7410(a)(1), (a)(2), (k)(3), (l); *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007).

As with state implementation plan promulgations, the “Act also places primary responsibility on the states for [plan] revisions.” *Concerned Citizens of Bridesburg*, 836 F.2d at 781. Because the plan revision process is time-consuming and costly, Congress provided states up to three years to revise their plans after EPA adopts or revises a national ambient air quality standard. 42 U.S.C. § 7410(a)(1). Although

Congress did not specify precisely how long States have to revise their plans in response to a change to the minimum requirements for state prevention of significant deterioration programs, EPA did by binding legislative rule: “[a]ny State required to revise its implementation plan by reason of an amendment to” EPA’s minimum standards for approvable state plans “shall adopt and submit such plan revision to the Administrator for approval no later than *3 years* after such amendment is published in the *Federal Register*.” 40 C.F.R. § 51.166(a)(6)(i) (emphasis added). State plan revisions operate “prospectively.” § 51.166(a)(6)(iii).

During the interim, the state’s previously approved state plan remains in force because an approved state implementation plan binds both the State and EPA, even when EPA later alters its strategy for implementing the Clean Air Act and calls for a plan revision. *See United States v. Cinergy Corp.*, 623 F.3d 455, 458 (7th Cir. 2010) (Posner, J.) (“The Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that the EPA has approved.”). EPA similarly takes the position that legislative rules, such as state plans, have binding force and effect even where they are not consistent with the Act—just because a regulation is inconsistent with the Act does not mean it is unenforceable. *See Med. Waste Ins. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (accepting EPA’s argument that a rule argued to be inconsistent with the Clean Air Act could not be challenged in a later proceeding). In fact, Congress, through

Clean Air Act § 110(i), expressly precludes EPA from collaterally attacking state plans: “except for . . . a plan promulgation under [Clean Air Act § 110(c)] . . . or a plan revision under [Clean Air Act § 110(a)(3)] . . . no . . . action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the States or the Administrator.” 42 U.S.C. § 7410(i).

EPA has authority to direct states to revise their implementation plans where they prove to be insufficient to achieve their intended regulatory objectives. Under Clean Air Act § 110(k)(5), EPA may call for revisions of plans that are “substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport . . . or to otherwise comply with any requirement of this chapter[.]” 42 U.S.C. § 7410(k)(5). In order to avoid giving EPA a revisory power to call for plan revisions outside the process provided by Clean Air Act § 110(a), Congress limited Clean Air Act § 110(k)(5) to requirements that were in force when states submit their implementation plans: “[a]ny finding under [Clean Air Act § 110(k)(5)] shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan[.]” *Id.* Even when EPA may require a state to make a plan revision under Clean Air Act § 110(k)(5), it may not allow EPA to force States to act immediately. Instead, it must “establish *reasonable* deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.”

42 U.S.C. § 7410(k)(5) (emphasis added).

C. EPA Imposes New Regulatory Requirements as Part of Its Greenhouse Gas Regulatory Agenda

Before 2007, greenhouse gases were not regulated under the Clean Air Act. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that the definition of “air pollutant” in Clean Air Act § 302(g) was sufficiently “capacious” to authorize regulation “of such gases from new motor vehicles.” *Id.* at 532. EPA then exercised its discretion to find that greenhouse gas emissions from automobiles endangered public health. 74 Fed. Reg. 66,496/1 (Dec. 15, 2009) (the “Endangerment Finding”), J.A. ___. On the heels of the Endangerment Finding, EPA promulgated greenhouse gas emission standards for new motor vehicles. 75 Fed. Reg. 25,324 (May 7, 2010) (the “Tailpipe Rule”), J.A. ___.

EPA stated that these rules made greenhouse gases “subject to regulation” under the prevention of significant deterioration program, such that any stationary source that met Clean Air Act § 169(1)’s definition of “major emitting facilities” may have to obtain a prevention of significant deterioration permit setting forth control technology and other requirements for greenhouse gases. *See* 74 Fed. Reg. 51,535 (Oct. 7, 2009), J.A. ___. EPA altered this interpretation in a concurrent rulemaking, determining that greenhouse gases would become “subject to regulation” only when “actual control” requirements “take effect” on January 2, 2011. 75 Fed. Reg. 17,004, 17,006/1-17,007/3 (Apr. 2, 2010) (the “Timing Rule”), J.A. ___.

D. EPA Issues the SIP Call and Threatens a Construction Moratorium

EPA's Timing Rule acknowledged that its rush to regulate greenhouse gases created a significant problem: the prevention of significant deterioration program simply could not be applied to the huge number of sources that emit or potentially emit greenhouse gases at the statutory thresholds. According to EPA, more than six million buildings and facilities emit more than 100 tons per year of greenhouse gases. 75 Fed. Reg. 31,514, 31,562/3 (June 3, 2010) ("Tailoring Rule"), J.A. ___. With the addition of greenhouse gases, about 82,000 sources per year would require prevention of significant deterioration permits. *Id.* at 31,556/1, J.A. ___. In the absence of greenhouse gases, only about 280 sources per year would require permits. *Id.* This was not an inevitable result of EPA's decision to regulate greenhouse gases—as the dissent in *Massachusetts v. EPA*, 415 F.3d 50, 70 (D.C. Cir. 2005) (Tatel, J., dissenting), explained, EPA would have authority to exempt greenhouse gases from Clean Air Act programs that were "unworkable"—but was a conscious decision by EPA.

In order to shoehorn its attempt to regulate greenhouse gases into a program clearly not designed to control ubiquitous and naturally occurring gases, EPA reworked the term "subject to regulation" within the existing definition of "regulated NSR pollutant" to provide that the greenhouse gases—and only greenhouse gases—"shall not be subject to regulation" unless emitted by a new or existing facility with the potential to emit in excess of 100,000 tons per year of greenhouse gases, or from a

source that undertakes a change that increases greenhouse gas emissions in excess of 75,000 tons per year of greenhouse gases. 75 Fed. Reg. at 31,606/3-31,607/1 (codified at 40 C.F.R. §§ 51.166(b)(48)(i)-(v)), J.A. ___. In other words, despite the unambiguous and concrete thresholds set forth by Congress, EPA determined that it had the authority to ignore those thresholds at least with respect to greenhouse gases. In effect, EPA created two separate Clean Air Acts: one for greenhouses gases and one for other substances.

Notably, the procedural mechanism through which EPA enacted the Tailoring Rule was a revision to the minimum approvable state plan requirements in 40 C.F.R. § 51.166 — the same Code section that guarantees States up to three years to revise their state plans in response to any change in minimum state plan prevention of significant deterioration standards. 40 C.F.R. § 51.166(a)(6)(i). Nevertheless, EPA also requested further information from States and threatened to “call” the implementation plan of any State that refused or lacked authority to engage in the post hoc reinterpretation of its existing laws, or that declined to rush through a plan revision to regulate greenhouse gases in the manner defined in the Tailoring Rule. 75 Fed. Reg. at 31,583/1, J.A. ___.

After EPA created the Tailoring Rule, it was faced with a quandary: approved state plans throughout the United States properly did not include greenhouse gases, and the Clean Air Act and EPA’s regulations allowed them three years to incorporate

the Agency's new requirements. In order to short-circuit the state plan revision process, EPA proposed a "SIP call" pursuant to Clean Air Act § 110(k)(5) finding Texas' and twelve other state plans "substantially inadequate." *See* 75 Fed. Reg. 53,892, 53,899 (Sept. 2, 2010), J.A. ___. By contrast, EPA found in its proposed SIP call that Wyoming's plan was presumptively adequate. *Id.* at 53,899-900, J.A. ___. EPA also proposed that states must revise or reinterpret their approved prevention of significant deterioration plans to regulate sources emitting greenhouse gases at thresholds defined in the Tailoring Rule's revisions to the Agency's 40 C.F.R. Part 51 minimum standards for approvable state plans. *Id.*, J.A. ___. At the same time, EPA proposed a federal implementation plan that would apply to any State that did not revise or reinterpret its state plan to include the Tailoring Rule's requirements by January 2, 2011, and that instead succumbed to the SIP Call. *See* 75 Fed. Reg. 53,883, 53,883/2 (Sept. 2, 2010), J.A. ___.

Finally, EPA threatened to impose a construction moratorium on sources in States that failed to either reinterpret their state plans or agree to a finding of substantial inadequacy before January 2, 2011— only three months after it put Wyoming and Texas in the position of having their state implementation plans undercut by the rule changes described above. 75 Fed. Reg. 53,892, 53,901/3, J.A. ___. EPA stated expressly that "the affected GHG-emitting sources in that State . . . will be *unable to receive a federally approved permit authorizing construction or modification.*" *Id.*

(emphasis added). EPA made this threat despite the Clean Air Act's mandate that approved state implementation plans remain in force pending submission and approval of plan revisions.

To avoid any construction ban, EPA proposed a federal implementation plan and encouraged States to select December 22, 2010, as the deadline for submitting revised plans. 75 Fed. Reg. 53,892, 53,896/1-2, J.A. ___. EPA did not specifically propose a federal implementation plan for Wyoming. 75 Fed. Reg. 53,883, 53,886/1, J.A. ___.

E. EPA Calls Texas' and Wyoming's State Plans and Imposes Federal Plans

Texas and Wyoming each responded to EPA's threatened construction moratorium. Texas informed EPA that the proposed SIP Call was an unlawful collateral attack on its state plan and declined to forfeit its rights under the Clean Air Act. Wyoming explained that it could not lawfully revise its state plan in the time period EPA prescribed because the Wyoming Legislature prohibited Wyoming state agencies from promulgating greenhouse gas rules or regulations, *see* Wyo. Stat. Ann. § 35-11-213, and was out of session until after the January 2, 2011 effective date for the proposed construction ban. J.A. ___. Rather than face the economic losses of a construction moratorium, Wyoming accepted EPA's proposed December 22, 2010 deadline for plan submittals. J.A. ___.

On December 13, 2010, EPA published its final SIP Call rule, determining that

Texas, Wyoming, and eleven other States (or portions thereof) had substantially inadequate plans that must be revised. 75 Fed. Reg. 77,698/1 (Dec. 13, 2010), J.A. ___.

EPA expressly premised the SIP Call on its threatened construction moratorium:

This SIP call is important because without it, large [greenhouse gas]-emitting sources in these states may be unable to obtain a [prevention of significant deterioration] permit for their [greenhouse gas] emissions and therefore may face delays in undertaking construction or modification projects. This is because without the further action by the states or EPA that the SIP call is designed to lead to, sources that emit or plan to emit large amounts of [greenhouse gases] will, starting January 2, 2011, be required to obtain [prevention of significant deterioration] permits before undertaking new construction or modification projects, but neither the states nor EPA would be authorized to issue the permits.

75 Fed. Reg. 77,698, 77,700/1-2, J.A. ___.

With regard to Texas, EPA set a December 1, 2011 deadline for response. J.A. ___. EPA acted separately to disapprove Texas' SIP in an interim final rule on December 30, 2010 and in a final rule on May 3, 2011. 75 Fed. Reg. 82,365, 82,365/3 (Dec. 30, 2010); 76 Fed. Reg. 25,178, 25,178/1 (May 3, 2011), J.A. ___. Those actions are before the Court in *Texas v. EPA*, No. 10-1425 (and consolidated cases).

For Wyoming, EPA set a December 22, 2010 deadline for response. J.A. ___. After Wyoming failed to meet the impossible deadline, EPA issued the Failure Finding rule on December 29, 2010.¹ 75 Fed. Reg. 81,874, 81,874/1, J.A. ___. EPA followed the Failure Finding with the Federal Implementation Plan, even though EPA had not specifically proposed this action for Wyoming in the SIP Call proposal. *See* 75 Fed. Reg. 82,246, 82,248/2, J.A. ___.

Texas filed a petition for review of the SIP Call in the United States Court of Appeals for the Fifth Circuit, as well as a protective petition for review in this Court. *See* Pet. for Rev., Dec. 15, 2010, J.A. ___; Pet. for Rev., Feb. 11, 2011. J.A. ___. Wyoming timely filed petitions for review of the GHG SIP Call, Failure Finding, and Federal Plan in the United States Court of Appeals for the Tenth Circuit. *See* Pet. for Rev., Feb. 10, 2011, J.A. ___; Pet. for Rev., Feb. 10, 2011, J.A. ___; Pet. for Rev., Feb. 10, 2011, J.A. ___. These actions were transferred to the D.C. Circuit on February 24, 2011, and August 15, 2011, respectively. Order, Feb. 24, 2011, J.A. ___; Order, Aug. 15, 2011, J.A. ___.

¹ The Failure Finding does not in and of itself regulate, but rather is a prerequisite to the imposition of the Federal Implementation Plan.

STATEMENT OF STANDING

Texas and Wyoming satisfy the three elements of Article III standing—injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The States' injury is plain. The SIP Call designates Texas' and Wyoming's implementation plans as “substantially inadequate,” injuring Texas' and Wyoming's quasi-sovereign interests in regulating air quality within their borders. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). In their comments to EPA, Texas and Wyoming each explained how their loss of this regulatory power harmed them. Texas commented that it had “an undisputed right to address air quality management resources issues, including newly-regulated pollutants, on a prospective basis. EPA may not step in unless and until the states have been given full and fair opportunity to do so.” *See* Comments of the Texas Commission on Environmental Quality, EPA-HQ-OAR-2010-0107-0084, J.A. ___. Wyoming commented that EPA's expedited action threatening a construction ban would nullify Wyoming's approved implementation plan and result in job losses and other costs to Wyoming and its citizens. J.A. ___. The ability of Texas and Wyoming to regulate air quality within their borders would not have been supplanted but for EPA's SIP Call.

Moreover, the SIP Call provided an unlawful foundation upon which EPA premised its subsequent Failure Finding and Federal Implementation Plan for

Wyoming, which injured Wyoming by overriding its state law and supplanting Wyoming as the primary air quality regulation authority in the state. *See Mont. Sulphur & Chem. Co. v. EPA*, Nos. 02-71657, 08-72642, 2012 WL 149354, at *5 (9th Cir. Jan 19, 2012); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., as Circuit Justice); *Cal. State Bd. of Optometry v. FTC*, No. 89-1190, 1989 WL 111595 at *1 (D.C. Cir. Aug. 15, 1989) (citing *Orrin W. Fox* to support stay of agency action).

A decision vacating the SIP Call, Failure Finding, and Federal Implementation Plan will redress Texas' and Wyoming's injuries. When the complainant is the object of government action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. So it is here. A judgment that EPA acted unlawfully or unconstitutionally will redress the harm EPA has caused by vacating the actions by which EPA supplanted Wyoming's and Texas' right to regulate air quality within their borders.

SUMMARY OF ARGUMENT

EPA's SIP Call is an unlawful attempt to rush into effect EPA's greenhouse-gas regulatory scheme, notwithstanding Texas' and Wyoming's rights under the Clean Air Act and the United States Constitution.

Relying on cooperative federalism to improve air quality, Congress established detailed procedures that allowed states a reasonable opportunity to implement new Clean Air Act requirements and specifically barred EPA from acting outside of those procedures. Rather than allow Texas and Wyoming to exercise their sovereign prerogatives under this process, EPA wrongly invoked Clean Air Act § 110(k)(5) in its call for Texas and Wyoming to change their implementation plans. That provision allows EPA to call for plan revisions where the plan in question is substantially inadequate to achieve the air quality goals it was enacted to attain. Neither Texas' nor Wyoming's existing implementation plan was designed to control greenhouse gas emissions because EPA only recently determined to regulate those gases under the Clean Air Act. Plan revisions needed to comply with new requirements—such as the new requirement to regulate greenhouse gases under the PSD program—must be conducted under Clean Air Act § 110(a), and applicable law allows states three years to conduct such revisions so that states have a reasonable time to make the revisions and to allow for public participation at the state level. In this way, EPA's SIP Call is arbitrary and capricious and is contrary to law, and must be vacated.

Even accepting EPA's mistaken view of its authority under the Clean Air Act, the SIP Call is nonetheless unlawful because Texas' and Wyoming's EPA-approved state plans were not substantially inadequate. The Clean Air Act unambiguously limits EPA's authority to call for plan revisions to "subject the State to the requirements of

this chapter to which the State was subject when it developed and submitted the plan for which such finding was made,” 42 U.S.C. § 7410(k)(5), but greenhouse gases were not regulated pollutants when the states’ plans were adopted decades ago. The SIP Call is effectively an unlawful collateral attack on EPA’s year-old decisions approving Texas’ and Wyoming’s state plans. It is contrary to law and should be vacated.

Moreover, the SIP Call is procedurally defective. Rather than provide appropriate notice that it would seek to supplant Wyoming’s laws, EPA described Wyoming’s plan as “presumptively adequate” in its proposed action and gave no indication that the State would ultimately be subject to the SIP Call. EPA’s decision to reverse course precluded the public from being on notice that Wyoming’s state implementation plan was at risk and denied the State and interested stakeholders the opportunity to participate meaningfully in this rulemaking.

Finally, EPA’s actions constitute coercion of Texas and Wyoming in violation of the Tenth Amendment. To coerce its preferred outcome—immediate regulation of greenhouse gases—EPA offered Texas and Wyoming a “choice” that amounted to a trilemma: the states could revise their domestic laws in a matter of weeks to carry out EPA’s regulatory scheme, abandon their rights under the Clean Air Act by consenting to imposition of federal control, or suffer a moratorium on construction of sources emitting greenhouse gases. To avoid having to adjudicate this issue, the Court should interpret the Clean Air Act consistent with its plain text and the

requirements of constitutional federalism to preclude EPA's coercion of the states' organs of government.

STANDARD OF REVIEW

The SIP Call and Failure Finding are rules within the meaning of Administrative Procedure Act § 553. They are subject to review under the legal standards set forth in the Administrative Procedure Act, 5 U.S.C. § 706, including without limitation that they are arbitrary and capricious, an abuse of discretion, and contrary to law.

The Federal Implementation Plan constitutes “the promulgation or revision of an implementation plan by the Administrator” under Clean Air Act § 110(c). Thus, this Court reviews the Federal Implementation Plan in accordance with the standards set forth in Clean Air Act § 307(d), 42 U.S.C. § 7607(d), including without limitation that it is arbitrary and capricious, an abuse of discretion, and contrary to law.

EPA's legal interpretations of the Clean Air Act are subject to the standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The Court first must ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter” and Congress's decision controls. *Id.* at 842-43. If “the statute is silent or ambiguous with respect to the specific issue,” then “the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Id.* at 843.

EPA’s non-factual determinations and explanation for its actions are reviewed under the arbitrary-and-capricious test, which requires an agency to “articulate a satisfactory explanation for its action” and forbids it from “entirely failing to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court considers only the regulatory rationale the agency actually offered in reaching its decision. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Review under the Clean Air Act’s “arbitrary and capricious” standard is the same as under the APA. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995).

ARGUMENT

A. The SIP Call, Failure Finding, and Federal Implementation Plan Are Unlawful

1. The SIP Call Violates Clean Air Act § 110 and Undermines the Clean Air Act’s Cooperative Federalism Scheme

EPA has two options for implementing its new greenhouse gas requirements that apply to a stationary source: it may require a State to submit a prospective state plan revision under Clean Air Act § 110(a), or if a State fails to make the required submission, it may promulgate a federal implementation plan pursuant to Clean Air Act § 110(c). EPA did not employ either of these two permissible options as to Texas and Wyoming. Instead, EPA unlawfully called for SIP revisions under section § 110(k)(5). EPA’s actions are contrary to law, and significantly undermine Congress’s

express intent that EPA must implement the Clean Air Act through cooperative federalism.

The SIP Call affects the prevention of significant deterioration program, which applies to stationary sources. At the time of the SIP Call, Texas and Wyoming had valid, EPA-approved prevention of significant deterioration state plans in place that satisfied all relevant state plan requirements. *See* 40 C.F.R. § 52.2303 (Texas) and § 52.2630 (Wyoming). Clean Air Act § 110(i) requires stationary source state plan requirements to be adopted by States under § 110(a) or imposed by EPA through a properly-promulgated federal implementation plan under § 110(c) of the Act:

Except for . . . a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

42 U.S.C. § 7410(i).²

² Clean Air Act § 110(i) was promulgated as part of the Clean Air Act in 1977. As part of the 1990 Clean Air Act Amendments, the language in subsection (a)(3) was struck and recodified with amendments in subsection (a)(2). However, the internal reference in §110(i) was not updated. For purposes of interpreting Clean Air Act § 110(i), the reference to subsection (a)(3) thus refers to subsection (a)(2).

Rather than allowing Texas or Wyoming to undertake prospective state plan revisions or waiting three years before imposing a federal plan after Texas or Wyoming failed to submit the required state plan revision under 40 C.F.R. § 51.166(a)(6), EPA unlawfully attempted to expedite the process by calling for immediate state plan revisions under Clean Air Act § 110(k)(5). But Clean Air Act § 110(k)(5) does not apply because Clean Air Act § 110(i) bars EPA from requiring any “*plan revisions . . . with respect to stationary sources*” outside the framework of Clean Air Act § 110(a). See *Concerned Citizens of Bridesburg*, 836 F.2d at 787 n.12 (stating that the Clean Air Act “enumerate[s] an exhaustive list of the EPA’s powers regarding SIPs” and that “[l]acking another statutory source of authority, the EPA must utilize the [SIP] revision provisions to accomplish its purpose.”). In contrast, Clean Air Act § 110(k)(5) only gives EPA authority to call for plan revisions where a state implementation plan is inadequate to meet the requirements in force when the plan was submitted. Neither Texas’s nor Wyoming’s plan was required to regulate greenhouse gases because EPA had not yet determined to regulate greenhouse gases when their state plans were approved. Because EPA regulation of greenhouse gases is a new requirement under the Clean Air Act, EPA must follow the Clean Air Act § 110(a) state plan revision process in order to change the requirements applicable to stationary sources in Texas and Wyoming.

Moreover, EPA’s attempt to use Clean Air Act § 110(k)(5) to coerce immediate state plan revisions out of Texas and Wyoming by threatening a construction moratorium contradicts Congress’s plan for cooperative federalism under the Clean Air Act. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221 (1986) (statute must be interpreted “in light of the language of the Act as a whole, the legislative history . . . , [and] the congressional purposes underlying the Act”). Congress intended that States retain “primary responsibility” for controlling air pollution. 42 U.S.C. § 7401(a)(3). EPA ignored its obligation to proceed under the Clean Air Act’s statutory state plan revision requirements because so proceeding would have afforded Texas and Wyoming three years to revise their state plans and to challenge EPA’s greenhouse gas rules before being required to implement them.

EPA’s call for immediate plan revisions under Clean Air Act § 110(k)(5) was therefore unlawful and should be vacated.

2. The SIP Call Unlawfully Departs from EPA’s Prevention of Significant Deterioration Regulations

The SIP Call’s requirement that states must reinterpret or amend their state plans within thirty days to conform to the Tailoring Rule or face a construction moratorium is an arbitrary and capricious departure from the Agency’s regulations. *See* 40 C.F.R. § 51.166(a)(6)(i).

EPA is bound to observe its legislative rule granting States up to three years to amend their state plans to incorporate revisions to EPA's 40 C.F.R. Part 51 minimum standards for approvable state plans:

Any State required to revise its implementation plan by reason of an amendment to this section . . . shall adopt and submit such plan revision to the Administrator for approval *no later than 3 years* after such amendment is published in the *Federal Register*.

40 C.F.R. § 51.166(a)(6)(i) (emphasis added). EPA's rule further ensures that, during that period, States will continue to be able to issue preconstruction permits under their existing implementation plans by expressly allowing prospective state plan revisions. *See* 40 C.F.R. § 51.166(a)(6)(iii). This provision protects the States' primary and undisputed right to the first opportunity to address air quality management issues on a prospective basis. *See Concerned Citizens of Bridesburg*, 836 F.2d at 781. It also furthers the policy of regulatory certainty.

The Tailoring Rule revised the minimum requirements for approvable state plans by amending 40 C.F.R. § 51.166 to define the term "subject to regulation" within the definition of "regulated NSR pollutant." *See* 75 Fed. Reg. 31,514, 31,606/3-31,607/1, J.A. ___. The SIP Call then implemented this new requirement by forcing States with approved prevention of significant deterioration implementation plans to implement the Tailoring Rule *immediately* through the reinterpretation or amendment of their approved state plans to include the redefined "regulated NSR pollutant" concept. *Id.* at 31,580/3-31,581/1.

EPA cannot lawfully depart from its legislative rule so casually. In deviating from its rules, an agency must “display awareness that it *is* changing positions. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations*, 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009) (internal citation omitted) (emphasis in original). Rather, the agency must “provide a reasoned explanation for any failure to adhere to its own precedents.” *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (citations omitted); see also *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality).

But EPA provides no reasoned explanation whatsoever for its decision not to allow states up to three years to revise state plans. EPA papers over its decision to ignore 40 C.F.R. § 51.166(a)(6) by arguing that “the current failure of the [state implementation plans] to include the Tailoring Rule thresholds is not the basis for the SIP Call.” 75 Fed. Reg. 77,698, 77,708/1, J.A. ___. Instead, EPA claims the call is prompted by “the failure of the [state plans] to apply [prevention of significant deterioration] to [greenhouse gas]-emitting sources, and that failure, in turn, is rooted in the failure of the [state plans] to apply [prevention of significant deterioration] to newly regulated pollutants on an automatically updating basis.” *Id.*

EPA’s explanation is incorrect. EPA never stated in its notice of proposed rulemaking that the SIP Call was justified by a State’s failure to include an

“automatically updating” provision in its existing prevention of significant deterioration implementation plan (and any such requirement would surely be unconstitutional). Instead, EPA’s proposed SIP Call made clear that States would be required to prospectively incorporate the new Tailoring Rule requirements into their existing state plans:

EPA promulgated the Tailoring Rule, which narrows PSD applicability to specified GHG-emitting sources on a specified phase-in schedule and makes clear that GHGs . . . are the “[air] pollutant” to which PSD requirements apply. Pursuant to the Tailoring Rule, PSD permitting requirements for construction or modification will apply to certain GHG-emitting stationary sources beginning on January 2, 2011[.]

75 Fed. Reg. 53,892, 53,898/2, J.A. ___. If EPA’s actual rationale was that existing state plans were deficient because they did not include an automatic updating provision, then the final SIP Call should be vacated because it is not a logical outgrowth of EPA’s proposal. *See Emvtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (vacating final rule that was not a “logical outgrowth” of the agency’s proposal).

Moreover, EPA does not consider “automatic updating” to be a necessary component of an approvable state implementation plan and regularly has approved SIPs from states that do not automatically update, including without limitation Florida, Kansas, Idaho, and Oregon. Fla. Sta. § 120.54(1)(i); 68 Fed. Reg. 8,845, 8,845 (Feb. 26, 2003) (approving revision to Kansas SIP); Idaho Code § 67-5229(3); Or.

Admin. R. § 340-200-0020(100), J.A. __ . Nor would such an automatic updating provision be lawful.

And far from requiring compliance with the Clean Air Act's text, EPA is clear that any state implementation plan that is consistent with the Tailoring Rule would not be deficient under the Clean Air Act, despite the fact that the Tailoring Rule constitutes a wholesale rewriting of Clean Air Act § 169(1)'s numerical statutory emission rate thresholds for major emitting facilities. *See Weyerhaeuser v. Costle*, 590 F.2d 1011, 1057-58 (D.C. Cir. 1978) (“[T]here is a major difference in pollution regulation enforcement between simple numerical standards and complex requirements.”) (citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978); *Phason v. Meridian Rail Corp.*, 479 F.3d 527, 530-31 (7th Cir. 2007) (Easterbrook, J.) (stating that a statute with numerical thresholds “draws . . . bright lines” that are not susceptible to reinterpretation “to replace the statute’s actual language with some other approach that better serves goals that Members of Congress may have sought to achieve.”).

Finally, EPA’s argument proves too much: under EPA’s view expressed in the SIP Call, new state plan requirements would never require prospective state adoption and implicate 40 C.F.R. § 51.166(a)(6)(i), because in each instance EPA could claim that the revisions were triggered by the Clean Air Act itself, and that EPA’s revisions

to the 40 C.F.R. Part 51 minimum standards for approvable state plans are simply a means of complying with existing requirements of the Clean Air Act.

EPA's failure to recognize and explain its departure from 40 C.F.R. § 51.166(a)(6)(i) is arbitrary and capricious and contrary to law. The SIP Call and EPA's actions in reliance upon it should, accordingly, be vacated.

3. The Texas and Wyoming State Plans Were Not Substantially Inadequate

The SIP Call is unlawful because Texas' and Wyoming's EPA-approved prevention of significant deterioration state plans were not substantially inadequate. Clean Air Act § 110(k)(5) is available where a state implementation plan is inadequate to meet the Clean Air Act objectives in force when it was submitted, not as a means of implementing new regulatory requirements more quickly than is allowed under Clean Air Act § 110(a). Thus, to find the plans substantially inadequate, EPA would have had to determine that Texas and Wyoming had failed to include greenhouse gas requirements at the time they originally submitted their plans. But greenhouse gases were not regulated pollutants at that time, and the Clean Air Act does not impose a self-executing requirement on sources that are governed by the provisions of an EPA-approved state plan. The SIP Call is therefore unlawful and should be vacated.

As described above, Clean Air Act § 110(k)(5) authorizes EPA, where a state plan "is substantially inadequate . . . to otherwise comply with any requirement of this chapter," to "require the State to revise the plan as necessary to correct such

inadequacies.” 42 U.S.C. § 7410(k)(5). Clean Air Act § 110(k)(5) is available where a state implementation plan fails to accomplish its stated objectives, applying only to Clean Air Act requirements that were in place at the time the State developed and submitted its implementation plan:

Any finding under this paragraph shall, to the extent the Administrator deems appropriate, *subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made*[.]

Id. (emphasis added). Wyoming submitted its state plan on January 26, 1979, while Texas’s state plan submissions were made on several occasions from 1985 to 1988. EPA approved Texas’ plan on June 24, 1992, and Wyoming’s plan on September 6, 1979. *See* 57 Fed. Reg. 28,093/3 (June 24, 1992), J.A. ___ ; 40 C.F.R. § 52.2630. At that time, greenhouse gases were not subject to regulation under the Clean Air Act. Accordingly, Texas’ and Wyoming’s state implementation plans are not substantially inadequate, and EPA may not revoke Texas’ and Wyoming’s authority to issue prevention of significant deterioration permits based on its latter-day interpretation of the Clean Air Act without giving each the time to comply with the Act’s notice and comment revision process.

This reading of the Clean Air Act is consistent with Congress’ direction to EPA on the implementation of new Clean Air Act requirements following enactment of the Clean Air Act Amendments of 1977. Clean Air Act § 161 provides that the prevention of significant deterioration program would be implemented through

States' including in their implementation plans measures "as determined under regulations promulgated under this part," leaving in place existing state plans until that time. 42 U.S.C. § 7471 (2006); *see also* Pub. L. No. 95-95, 91 Stat. 685 (1977) (stating that the 1977 amendments do not alter "any requirement of an approved implementation under [section 110] . . . until [such requirement is] modified or rescinded in accordance with [the Clean Air Act] as amended"). Congress's decision not to make the program self-executing assures that States would be able to conduct deliberative public rulemaking to revise their state plans to incorporate new provisions, a process that EPA's SIP Call wholly frustrates.

EPA's use of the SIP Call effectively constitutes an unlawful collateral attack on EPA's years-old decisions approving Texas' and Wyoming's prevention of significant deterioration state plans. State implementation plans are binding legislative rules with legal force and effect, promulgated pursuant to notice and comment rulemaking process. *See* 42 U.S.C. § 7410(a). An approved state plan thus binds both the State and EPA, and remains valid even when EPA later alters its strategy for implementing the Act. *See United States v. Cinergy Corp.*, 623 F.3d 455, 459 (7th Cir. 2010) ("[EPA] can't impose the good standard on a plant that implemented the bad when the bad one was authorized by a state implementation plan that the EPA had approved. The blunder was unfortunate but the agency must live with it."). Indeed, EPA consistently opposes collateral attacks on regulations that are not consistent with the Clean Air Act

in all other contexts, *see, e.g., Med. Waste Ins. & Energy Recovery Council*, 645 F.3d at 427, and it should not be able to collaterally attack an approved state plan itself.

Finally, EPA's interpretation of the prevention of significant deterioration program as being self-executing, thereby justifying its substantial inadequacy findings, is absurd. It is, or should be, uncontested that the primary purpose of this program is to prevent significant deterioration of air quality, a term that even by its very name refers to the ambient air quality standards. The program's stated purpose is "to protect public health and welfare" against adverse effects due to deterioration in ambient air quality, "notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1). To accomplish that end, Congress directed that EPA regulate "as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated . . . as attainment or unclassifiable" with respect to local air quality. 42 U.S.C. § 7471. Congress also specified prevention of significant deterioration applicability in terms of ambient air quality (i.e., national ambient air quality standards) in numerous statutory provisions. *See* 42 U.S.C. §§ 7472, 7473, 7474, 7475(a)(3), 7475(d)(2), 7475(e), 7476. These statutory provisions are comprehensible only in the context of pollutants that affect ambient air quality. *See Offshore Logistics*, 477 U.S. at 221 (statute must be interpreted "in light of the language of the Act as a whole, the legislative history . . . , [and] the congressional purposes underlying the Act").

The Clean Air Act allows States three years to make revisions to incorporate changes to criteria pollutant regulations into their state plans. *See* Clean Air Act § 110(a). Yet, EPA now claims that the Act requires it to impose new requirements on states when pollutants for which no ambient air quality standard are set become subject to regulation for peripheral reasons, such as light-duty motor vehicle standards under Clean Air Act § 202. This absurd result is plainly incongruous with the prevention of significant deterioration program’s focus on ambient air quality.

For these reasons, Texas’ and Wyoming’s existing state implementation plans did not include a substantial inadequacy that could properly be addressed through a Clean Air Act § 110(k)(5) SIP Call. EPA’s call for plan revisions is therefore unlawful and should be vacated.

B. EPA Invalidly Promulgated the SIP Call, Failure Finding, and Federal Implementation Plan

EPA’s SIP Call is a legislative rule that is subject to the notice and comment requirements of Administrative Procedure Act § 553. The rulemaking process is not a mere formality, but is “one of Congress’s most effective and enduring solutions to the central dilemma...[of] reconciling the agencies’ need to perform effectively with the necessity that ‘the law must provide that the governors shall be governed and the regulators shall be regulated[.]’” *Am. Bus Ass’n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946)). To that end, notice requirements are necessary “(1) to ensure that agency regulations are

tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These functions are particularly important where, as here, federal agency action threatens to upend state law. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 909 n.24 (2000) (citing Exec. Order No. 13132, § 4(e), 64 Fed. Reg. 43,255 (Aug. 4, 1999)).

Although an agency may deviate from its proposed rule in response to comments received, its “proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.” *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Where a proposal and final rule differ, the logical outgrowth standard requires that the proposal provided adequate notice such that “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (internal quotation marks and citations omitted). By contrast, where, as here, “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule,” notice was inadequate. *Id.* (internal quotation marks omitted).

On this basis, the Court has invalidated final agency actions in “situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position.” *CSX Transp.*, 584 F.3d at 1081. For example, in *United Mine Workers*, 407 F.3d at 1260, this Court found an agency provided inadequate notice when its proposed rule stated that setting a maximum air velocity for mine ventilation belts was unnecessary, but the final rule included one. Because the agency did not provide the “public notice of its intent to adopt, much less an opportunity to comment on, such a cap,” the final rule could not be a “logical outgrowth.” *Id.* at 1261.

Similarly, in *Environmental Integrity Project*, this Court held that a final rule was not a logical outgrowth of a proposed rule that adopted the exact opposite approach to a major aspect of the rule. In the proposed rule, EPA stated that certain regulations would operate independently of one another, but in the final rule, EPA declared that the regulations were not in fact separate regulatory standards. *Id.* at 994-95. The Court rejected EPA’s argument that it had satisfied its notice-and-comment obligations by “repudiat[ing] its proposed interpretation and adopt[ing] its inverse” in the final rule. *Id.* at 998.

Yet that is the path EPA took with respect to Wyoming’s implementation plan. In its proposed rule, EPA noticed its intent to find thirteen state and local plans to be substantially inadequate pursuant to § 110(k)(5). 75 Fed. Reg. 53,892, 53,899-900, J.A.

___ . Wyoming’s plan was not among them. Instead, Wyoming was included among the “States With SIPs That Appear To Apply PSD to GHG Sources (Presumptive Adequacy List),” which EPA did not propose to subject to the SIP Call. *Id.* Without notice, EPA reversed course in its final rule, finding that Wyoming’s implementation plan was substantially inadequate. No other state included on the “Presumptive Adequacy List” was subjected to the SIP Call. 75 Fed. Reg. 77,698, 77,705/2, J.A. ___.

EPA’s surprise inclusion of Wyoming in the SIP Call is the precise type of change that this Court has found inadequate to fulfill the notice requirement of the APA. In the proposed rule EPA did not indicate that Wyoming was at risk of having its state plan found inadequate. Indeed, the only indication in the proposed rule that Wyoming could be subject to the SIP Call was EPA’s general assertion that it might add other state plans to the final rule as a result of information received during the comment period. 75 Fed. Reg. 53,892, 53,892/2-3, J.A. ___ . A generalized notice that EPA might adopt some other, unspecified regulatory approach is insufficient to put interested persons on notice of its intentions and renders the APA’s notice requirement toothless. And such generalized notice cannot be availing where, as here, the agency has entirely reversed its position. *CSX Transp.*, 584 F.3d at 1081 (explaining that a final rule may be a “logical outgrowth” only if the agency “made clear that [it] was contemplating a *particular* change”) (emphasis added). Upholding EPA’s bait-and-switch maneuver in this instance would empower EPA effectively to

dispense with providing individual states with advance notice of future calls for plan revisions.

EPA also may not “bootstrap notice from a comment” it received. *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). “The fact that some commenters actually submitted comments suggesting [the agency’s ultimate approach] is of little significance.” *Id.* “EPA must itself provide notice of a regulatory proposal[.]” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *see also United Mine Workers*, 407 F.3d at 1261 (the court has “rejected the notion . . . that comment evidencing recognition of a problem can inform the public ‘of how, or even whether, the agency will choose to address it.’”) (quotation omitted).

EPA’s failure to observe the APA’s notice requirements was far from harmless. The proposed rule failed to provide reasonable notice to the public that Wyoming’s state implementation plan was at risk of being found inadequate, thereby seriously undermining the basic notice and comment requirements of the APA. EPA’s failure severely prejudiced Wyoming and other parties. To demonstrate prejudice, a party “need not prove that its comments would have persuaded the [agency] to reach a different outcome,” only that “it had something useful to say.” *Chamber of Commerce v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006). Had Wyoming been properly on notice of EPA’s intentions, it would have explained that EPA’s action to arrogate the State’s environmental permitting authority, without affording the State even an opportunity

to legislate, uniquely violates its rights under the Tenth Amendment, due to its part-time legislature—as argued below. Accordingly, the SIP Call, and EPA’s actions in reliance upon it, should be vacated.

C. EPA’s Actions Violate the State Petitioners’ Sovereign Rights

As described above, the Clean Air Act does not authorize the SIP Call. If the SIP Call were authorized, its requirement that States cede their rights and carry out federal policy, or face unprecedented and unlawful sanctions, constitutes coercion and commandeering of the organs of State government, in violation of the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 161 (1991). Accordingly, the canon of constitutional avoidance compels that this Court interpret the Clean Air Act as Congress intended, which was to avoid conflict with the States’ sovereign rights as guaranteed by the Tenth Amendment.

Presumably, direct regulation of airborne emissions and individual sources is within Congress’s authority under the Commerce Clause. *See Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 83 (D.C. Cir. 2000). If so, Congress could have chosen to preempt State air quality regulation entirely. *Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264, 290-91 (1981). But where Congress opts instead to regulate through cooperative federalism, under which State resources, personnel, democratic legitimacy, and sovereign dignity are prominently engaged, the Constitution demands that it respect the States’ co-equal sovereignty and legislative discretion and,

accordingly, stop “short of outright coercion.” *New York*, 505 U.S. at 166. Thus, in *New York*, the Supreme Court struck down a federal law that required States to either regulate nuclear waste according to Congress’s instructions or take title to it themselves, at great expense. *Id.* at 174-77. Because both options were beyond Congress’s authority, “it follows that Congress lacks the power to offer the States a choice between the two.” *Id.* at 176.

And in *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975), *vacated and remanded for consideration of mootness sub nom, EPA v. Brown*, 431 U.S. 99 (1977) (*per curiam*), this Court relied on similar reasoning to vacate regulations that required States to create and implement motor vehicle inspection and retrofitting programs and threatened States with fines and penalties for noncompliance. *Train*, 521 F.2d at 994; *see also Brown v. EPA*, 521 F.2d 827, 841 (9th Cir. 1975) (applying constitutional doubt to similar regulations) and *Maryland v. EPA*, 530 F.2d 215, 225-27 (4th Cir. 1975), *vacated on other grounds EPA v. Brown*, 431 U.S. 99 (1977). The Fourth Circuit followed *New York* and *Train* in *Virginia v. Browner*, 80 F.3d 869, 882-883 (4th Cir. 1996), but distinguished them on the sole basis that the State petitioner was “not commanded to regulate” in that instance. Instead, the State could “choose to do nothing and let the federal government promulgate and enforce its own permit program[.]” *Id.* at 882

Here, EPA concedes that Texas and Wyoming could not “choose to do nothing” and let the federal government act, thereby conceding that it has unlawfully commandeered their governmental functions. 75 Fed. Reg. 53,892, 53,905/1, J.A. ___. As in *New York*, EPA presented Texas and Wyoming with a choice in which all options were beyond the EPA’s lawful powers: Texas and Wyoming could (1) revise their domestic laws in a matter of weeks to carry out EPA’s regulatory scheme, (2) abandon their rights under the Clean Air Act, as well as their permitting authority under federal and state laws, by consenting to imposition of federal control, or (3) suffer a moratorium on construction of sources emitting greenhouse gases.

Wyoming in particular was left no choice but to accede to EPA’s unlawful command. Ten years before EPA decided to regulate greenhouse gases, Wyoming’s legislature prohibited Wyoming agencies from promulgating greenhouse gas regulations. *See* Wyo. Stat. Ann. § 35-11-213. Wyoming’s legislature was not only out of session at the time the SIP Call was made, but was prohibited by the State’s Constitution from meeting until the second Tuesday of January. Wyo. Const. art. 3, § 7(a); *see also* Wyo. Stat. Ann. § 28-1-102(a). Rather than acknowledge Wyoming’s unique situation and set a “reasonable” deadline for corrective state plan revisions, EPA forced Wyoming to conform to EPA’s approach by threatening a construction ban if the State did not accept EPA as the greenhouse gas permitting authority in Wyoming. To avoid the risk of significant economic harm, Wyoming’s executive was

compelled to accept an impossible state plan submission deadline, allow EPA to arrogate the State's previously plenary power over permitting, and effectively abandon execution of a law passed by the State's legislature, without any opportunity for the legislature to address the problem at hand through democratic means. As the Supreme Court has observed, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. So it was here.

The SIP Call also amounts to unlawful coercion of States in violation of the Tenth Amendment. With regard to both Texas and Wyoming, EPA's generous "offer" that States abandon their rights when they are not legally required to do so and accede to federal control is a concession that the only presented alternative, suffering an unprecedented construction moratorium, amounts to unlawful coercion. In this instance, EPA threatened to disregard Texas' and Wyoming's approved state plans and to construe the Clean Air Act as imposing a construction moratorium on virtually all industrial facilities if the States did not allow EPA to impose the Failure Finding and Federal Implementation Plan. There is no clearer case of coercion possible than threatening to bar economic activity in a time of economic troubles.

EPA's interpretation of the Clean Air Act clearly violates the Tenth Amendment, but this Court may avoid a determination that EPA's implementation of the Clean Air Act is unconstitutional by applying instead an interpretation of the Act

that is both more reasonable and more firmly rooted in its plain text. While EPA's actions give rise to grave constitutional doubts, Congress recognized the limitations on its powers and legislated accordingly. Most directly, it required that EPA provide a "reasonable deadline" to States to make plan revisions in response to a Clean Air Act § 110(k)(5) SIP call. It also established a detailed and comprehensive process for States to adopt new Clean Air Act requirements into their domestic laws—a process which EPA chose in this instance to ignore. The Court should construe the Clean Air Act according to its plain meaning and structure so as to avoid passing on the State Petitioners' constitutional claims. *See, e.g., United States v. Jim Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). But if the Court determines that is not possible, then it must uphold Texas' and Wyoming's sovereign rights. In either instance, the SIP Call, and the rules that rely upon it, must be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate the SIP Call, Failure Finding, and Federal Implementation Plan.

Dated: February 8, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Petitioner's Brief contains 9,974 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limited set by the Court. I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Dated: February 8, 2012

/s/ Mark W. DeLaquil
Mark W. DeLaquil

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioners' Brief and Addendum was filed electronically with the Court by using the CM/ECF system on the 8th day of February 2012. Participants in the case who are registered CM/ECF users will be served through the CM/ECF system. Two (2) copies of the foregoing Petitioners' Brief and Addendum will also be served on counsel for all parties by U.S. mail, first-class, postage-prepaid.

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